**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

Civil Suit No. CV692 of 2017

**BETWEEN:**

**TRUDY PATRICIA BELLAMY** **CLAIMANT**

**AND**

**CASA GRANDE INC. trading as CASA GRANDE BOWLING ALLEY** **DEFENDANT**

***Before Master Deborah Holder, BSS, Master of the High Court***

**2021: December 20**

**Appearances:**

**Ms. Richelle M. Nichols, Attorney-at-Law of Clarke Gittens Farmer for the Claimant**

**Ms. Destinie Simmons Beckles, Attorney-at-Law for the Defendant**

## DECISION

### Introduction

[1] In this application the Claimant is seeking specific disclosure of the loss adjuster's report(s) which MRG Inc. prepared. The application is resisted by the Defendant on the ground of litigation privilege. The application is made pursuant to **Rule 28** of the **Supreme Court (Civil Procedure) Rules 2008 (CPR)**. Given the manner in which this matter unfolded, it is

no longer necessary to consider the second order which the Claimant sought.

**Background**

[2] The claim form and statement of claim were filed on 11th May, 2017. According to the affidavit of service which was filed on 20th June, 2017, Director, Ram Mirchandani was served personally on 9th June, 2017 at 11:30 a.m. On 3rd July, 2017 the Claimant filed a request for entry of judgment against the Defendant in default of Acknowledgement of Service. On 2nd August, 2017 judgment was entered.

[3] On 15th August, 2017, a defence was filed. On 5th September, 2017, a notice of application that judgment entered be set aside, as well as grounds of application were filed. The affidavit in support followed on 23rd November, 2017.

[4] On 26th March, 2018, the Claimant filed a notice of application pursuant to parts 26 and 28 of the CPR with supporting affidavit. An affidavit in response was filed on 22nd October, 2018.

[5] In the Application the Claimant seeks the following orders:

> "1. That the Defendant must within 7 days of service of this order deliver up the report(s) prepared by MRG Inc. in this matter to the Claimant's Attorney-at-law.
>
> 2. That the Defendant's application filed herein on September 5th, 2017 be stayed pending the outcome of this application.
>
> 3. That the Defendant do pay the Claimant's costs of this Application such costs to be agreed or assessed.

[6] The grounds of Application are:

> "1. By Notice of Application filed herein on September 5, 2017 the Defendant seeks to set aside the Judgment entered on the 2nd day of August, 2017.
>
> 2. The Affidavit of Ms. Ram Mirchandani filed in support of the said Application on November 23, 2017 makes certain

statements with regard to the condition of the property at the time of the incident.

3. The Claimant has reason to believe that a report prepared by MRG Inc. in this matter refutes certain statements made in the said Affidavit of Ms. Ram Mirchandani.

4. The said report prepared by MRG Inc. is in the custody of the Defendant and is relevant and necessary to the Claimant's claim against the Defendant.

5. The Claimant has requested a copy of the said report but the Defendant has refused production of the same.

6. The determination of this application will indicate whether the Defendant's application to set aside the Judgment entered on the 2nd day of August 2017 is relevant or necessary to dispose fairly of the litigation between the parties in a manner which will save costs and time.

7. Unless ordered by this Honourable Court it is unlikely that the Defendant will disclose the said report of the Claimant."

**Brief Facts**

[7] The Defendant was owner and occupier of Casa Grande Bowling Alley at Casa Grande Resort, Oldbury, St. Philip. On 19th August, 2015 the Claimant lawfully entered the said premises as a visitor to "partake in bowling". She proceeded down the lane to commence bowling, slipped and fell on the slippery lane, thereby injuring herself. The accident was caused by the negligence and breach of statutory duty by the Defendant, its servants and agents.

**Ms. Nichols' affidavit filed on 26th March, 2018**

[8] In her affidavit in support she deposed that the report was directly relevant to the Claimant's case. She stated that certain allegations were made by Ms. Ram Mirchandani in her affidavit filed on 23rd November, 2017 with respect to the condition of the property, at the time of the accident.

[9] MRG Inc., an agent of the Defendant, conducted investigations at the time of the accident and prepared a report of its findings. Based on the

Claimant's advice, she believed that the report refuted statements made by Ms. Ram Mirchandani especially clause 9.

[10] She also deposed that the report related directly to the matters, or some of the matters in question as a result of the Defendant's application to have judgment set aside. It spoke to whether or not the Defendant failed in its duty of care to the Claimant.

[11] She said that the determination of her application would indicate whether the Defendant's application to set aside judgment was relevant or necessary to dispose fairly of the litigation between the parties in a manner which would save costs and time.

