

**APPROVED**

**THE HIGH COURT**

[2022] IEHC 593

[2020/66 COS]

**IN THE MATTER OF THE COMPANIES ACT, 2014**

**BETWEEN**

**DIRECTOR OF CORPORATE ENFORCEMENT**

**APPLICANT**

**AND**

**CUMANN PEILE NA H-EIREANN**

**“FOOTBALL ASSOCIATION OF IRELAND”**

**RESPONDENT**

**AND**

**JOHN DELANEY**

**NOTICE PARTY**

**JUDGMENT of Ms. Justice Reynolds delivered on the 21<sup>st</sup> of October, 2022**

**Introduction**

1. In this application, the Director of Corporate Enforcement (“*the Director*”) seeks a determination as to whether certain documents attract legal professional privilege.
2. The documents in question were seized from the offices of the Football Association of Ireland (“*the FAI*”) pursuant to a search warrant on the 14<sup>th</sup> February,

2020 and constitute the contents of a digital work email folder of the notice party (“*Mr. Delaney*”), being the FAI’s former Corporate Executive Officer.

### **Background**

3. The material background is set out in two previous judgments which I delivered last year (*Director of Corporate Enforcement v Cumann Peile Na H-Eireann & Delaney* [2021] IEHC 141 & [2021] IEHC 651. For this reason, I do not propose to regurgitate same.

4. However, an updated chronology as set out succinctly in the applicant’s submissions provides useful additional context as follows: -

- “14/02/20 A search warrant was executed at the offices of the Respondent.*
- 17/02/20 A motion issued under s. 795(4) of the Companies Act 2014 seeking a determination as to whether legal professional privilege (hereinafter “LPP”) attaches to material seized.*
- 20/02/20 The Notice Party was joined to proceedings*
- 24/06/20 An examination strategy was approved, and c. 285,000 files were identified*
- 06/07/20 A review of material on behalf of the Notice Party began.*
- 15/07/20 The court granted an extension of time for the review*
- 29/07/20 The Notice Party identified c. 29,500 documents potentially attracting LPP.*
- 10/11/20 Counsel was appointed under s. 795(6) to report on LPP*
- 03/03/21 Reynolds J delivered judgment allowing for appointment of second counsel*
- 17/05/21 A report was delivered to court*

- 18/06/21 *The Applicant asserted crime-fraud exception over the remaining documents.*
- 20/07/21 *A hearing was conducted in relation to the crime-fraud exception argument.*
- 10/08/21 *Reynolds J delivered judgment in relation to the crime fraud exception.*
- 12/10/21 *An issue was ventilated about the Notice Party document[s] being handed over to the Applicant.*
- 22/10/21 *Reynolds J directed the solicitor for Notice Party could attend the office of the Applicant for reviewing documents to identify LPP and file an affidavit by November 24<sup>th</sup>.*
- 26/11/21 *The Notice Party sought copy documents.*
- 11/01/22 *The court adjourned the case to March 6<sup>th</sup>, 2022 and directed a timeline for the exchange of submissions.*
- 09/02/22 *On the application of the Applicant, the timeline was altered.”*

**5.** At the outset, the application concerned c. 273,000 documents which were seized on foot of a warrant issued pursuant to s.787 of the Companies Act 2014 (“*the Act*”).

**6.** A number of procedural steps were undertaken which facilitated the court eliminating from its considerations a significant volume of documentation (which did not attract legal professional privilege).

**7.** This included the appointment of two independent persons pursuant to s. 795(6) of the Act for the purpose of preparing a report (“*the report*”) to assist the court in its determination.

8. Subsequent to the delivery and circulation of the report and consequent upon further engagement between the parties, the number of outstanding documents was further whittled down.

9. What now remains are 1,123 digital documents over which Mr. Delaney has asserted legal professional privilege.

10. In addition, there is a small number of hard copy documents (which were also seized during the search) for the court's consideration.

### **Section 795 of the Companies Act, 2014**

11. Section 795 of the Act requires the court to come to a determination as to whether a person is entitled to refuse to produce a document on the grounds of legal professional privilege.

12. Section 795(1) defines information and privileged legal material as follows:-

*“‘information’ means information contained in a document, a computer or otherwise; ‘privileged legal material’ means information which, in the opinion of the court, a person is entitled to refuse to produce on the grounds of legal professional privilege.”*

Section 795(4) provides:-

*“(4) Without prejudice to subsection (5), where, in the circumstances referred to in subsection (3), information has been disclosed or taken possession of pursuant to the powers in this Part, the person—*

*(a) to whom such information has been so disclosed, or*

*(b) who has taken possession of it,*

*shall (unless the person has, within the period subsequently mentioned in this subsection, been served with notice of an application under*

*subsection (5) in relation to the matter concerned) apply to the court for a determination as to whether the information is privileged legal material and an application under this subsection shall be made within 7 days after the date of disclosure or the taking of possession.*

Section 795(5) states:-

*“A person who, in the circumstances referred to in subsection (3), is compelled to disclose information, or from whose possession information is taken, pursuant to the powers in this Part, may apply to the court for a determination as to whether the information is privileged legal material.”*

**13.** Section 795(6)(b) further provides for:-

*“(b) the appointment of a person with suitable legal qualifications possessing the level of experience, and the independence from any interest falling to be determined between the parties concerned, that the court considers to be appropriate for the purpose of—*

- (i) examining the information, and*
- (ii) preparing a report for the court with a view to assisting or facilitating the court in the making by the court of its determination as to whether the information is privileged legal material.*

**14.** The report in this case has been of considerable assistance in discounting the vast majority of documents from the court’s considerations as outlined above.

### **Legal professional privilege**

15. It is well established that there are occasions when a person or party is not obliged to answer particular questions or produce particular documents on the grounds of privilege.

16. The rationale behind the existence of legal professional privilege is that of encouraging full and frank disclosure as between solicitor and client and ensuring that the client discloses all facts to the solicitor, not just those which favour the client. (See the principles as enunciated by Lord Taylor C.J. in *R. v. Derby Magistrates Court, Ex P. B* [1995] 3 WLR 681, at p.695).

17. There are two categories of legal professional privilege, both of which are relevant in the context of the within application.

#### **First category - legal advice privilege**

18. This type of privilege encompasses documentation prepared in connection with litigation and extends to any communication made for the purpose of obtaining legal advice.

19. In *Smurfit Paribas Bank Ltd v. AAB Export Finance Ltd* [1990] 1 IR 469 at p. 478, Finlay C.J. discussed the framework within which this aspect of privilege will be considered:

*“Where a person seeks or obtains legal advice there are good reasons to believe that he necessarily enters the area of potential litigation. The necessity to obtain legal advice would in broad terms appear to envisage the possibility of a legal challenge or query as to the correctness or effectiveness of some step which a person is contemplating. Whether such query or challenge develops or not, it is clear that a person is then entering the area of possible litigation.*

*Having regard to those considerations I accept that where it is established that a communication was made between a person and his lawyer acting for him as a lawyer for the purpose of obtaining from such lawyer legal advice, whether at the initiation of the client or the lawyer, that communication made on such an occasion should in general be privileged or exempt from disclosure, except with the consent of the client.”*

- 20.** In order to justify a claim of legal advice privilege a number of essential criteria must be met.
- 21.** Firstly, the communication must be between solicitor and client although this can be extended to include an agent of the client where such agent is appointed for the purposes of obtaining legal advice from the lawyer on the client’s behalf.
- 22.** Secondly, the solicitor must be acting in a professional capacity. In *Bramwell v. Lucas* (1824) 2 B&C 745, at 749, Abbott C.J. stated:

*“Whether the privilege extends to all confidential communications between attorney and client or not there is no doubt that it is confined to communications, and to communications to the attorney in this character as attorney.”*

- 23.** Thirdly, the document over which legal advice privilege is claimed must be confidential. Thus, in *Bord Na gCon v. Murphy* [1970] 1 IR 301 at p.314, the Supreme Court rejected a defendant’s claim of privilege on the basis that the letters in question were not privileged. In so determining, Walsh J stated: -

*“The protection which extends to communications between a solicitor and client depends upon the confidential character of the communication and, if a client has instructed a solicitor to write a particular letter to another party, namely, the complainants in this case, it is quite clear that the content of that*

*letter or the fact that the writing of it was directed by the client is not and was not intended to be a confidential communication.”*

**24.** Fourthly, the document in question must relate to the provision of legal advice as opposed to legal assistance. This aspect was also considered in *Smurfit* where Finlay C.J. at p 478 held:

*“Similar considerations do not, however, it seems to me, apply to communications made to a lawyer for the purpose of obtaining his legal assistance other than advice. There are many tasks carried out by a lawyer for his client and properly within the legal sphere, other than the giving of advice, which could not be said to contain any real relationship with the area of potential litigation. For such communications there does not appear to me to be any sufficient public interest or feature of the common good to be secured or protected which could justify an exemption from disclosure.”*

**25.** Accordingly, it appears that factual matters leading to the drafting of legal documents may be found to be communications with lawyers which do not necessarily constitute legal professional privilege.