**Ms. Simmons Beckles' Affidavit in Response filed 22nd October, 2018**

[12] Ms. Simmons Beckles deposed that she was a Legal Officer of CGI and was authorized in that capacity to make this affidavit in response. As a result of the incident alleged by the Claimant, the Defendant through its insurers instructed that an investigation be conducted by a loss adjustor to assist with the determination of liability and in contemplation of potential legal proceedings being brought by the Claimant. She denied that investigations were conducted at the time of the incident as deposed by Ms. Nichols in her affidavit.

[13] She also stated that in response to the Claimant's allegation that Ms. Ram Mirchandani's affidavit conflicted with the loss adjuster's report, the Defendant's attorney wrote the Claimant's attorney requesting the latter to identify the statements, so that the same might be addressed. No response was received. As such the Defendant was not provided with an opportunity to properly or at all respond to the allegations.

[14] Ms. Simmons Beckles said that the Defendant claimed a right to withhold disclosure of the document as it was deemed privileged pursuant to **Rule**

**28.14(1)** of **CPR**. Also, that the right to withhold was raised with the Claimant's attorney at the hearing and by correspondence as required by **Rule 28.14(1)** of **CPR**.

[15] She urged the court to grant the Defendant's request to withhold the said privileged document.

**The Claimant's Submissions**

[16] The Claimant sought disclosure of the report(s) prepared by MRG Inc. in this matter. She wanted to have her application heard before the Defendant's application to set aside judgment. She contended that should the court allow the production of the report there might not be a need to contest the Defendant's application.

[17] It was also submitted that there were special circumstances which warranted the application for specific disclosure. **Rule 28.6 (2)** of the **CPR** sets out the matters to be considered for ordering specific disclosure.

[18] Ms. Nichols argued that disclosure was necessary at this stage of the proceedings to allow the fair disposal of the application as well as saving costs and judicial time. In her opinion, since the document was in the Defendant's possession there would be no burden in time or costs or otherwise associated with disclosure of the document.

[19] She rejected the Defendant's claim that it had the right to withhold the document on the ground of privilege because it was commissioned to assist with the determination of liability and in contemplation of legal proceedings being brought by the Claimant. Ms. Nichols asked the court to request the document to see whether the claim of privilege was justified. Counsel also contended that the dominant purpose for the report was part of the routine procedures of the Defendant's insurers to

commission a lost adjuster's report to inform decision making. She reasoned that in these circumstances it could not be said that litigation was the dominant purpose for which it came into being,

[20] She relied upon ***Waugh v. British Railways Board*** [1980] AC 521, where the House of Lords allowed disclosure of an internal inquiry report prepared by the Board's officers, two days after the accident. Notwithstanding the heading on the document it was clear from the evidence that the report was prepared for two purposes and they were of equal importance. **Lord Edmund Davies** defined the "dominant purpose" as a purpose with "clear paramountcy." He held that the report would have been protected by legal professional privilege only if the legal advice aspect had been the dominant purpose.

She also referred to the dictum of **Lord Wilberforce** at page 532, A and B who said:

> "On principle I would think that the purpose of preparing for litigation ought to be either the sole purpose or at least the dominant purpose of it: to carry the protection further into cases where that purpose was secondary or equal with another purpose would seem to be excessive, and unnecessary in the interest of encouraging truthful revelation. At the lowest such desirability of protection as might exist in such cases is not strong enough to outweigh the need for all relevant documents to be made available."

[21] Citing ***Grant v. Downs*** [1976] HCA 63, 135 CLR 674 as the authority, Counsel contended that more than a bald assertion that one of the purposes of the document was for submission to legal advisors in the event of legal proceedings was required. Further the party claiming privilege had to show the circumstances in which the document was brought into existence. This had to be done via the nature of the document or the evidence. She also referred to the court's opinion that privilege was not necessarily or conclusively established by resort to any formula or ritual (per **Barwick CJ** paragraph 28).

[22] In ***Grant v. Downs*** the court held that the evidence did not establish that the dominant purpose for producing the report was to obtain advice or to aid the conduct of litigation then in reasonable contemplation.

[23] In Ms. Nichol's opinion the affidavit evidence did not establish that the document was commissioned to assist with the determination of liability and in contemplation of potential legal proceedings, it merely provided the bald statement that the document was privileged.

[24] Based on the authority of ***Grant v. Downs*** she urged the court to exercise its power to examine the document for itself to ascertain the purpose for which it was brought into existence. The date on which it was commissioned would be ascertained and, she suggested that the date was prior to the commencement of these proceedings. She also said that the Defendant should have provided the circumstances surrounding the production of the report.

[25] She contended that it was common place for insurance companies to commission loss adjuster's reports routinely. She also referred the court to comments of **Hamilton LJ** in the ***Birmingham*** case (1913) 3kB 850.