**26.** In the within application, Mr. Delaney has asserted legal advice privilege over 163 documents and is therefore required to satisfy the court that he can justify such a claim. Evidentially, this can only be achieved by providing a full account of the circumstances in which the documents were created to enable the court to comprehensively analyse the basis for the assertion and make a reasoned determination.

**Second category - litigation privilege**



**27.** In essence, litigation privilege allows parties to prepare for litigation without having to disclose those preparations in advance of the trial. Litigation privilege attaches where communications were intended to be confidential, and where their dominant purpose is to prepare for actual or reasonably apprehended litigation.

**28.** In *Waugh v. British Railway Board* [1980] AC 251 at p.531, Lord Wilberforce concisely summarised the position as follows: -

*“One side may not ask to see the proof of the other side’s witnesses or the opponent’s brief or even know what witnesses will be called: He must wait until the card is played and cannot try to see it in the hand.”*

**29.** More recently, Hogan J in *Ryanair Limited v. Revenue Commissioners* [2018] IECA 222 held:

*“...litigation privilege is essentially temporal in scope and is designed to prevent premature disclosure of a litigant’s case to his or her opponent.”*

**30.** To justify a claim of litigation privilege, a number of essential prerequisites must be met.

**31.** Firstly, the communication with a third party is only subject to litigation privilege if the litigation has commenced or is closely anticipated and there is a connection between the communication and the litigation itself. Hence, the requirement is not satisfied where there is only a possibility of litigation - the litigation must be reasonably in prospect.

**32.** Secondly, in order for a document to attract of litigation privilege, it must be established that the “dominant purpose” of the document is that it was prepared for the purpose of assisting the preparation of litigation.

**33.** Thus, in *Silver Hill Duckling v. Minister for Agriculture* [1987] 1 IR 289 at p.294, O’Hanlon J. in endorsing the earlier decision in *Alfred Crompton Amusement Machines Limited v. Customs & Excise Comrs. (No. 2)* [1972] 2 QB 102 stated:

*“... the dominant purpose for the document coming into existence in the first place should have been the purpose of preparing for litigation then apprehended or threatened.”*

**34.** Thirdly, the onus rests on the party seeking to assert privilege to establish that “*the dominant purpose*” of the document was that it was created in contemplation of litigation or apprehended litigation.

**35.** In *Artisan Glass Studio Limited v. Liffey Trust Limited* [2018] IEHC 278 at pp. 29 to 31, McDonald J. in reviewing the authorities on the issue held:

*“...the court is not bound by a bald assertion in an affidavit contending that litigation is the dominant purpose of a document. On the contrary, the question of dominant purpose is a matter for objective determination by the court.”*

**36.** One of the difficulties in that case was that mere assertions - and nothing more - had been made that the dominant purpose of the relevant material was the apprehended litigation.

**37.** Consequently, McDonald J. noted:

*“I have already drawn attention to the fact that the very use of the word 'dominant' immediately indicates that litigation was not the sole purpose of the report.”*

**38.** McDonald J. concluded that the defendant had not discharged the burden of proving, on the balance of probabilities, that the relevant report had been prepared

with the dominant purpose of litigation in mind, ergo, no litigation privilege was deemed to attach.

**39.** Fourthly, it is necessary to establish that the litigation is ongoing as litigation privilege may be lost once the proceedings have concluded. Litigation privilege does not continue automatically beyond the final determination of the litigation to which it relates.