[26] Counsel also did not believe that the affidavit evidence satisfied the criteria as set out by the court in ***Grant v. Downs***. The court's position was that where the purpose of the intended use of the document was that of submission to legal advisers, but only in the event of actual, or proposed or threatened litigation, that purpose must be the reason for bringing the document in existence. She found no indication that this report would not have come into existence in the ordinary course of administration even if no thought had been given to its possible usefulness if litigation should ensue. She concluded that privilege should not be extended to the report.

**The Defendant's Submissions**

[27] Ms. Simmons Beckles described the application for specific disclosure as "curious." This position was taken in light of a letter dated 23rd February, 2018 received from the Claimant's legal Counsel which stated in part:

> "Our investigations have revealed that Consumers Guarantee Insurance Co. Ltd. ("CGI") hired the services of Mr. Martin Goddard of MRG Inc. to conduct independent investigations into the allegations of our client as contained in our letter dated February 12, 2016. Such investigations resulted in the production of a report; the contents of which are contrary to that contained in the affidavit of Ms. Ram Mirchandani filed herein on November 23, 2017.
>
> We therefore call upon you to withdraw the said Application; failing which we will summon Mr. Goddard to court to testify as to the findings and the contents of his report and seek the necessary sanction against Ms. Mirchandani for her perjury."

[28] In the opinion of Counsel this intimated that the Claimant and/or her attorneys-at-law were privy to the contents of the report. It was only after the Defendant's response, in a "Without Prejudice" letter dated 19th March, 2018 as well as the denial of the request, that the application was made. The response was as follows:

> "Please be advised that we have forwarded your letter to our insured's Director for her comment and instructions relevant to the same. As we are unsure of any conflict, as alleged, we now ask that you specify the said areas so that these may be properly addressed."

[29] The Defendant claimed privilege over the loss adjuster's report. Referring to Halsbury's Laws of England[1] where two forms of legal protection privilege were discussed, Ms. Simmons Beckles submitted that litigation privilege was relevant to these proceedings. Litigation privilege relates to communications between a party and his lawyer, or between the party or his lawyer and a third party and is made when litigation is pending or in contemplation for the sole or dominant purpose of obtaining legal advice or conducting litigation. This claim for litigation

[1] Volume 12 (2015) paragraph 647

privilege is an exception to the general obligation for disclosure by the parties.

[30] She pointed out that **Rule 28.1** of the **CPR** stipulates that a party "discloses" a document by revealing that it exists or has existed. There was no scope for disclosing any and all documents which ever existed. She submitted that disclosure was limited to documents which were "directly relevant." **Rule 28.1(4)** of **CPR** defines "directly relevant."

[31] Citing ***Jonathan Enterprises Ltd. v. Ryan Investments Ltd. et al*** BB 2014 HC 78 she submitted that a claim for specific disclosure had to be more than a bald assertion for documents which were relevant to the "fair disposal" of the matter, as stated by the Claimant. In addition it was not to be merely a fishing expedition or a "roving exercise". She cited ***Gartside v. Outram*** [1856] 26 LJ Ch 113.

[32] Ms. Simmons Beckles also cited ***P.J. Carrigan Ltd. et al v. Norwich Union Fire Society Ltd. et al*** [1987] 1R 618, where a report commissioned by a firm of loss adjusters was held to be privileged. The Defendant had claimed that the document had been prepared for the purpose of litigation. **O'Hanlon J** held that privilege from disclosure might be claimed by a party in respect of documents which came into existence prior to the commencement of proceedings, when it could be shown that the dominant purpose for the document coming into existence was for the purpose of preparing litigation then apprehended or threatened.

[33] Counsel noted that on the issue of privilege the law favoured substance over form. The substance and the intention for which the document was created were the determining factors rather than whether the report was headed "Privileged." The test was subjective.

[34] On the authority of ***P.J. Carrigan Ltd. et al*** Ms. Simmons Beckles submitted that the loss adjuster's report had to be deemed to be privileged. The fact that it was commissioned before litigation commenced was not a bar to privilege from disclosure. Further the fact that the report was commissioned more than a year and a half before litigation started was immaterial. In addition the Defendant's loss adjuster's report was the same type of document as that over which privilege was claimed.

[35] She also submitted that ***Waugh v. British Railways Board*** was distinguishable from this matter. The report was made two days after the death occurred. The House of Lords said that the report was contemporaneous, contained statements of witnesses on the spot and was "almost certainly the best evidence as to the cause of the accident." It was standard practice to prepare a report, once an accident occurred on the railway. Consequently it could not be said that the sole or dominant purpose for preparing the report was for litigation.

[36] Ms. Simmons Beckles said that the decision in ***Waugh*** turned on the facts of that case and that each application had to be determined on a case by case basis. There was no evidence that the loss adjuster's report was "standing practice" or contained contemporaneous statements which made it the "best evidence."

[37] In summary, she said that the incident which gave rise to the Claimant's claim occurred 19th August, 2015. By letter dated 14th October, 2015, Counsel for the Claimant was informed that CGI was notified for the first time that an incident had occurred after the former wrote asking for a position on liability. As the Defendant's insurer had not previously been notified of the alleged incident, it was more than certain that litigation would be resorted to. No investigations had been carried out at the date of

said letter as there was no previous notice. She contended that litigation was fully apprehended at this stage and was the dominant purpose for which the report was commissioned. The "Without Prejudice" letter to Clarke Gittens Farmer from the Assistant Manager of CGI is as follows:

> "Your correspondence dated 11 September and 6 October of 2015 refers. Please note that this represents our initial notification of this matter. Accordingly, we now have to contact our insured so that we may conduct investigations into the circumstances surrounding this incident before we are able to comment on liability.
>
> We will seek to provide you with our position on liability upon completion of our investigation."

**Claimant's Response**

[38] Ms. Nichols found that ***P.J. Carrigan Ltd.*** could be distinguished based on the comments of **O'Hanlon J** which were cited by the Defendant. She was satisfied that there was no evidence before the court to indicate that the Claimant's case was viewed with suspicion and that the report was sought to repudiate liability. It was gleaned from the letters attached to the Defendant's submissions that the report was commissioned for investigative purposes.

[39] She also noted that the report was dated 23rd November, 2015 and that by letter dated 16th March, 2016, the Defendant's insurers invited the submission of the quantified claim. She was of the opinion that if the claim was viewed with suspicion from the onset and that the report was commissioned for the sole or dominant purpose of obtaining legal advice or conducting litigation as argued, liability would have been disputed, rather than the invitation to submit the quantified claim.

[40] Ms. Nichols maintained that it was standard practice or routine to commission a loss adjuster's report for decision-making purposes and that the true purpose would be ascertained by the examination of the report.

[41] She said that the Defendant hammered the fact that CGI was first informed of the incident by letter dated 14th October, 2015. She noted that the report was dated just over a month from the date of notification. Counsel said that she held a similar view to that of the House of Lords in ***Waugh v. British Railways Board.*** In her opinion, the loss adjuster's report offered as close as possible to a contemporaneous account of the circumstances surrounding the matter.

[42] She queried why the Claimant should be put to the expense of a trial and associated delay when a document existed which might not be covered by the doctrine of privilege and which could put the issue of liability to rest. She considered it to be a waste of the time and resources of the litigant and the court. To put the litigant through a trial was described as frivolous, oppressive and vexatious.

**Issues**

[43] (1) Whether the loss adjuster's report prepared by MRG Inc. is protected by privilege. (2) Whether specific disclosure should be granted.

**Law**

**Criteria for ordering specific disclosure**

[44] **28.6** (1) When deciding whether to make any, and if so what, order for disclosure, the court must consider whether the contemplated order for disclosure is necessary, or necessary at that stage of proceedings, in order to dispose fairly of the litigation or to save costs.

(2) The court must have regard to

(a) the likely benefits of the disclosure contemplated by any party;

(b) the likely burden in time, cost and otherwise of such disclosure; and

(c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to

enable that party to comply with any such order.

**Claim of right to withhold disclosure or inspection of a document**

[45] **28.14** (1) A person who claims a right or privilege to withhold disclosure or inspection of a document or part of a document must

(a) make that claim for the document; and

(b) state the grounds on which such a right or privilege is claimed,

in his list of documents, or otherwise in writing to the person wishing to inspect the document.

(5) A person who does not accept a claim of a right or privilege to withhold disclosure or inspection of a document may apply to the court for an order that the document be disclosed or made available for inspection.

(6) On the hearing of such an application the onus is on the party resisting disclosure or inspection.

(7) Where a person

(a) claims a right or privilege to withhold inspection; or

(b) applies for an order permitting that person not to disclose the existence of a document or part of a document,

the court may require the person to produce that document to the court to enable it to decide whether the claim is justified.

(8) On considering any application under this rule, the court may invite any person to make representations on the question whether the document ought to be withheld.

***(1) Specific Disclosure***

[46] **Rule 28.5(1)** defines an order for specific disclosure as an order that a party must do one or more of the things specified in (a) and (b). The latter requires disclosure of documents relevant within the principles relating to discovery of documents, or, alternatively directly relevant to a specified issue or issues in the proceedings. **Rule 28.6** stipulates the criteria for

ordering specific disclosure. **Rule 28.1(4)** provides that a document is directly relevant if (i) the party with control of the document intends to rely on it; (ii) it tends to affect adversely the party's case; or it tends to support another party's case.