**40.** In considering this issue in *University Cork College v. Electricity Supply Board* [2014] 2 IR 525, Finlay Geoghegan J. noted: -

*“Thus, the principle ‘once privileged, always privileged’, so vital in the solicitor-client privilege, is foreign to litigation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration.”*

**41.** A similar approach had been taken in Northern Ireland in *Porter v. Scott* [1979] NI 7 wherein Kelly J. contrasted the permanency of legal advice privilege with litigation privilege:

*“The element of permanency does not seem to pervade communications made in contemplation of litigation. Such communications are not generally intended to remain unrevealed – indeed, more often than not it is intended that they should be revealed at the appropriate time in one form or another during the course of legal proceedings. They come into existence for the precise and limited purpose of use in contemplated litigation and I do not see on any grounds of public policy or otherwise why they should remain clothed with privilege when the proceedings for which they were made have been disposed of or abandoned.”*

**42.** Finally, litigation privilege can only be asserted in respect of the same or closely related proceedings as held by Hogan J. in *Ryanair v. Revenue Commissioners* [2018] IECA 222. The issue in that case was whether the State was entitled to claim litigation privilege in respect of documents deployed by it in the course of proceedings brought by the European Commission on the basis that privilege endured for the purpose of defending separate proceedings. Hogan J. in reviewing the case law including *UCC* and *Porter*, determined that litigation privilege ended once the proceedings came to an end:

*“Accordingly, the zone of privacy which the State required to defend the Commission proceedings – and which gave rise to the litigation privilege in the first place – is no longer required as those proceedings have ended. Nor can it be said that Ryanair or Aer Lingus are somehow proxies for the Commission or that the outcome of the present litigation can in any way affect the Commission proceedings involving the State which, to repeat, have long concluded. The situation is, in reality, no different from that which obtained in Porter where the litigation privilege attaching to the medical report which had been prepared for the criminal injuries claim ended once that claim was settled, so that this privilege no longer availed the plaintiff when discovery of that medical report was sought in the course of the second, unrelated personal injuries case.”*

**43.** The decision in *Ryanair* clearly signals that litigation privilege can only be asserted in respect of the same or closely related proceedings. In addition, it demonstrates that even where litigation is ongoing, documents will only be privileged against the opposing party to that litigation but may be disclosable to an applicant

where there is no link between that applicant and any proceedings involving the party claiming privilege.

44. In the context of the within application, Mr. Delaney has asserted litigation privilege over the vast majority of the documents and must therefore satisfy the court of his entitlement to maintain such a claim.

45. Again, this can only be achieved by providing a comprehensive narrative of all the relevant facts pertaining to the documents in issue to facilitate a reasoned analysis of the evidence and valid determination as to whether the documents are exempt from disclosure.

#### **Waiver of privilege**

46. As outlined above, the protection afforded by privilege is predicated upon confidentiality. However, privilege may be waived, either expressly or impliedly, and the decision as to whether privilege is waived is that of the client.

47. Consequently, privilege will be taken to have been waived where a privileged document or communication is disclosed to an opposing party, unless it is expressly reserved.

48. In *Discovery and Disclosure* (3<sup>rd</sup> Edition) - Abrahamson, Dwyer & Fitzpatrick, Roundhall, 2019 (para. 40-114), the position is aptly summarised as follows:

*“Therefore, where the client destroyed the confidentiality of a document, by disclosing it, either to the opposing party or to the public generally, any entitlement to assert privilege will generally be waived.”*

49. This issue arises where it is evident that Mr. Delaney has disclosed documents (660 in total) to third parties (non-lawyers) and consequently privilege may have been

waived unless Mr. Delaney can satisfy the court to the contrary. This matter is considered further below in the context of common interest privilege.

**50.** In *Fyffes Plc v DCC Plc* [2005] 1 IR 59, the Supreme Court considered the circumstances in which a party may lose privilege as a result of utilising or partially disclosing documents. Fennelly J. held:

*“... a party who seeks to deploy his privileged documents by partially disclosing them or summarising their effect so as to gain an advantage over his opponent in the action in which they are privileged, runs a serious risk of losing the privilege.”*

### **Communications with third parties – common interest privilege**

**51.** Where clients jointly retain a solicitor, privilege cannot be claimed *inter se* in respect of communication passing between either of them or the solicitor but will be maintained against third parties unless waived jointly.