[47] There must be some evidential basis on which to base the finding of relevance.[2] In this regard the pleadings and factual issues must be analyzed. **Lord Chadwick** commented on this matter as follows:

> "12. In my view the judge was plainly correct to approach the application for further disclosure on the basis that it was essential, first to identify the factual issues that would arise for decision at the trial. Disclosure must be limited to documents relevant to those issues and, in seeking to identify the factual issues which would arise for decision at the trial, the judge was plainly correct to analyze the pleadings. The purpose of the pleadings is to identify those factual issues which are in dispute and in relation to which evidence can property be addressed. It is necessary therefore, to have in mind the issues as they emerge from the pleadings and are relevant in the present context."[3]

[48] In discussing the court's discretion to order specific disclosure the point was made that the overriding objective must be taken into account.[4] It requires the parties, so far as possible and as economically reasonable to have access to the documents which might help their case. Therefore in ***Commissioner of Inland Revenue v. Exeter City AFC Ltd.*** [2004] BCC 519 extensive disclosure was ordered because an issue of national importance was raised and the costs of the exercise were not disproportionate. In ***Simba-Tola v. Elizabeth Fry Hostel*** [2001] EWCA Civ 1371, LTL 30/7/2021, the Court of Appeal did not grant disclosure. It held that it would not be proportionate to make the order. **Lord Justice Keen** pointed out that:

> "22. The overriding objective is to deal with cases justly, but that includes so far as practical saving expense and dealing with the

[2] Re Skyward Builders plc [2002] EWHC 1788 Ch.
[3] Harrods Ltd. v. Times Newspaper Ltd. & Ors. [2006] EWCA Civ 294
[4] Blackstone's Civil Practice 2001 paragraph 48.31.

> case in ways which are proportionate to the issues and to what is at stake."

[49] The case law has clearly indicated that in addition to the overriding objective to deal with cases justly, relevance and proportionately must be considered. The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly.[5] In addition a party will not be permitted to go on a roving exercise or fishing expedition (See ***Harrods Ltd. v. Times Newspaper*** (supra)).

***The Pleadings***

[50] Until an issue is pleaded specific disclosure will not be ordered. (***Taranissi v. British Broadcasting Corporation*** [2008] EWHC 2486 (QB), LTL 24/10/2008.[6]

[51] The issues raised by the Claimant included: whether the lane was slippery; whether there was a lack of adequate signage to warn patrons of danger; whether there was a failure to take adequate precaution for the safety of the Claimant and in consequence she was exposed to a foreseeable risk; whether there was a failure to discharge the common duty of care to visitors. The information in the report must be directly relevant to these issues.

## (2) Litigation privilege

[52] Legal Professional Privilege has two heads of privilege namely legal advice privilege which is absolute and litigation privilege. The following statement was made about litigation privilege under the heading "Communications connected to litigation":

> "Confidential communications between a solicitor or a client and a third party where the dominant purpose in creating the document is to use it or its contents in order to obtain legal advice or to help in the conduct of litigation which is at that time reasonably in prospect are privileged. This includes:

[5] Tweed v. Parades Commission for Northern Ireland [2006] UK HL 53 per Lord Bingham of Cornhill at paragraph 3.

[6] Blackstone 48.30

(a) obtaining and collecting evidence to be used in litigation; and

(b) obtaining information which may lead to the obtaining of evidence to be used in litigation (***Anderson v. Bank of British Columbia*** (1876) 2 ChD 644; ***Wheeler v. Le Marchant*** (1881) 17 ChD 675; ***Southwark and Vauxhall Water Co. v. Quick*** (1878) 3 QBD 315)."[7]

[53] Other useful points on litigation privilege are as follows: [8]

(1) "In relation to clients' communication with persons other than their lawyers litigation privilege has a narrower scope than in relation to communications through their lawyers. In ***Waugh v. British Railways Board*** [1980] AC521…the report would only have been protected by legal professional privilege if the legal advice aspect had been the dominant purpose."

(2) "A solicitor's assertion that the dominant purpose of a particular communication was the obtaining of legal advice is not conclusive. This has to be determined by the court on the whole of the evidence (***United States of America v. Philip Morris Inc.*** [2003] EWHC 3028 (Comm), LTL 10/12/2003)."

(3) "Just because a report is compiled shortly after the relevant event does not mean that it cannot be privileged. In ***Re Highgrade Traders Ltd.*** [1984] BCLC 151 the Court of Appeal held that an insurer who instructed experts in fire investigation in a suspected insurance arson case was primarily interested in the question of liability, not the prevention of recurrence, so the report was privileged. This case is also authority for the proposition that the dominant purpose must be that of the person commissioning the report, not necessarily that of the author. The time at which the dominant purpose is to be judged is the time at which the document was created. The privileged status of the document will not be affected by any subsequent use to which it is put, or the subsequent intentions of the author or the person commissioning it….(***Alfred Crompton Amusement Machines Ltd. v. Commissioners of Customs and Excise*** (No 2) [1974] AC 405)."

## Discussion

[54] The broad legal framework for specific disclosure and litigation privilege having been set out above the court now has to consider and be guided by the evidence of the parties.

[7] Blackstone at 48.48
[8] Ibid 48.49

[55] The affidavit of Ms. Simmons Beckles is made up of nine paragraphs, of which only two speak specifically to the loss adjuster's report. After referring to the circumstances surrounding the Claimant's allegations, the deponent said:

> "5. That as a result of the said incident, the Defendant, instructed that an investigation be conducted by a loss adjuster to assist with the determination of liability and in any event, in contemplation of potential legal proceedings being brought by the Claimant. In this regard, paragraph 5 of the said Affidavit filed on the 26th day of March 2018 is admitted, save and except to say that investigations were not conducted at the time of the accident as it stated therein."
>
> "9. That, as stated, above the report to which the Claimant refers, was commissioned in anticipation of legal proceedings and as such, is a privileged document. That for the above reason, the Defendant now urges this Honourable Court to grant the Defendant's request to withhold disclosure of the said privileged document pursuant to its discretion in ***Rule 28.14 (1) of the Supreme Court (Civil Procedure) Rules 2008***."

[56] The Defendant also relied heavily on ***P. J. Carrigan Ltd. v. Norwich Union Fire Society Ltd.*** (supra) a case from the High Court of Ireland where privilege was claimed over the loss adjuster's report.

[57] The facts are: On 22nd May 1981 the plaintiff's premises were destroyed by fire. On 5th June 1981, they informed the defendants, their insurers, of the loss. The defendants immediately commissioned a report from a firm of loss adjusters. They received this report on the 8th June, 1981. The plaintiff commenced proceedings on 4th February 1983 to recover their loss. Discovery was sought but the defendant claimed privilege over the report. The plaintiff's action was refused.

[58] **Hanlon J** held, (1) That privilege from disclosure may be claimed by a party in respect of documents which come into existence prior to the commencement of proceedings, when it can be shown that the purpose for the document coming into existence was for the purpose of preparing for litigation then apprehended or threatened. (***Silver Hill Duckling Ltd.***

***v. Minister for Agriculture*** [1987] I.R. 289 was applied.) (2) That from the time the plaintiffs had claimed to be indemnified, the defendants had viewed the claim with suspicion and their motive in commissioning the report was not only to evaluate the financial value of the claim but also to gather any evidence which might justify them in repudiating liability.

[59] It is clear from the judgment that the affidavit evidence which was provided was of a nature, quality and kind to allow the judge to properly analyze and draw appropriate inferences. He referred to the evidence of a senior official of the first defendant who not only deposed that the probability of litigation was already contemplated by the defendant at the time they received the report, but also linked this to a number of suspicious circumstances which he enumerated in his affidavit.

[60] The judge was satisfied that the possibility of repudiating liability was a real factor in their thinking from the time the claim to be indemnified was made by the plaintiff. He said at page 620:

> "In other words, they were, even at that early stage, contemplating the possibility of a showdown with the plaintiffs, in which they, the defendants, might well decide to repudiate liability under the policy, and the plaintiffs in turn would then have to decide whether they were prepared to embark on litigation to enforce their claims under the policy.
>
> While no litigation was threatened at the time the report was commissioned I am satisfied it was apprehended, in the thinking of the defendants, and that this apprehension constituted a dominant purpose in looking for the report. In these circumstances I am of opinion that the document is privileged and I propose to refuse the application for further and better discovery."

[61] While **Hanlon J** in ***P.J. Carrigan Ltd.*** was able to analyze the affidavit evidence before him and draw certain conclusions, this court is in no position to do the same. The affidavit evidence of Ms. Simmons Beckles

provides no information whatsoever for the court to analyze and make any determination. The court either accepts Counsel's assertion that the report was commissioned "to assist with the determination of liability" and "in contemplation of potential legal proceedings" or reject it. I am sure that there was room for the deponent to provide the court with useful information to allow it to make a finding.

[62] I find that there is merit in Ms. Nichols' position that ***P.J. Carrigan Ltd.*** is distinguishable from this case. Certainly, no evidence was adduced to indicate any factual similarities between the two cases.

[63] Ms. Simmons Beckles said that the insurers were only informed of the claim when the Claimant's lawyer wrote asking them for their position on liability. She interpreted this as evidence that litigation would almost certainly be resorted to. Without more, I do not accept the conclusion that litigation was fully apprehended and that it was the dominant purpose for which the report was commissioned.

[64] I also accept Ms. Nichols' argument that the Defendant had to show the circumstances in which the document was brought into existence and that more than a "bald assertion" was required. This must be done through evidence.

[65] As it stands there is no evidence to ground the claim of privilege and this court will not accept a mere assertion. The claim of privilege has failed.

[66] The court, having found that the evidence of the Defendant did not support privilege, now has to determine whether the case for specific disclosure has been made.

[67] The genesis of this application is to be found in certain statements made by Ms. Ram Mirchandani in her affidavit filed 23rd November, 2017, which conflicted with aspects of the loss adjuster's report. Ms. Nichols in her affidavit said:

> "4. The Affidavit of Ms. Ram Mirchandani filed on November 23, 2017 made certain allegations with respect to the condition of the property at the time of the accident.

> 5. I have been advised by the Claimant and verily believe the same to be true that investigations were conducted at the time of the accident by an agent of the Defendant, MRG Inc., and a report of the findings was prepared.
>
> 6. I have been further advised by the Claimant and verily believe the same to be true that the said report refutes certain statements made by the director of the Defendant in her said Affidavit; particularly clause 9 thereof."

[68] Ms. Simmons Beckles in her affidavit deposed that she requested the Claimant's Attorney-at-Law to identify the statements in Ms. Ram Mirchandani's affidavit which allegedly conflicted with the loss adjuster's report so that the same might be addressed, but she received no response.

[69] Ms. Nicholls referred specifically to clause 9 of Ms. Mirchandani's affidavit which is as follows:

> "9. In addition to being warned not to pass the foul line before play begins, signs are also placed strategically in or around the bowling alley prohibiting players from going beyond the same and onto the bowling lane. If by chance a player is observed by staff of the bowling alley to be walking beyond the foul line, he/she is immediately warned and reminded not to do so."

[70] Given the significance of Ms. Mirchandani's affidavit which is wide ranging the court believes that it deserves some attention. The relevant aspects of the affidavit as it relates to this application are paragraphs 3-14. Paragraphs 15-19 which appear under the heading "Contributory negligence" set out the Defendant's version of the incident. This part (paragraphs 3-14) of the affidavit was concerned with the business of bowling starting from when the business was open, the hours of business and the amount a player had to pay to participate in the game of bowling. Also mentioned was the attendant's duty, in keeping with the company's policy, to players after they were given their shoes and the instructions. The deponent also mentioned the requirement to have your own socks or purchase a pair.

[71] The affidavit described the "finish" (laminated or synthetic' surface atop of concrete floor) of the eight lanes as well as the location of the foul line. The "approach" and its purpose was also described. It outlined the company's policy pertaining to cleaning the bowling lanes, the special conditioner that was used and the brushing and cleaning routine during opening hours and after the business was closed to the public.

[72] The deponent pointed out the areas where conditioner was applied, where it was not applied as well as its dual purpose. She also pointed out that the approach or bowling area, though shiny was not slippery and no conditioner was used in cleaning it. She explained the methodology used to clean it. She also dealt with the "special equipment" used to brush and clean bowling balls before they were returned to players via the underground mechanism.

[73] This affidavit was filed in support of the Defendant's application to set aside judgment. The relevant part of the affidavit is of a general nature. The Claimant, not only failed to respond to the Defendant's request to identify the areas of conflict which the report is needed to clarify but also failed to be specific in the written submissions and her Counsel's affidavit in support of this application. This omission is significant. According to the Claimant, the information is required for the "fair disposal of the proceedings." The information is such that the Claimant may not need to contest the Defendant's application. It also should save costs and judicial time.

[74] The court is unable, of its own volition, to identify the "certain statements with regard to the condition of the property at the time of the incident" which may or may not be refuted by the report. After careful perusal of the affidavit the court is satisfied that no statements were made about the condition of the property at the time of the incident.

[75] The Claimant's failure to articulate any specifics whatsoever pertaining to these statements must have an impact on the determination of what is relevant. Relevance must be demonstrated. However, the ultimate test is whether the order is necessary to dispose fairly of the litigation. The following definition is useful:

> "What does "necessary" in this context mean? It of course, includes the case where the party applying for the order for discovery and inspection of certain documents could not possibly succeed in the pleadings unless he obtained the order, but it is not confined to such cases. Suppose, for example a man has a very slim chance of success without inspection of documents but a very strong chance of success with inspection, surely the proceedings could not be regarded as being fairly disposed of, were he to be denied inspection." (***Science Research Council v. Nasser*** [1980] AC 1028 at 1071 per **Lord Salmon**).

[76] While Counsel for the Defendant was rightly accused of making bald assertions, it is my opinion that Counsel for the Claimant has also been doing the same thing. The bald assertion that the report was necessary to "dispose fairly" of the litigation between the parties, has not been accompanied by specifics. In addition, no evidence has been produced to substantiate the allegation that the loss adjuster's report is standard practice or routine step and that it contains contemporaneous statements which make it the best evidence. There is also no evidence that an investigation was conducted at the time of the incident.

[77] If Ms. Simmons Beckles is to be taken at her word and there is no basis for doing otherwise, the report is dated 23rd November, 2015. This incident occurred on 19th August, 2015. The circumstances of this matter are not favourably comparable with ***Waugh v. British Railways Board***. In this case the internal inquiry report which the plaintiff sought was prepared by two of the defendant's officers two days after the accident. This report incorporated statements by witnesses on the spot. The House

of Lords was justified in concluding that the report was contemporaneous and was "almost certainly the best evidence as to the cause of the accident." I agree with Ms. Simmons Beckles that this case is distinguishable.

**The Benefits of Disclosure**

[78] According to Counsel for the Claimant disclosure would not only save judicial time and costs but it would determine whether there was a necessity to hear the Defendant's application to set aside judgment. Apparently Counsel expects the report to provide information which is favourable to the Claimant and unfavourable to the Defendant. In consequence this would give rise to a summary disposal of the Defendant's application.

**The burden in time and costs of disclosure**

[79] I accept Ms. Nichols' position that if ordered the Defendant would be able to produce the report without being financially burdened. According to Counsel the report already exists. Any expenses incurred in making copies of the document are not likely to be significant.

**The pleadings**

[80] The information covered in the report must be directly relevant to the issues raised in the Statement of Claim. In her affidavit Counsel for the Claimant stated that the report related to the matters directly in question or some of them and that it spoke to whether or not the Defendant failed in its duty of care to the Claimant. The basis for this was the Defendant's application to set aside judgment itself. The only ground of application is that the Defendant has a real prospect of successfully defending the claim (**Rule 13.3(1)**). In the absence of any explanation the evidential basis for this statement appears questionable.

**Proportionality**

[85] The principle of proportionality is important in that it imposes limits. It therefore avoids a free-for-all situation with respect to disclosure. The Claimant has not addressed proportionality. There must be evidence to satisfy the court that the entire report is directly relevant to the Claimant's case. I endorse the following statement.

> "37. Proportionality is of course important….It would be wrong to order disclosure which was hugely disproportionate to the information that could reasonably be expected to be relevant." (***Harrods Ltd. v. Times Newspaper*** EWHC 83 Ch per **Warren J**)

**Relevance**

[86] The report is directly relevant if the Defendant intends to rely on it, if it tends to affect adversely the Defendant's case and if it tends to support the Claimant's case. It should be noted that the Defendant has not signaled an intention to rely on the report or any aspects of the report.

[87] In a "Without Prejudice" letter dated 16 March, 2016 the Litigation Department of the CGI invited the submission of a quantified claim. The Claimant drew certain inferences from this invitation as set out in her submissions. The letter is as follows:

> "We acknowledge receipt of your letter dated 12th February 2016 and invite you to submit your client's quantified claim for our consideration, as soon as you are in a position to do so.
>
> Kindly note that this request for a quantified claim is not an admission of liability on the part of our insured, and is without prejudice to our insured rights, all of which are reserved."

[88] In keeping with the Claimant's arguments, is there an adverse inference to be drawn from this invitation, because lability was not disputed? I do not think that this invitation is a sufficient reason to infer that the report adversely affects the Defendant's case or supports the Claimant's case. I

also disagree with the position that from this invitation one can determine whether or not the claim was ever viewed with suspicion.

**Conclusion**

[89] The basis upon which the Claimant approached the court for specific disclosure of the report prepared by MRG was flawed from the start. Having issued a 'threat' in her letter dated 23rd February, 2018 [paragraph 27 above] the Claimant thereafter appeared to be 'grasping at straws.' The broad and bald assertions have not been substantiated. Direct relevance as defined by the **CPR** has not been demonstrated.

[90] While it is important for the Claimant to have access to documents which will assist her case, this process must be dictated by relevant principles and the overriding objective. There is no suggestion that the Claimant cannot succeed without this order or that it will greatly improve a slim chance of success. The Claimant has not demonstrated that the report is necessary or necessary at this stage of proceedings in order to dispose fairly of the litigation or to save costs.

[91] This exercise appears to be speculative. The evidential basis on which to base the finding of relevance has not been provided. This application appears to be a 'fishing expedition.' In these circumstances the court will not exercise its discretion under **Rule 28.14** to require production of the document for its own examination.

**Disposal**

[92] The Claimant's application is dismissed. The court does not consider the Defendant to be a successful party in this matter. There will be no order as to costs.

**Deborah Holder, BSS**
Master of the High Court