**52.** Common interest privilege is effectively an extension of legal professional privilege and aptly described by McKechnie J. in *Hansfield Developments v. Irish Asphalt Ltd* [2009] IEHC 420 at para. 19:

*“The phrase ‘Common Interest Privilege’ is apt to mislead if it conveys the existence of a sui generis category of privilege known by that name. None so exists. The description if used must be understood as preserving legal professional privilege where the third party, recipient, or creator of a communication, has a common interest in the subject of the privilege with the primary holder thereof. As interpreted the phrase can be so used.”*

**53.** Thus, common interest privilege essentially requires a determination as to whether there has been a waiver of privilege through disclosure to a third party.

54. In circumstances where Mr. Delaney relies on common interest privilege as an extension of legal professional privilege, it is incumbent on him to establish that the disclosure of the 660 documents was for some limited purpose and that the sharing of them was with persons who could be found to come within the definition of common interest privilege.

55. In the absence of such unequivocal evidence, the court is left with no evidence to support the claim that legal professional privilege applies.

### **The burden of proof**

56. The onus of establishing legal professional privilege falls on the party seeking to assert that privilege.

57. In *Colston v Dunnes Stores* [2019] IECA 59, the material at issue related to maintenance records over which privilege had been claimed in an affidavit of discovery. The proceedings arose from a fall on the defendant's premises arising from which the plaintiff claimed damages from personal injuries. In the Court of Appeal, Irvine J. found that the High Court was correct in holding that the defendant had not discharged the burden of proof which lay upon them and in so doing reviewed the relevant authorities: -

*“41. In all of the aforementioned cases the evidence advanced to support the claim of litigation privilege extended significantly beyond the mere assertion that the documents in question were created with litigation in mind. A full account of the circumstances in which the documents were created was provided. Likewise, there was an explanation of the procedures deployed at the time the documents were created as there was of the motivation for so doing.*

*42. All that said, litigation in this jurisdiction is adversarial in nature, and that being so, there is nothing improper in a party standing on their right to privilege where it is properly made out. Nonetheless, when a claim of privilege is upheld the consequences are, first, that material which has already been determined as relevant to the issues the Court will have to decide, will not be available to the other party. Neither will it be available to the Court to enable it to do justice between the parties. For this reason, the Court must be diligent to ensure that the party claiming privilege, discharges the requisite burden of proof. Privilege has the potential to interfere with the Court's ability to establish the truth. Thus, a party claiming privilege must discharge the onus upon them to satisfy the court that privilege is properly claimed”.*

**58.** Irvine J. went on to consider the applicable principles (extrapolated from the authorities) to be applied when a challenge is made to a claim of privilege over documents which predate either notification of intended proceedings or the commencement of proceedings and held: -

*“(1) Every application for inspection of documents in respect of which litigation privilege is claimed, must be decided on its own facts.*

*(2) The Court must be satisfied, on the evidence, that the party claiming privilege has demonstrated that they reasonably apprehended litigation when the documents were created. This is an objective test and is one to be decided on the basis of the evidence.*

*(3) If the documents in respect of which privilege is claimed were created for more than one purpose, the Court must be satisfied that the evidence demonstrates that apprehended litigation was the dominant purpose for the creation of the documents”.*



**59.** Para. 45 of the judgment outlines the dangers of a court accepting a bald averment as to the purpose/dominant purpose for which a document was created and highlights: -

*“The only way that a Court can ascertain whether the purpose for which a document was created was apprehended litigation is for the deponent to explain all of the relevant facts and processes which led to the creation of the documents. The Court and the opposing party must be in a position to subject the claim of privilege to rigorous examination”.*

**60.** Consequently, it is evident that what is required to be produced by a party asserting privilege must be of sufficient detail as to allow the court to make a finding regarding the intention behind the generation of the documents and explaining *“the nature, genesis and purpose of the documents in issue”*.

**61.** In *IBRC v. Quinn* [2015] IEHC 84, Mahon J., at para. 50, observed that the party asserting privilege must set out: -

*“a meaningful narrative containing a sufficient description to allow the receivers to make a reasoned judgment as to whether privilege is maintained”.*

**62.** Similarly, the *Artisan Glass Studio* case referred to above, also set out what is required: -

*“. . . it is therefore essential that the court should be provided with sufficient material to enable it to properly and comprehensively assess that contention. Otherwise, the court will not be in a position to carry out the objective determination which is required in accordance with the case law. Where a party claiming privilege fails to provide the necessary material to the court, the court may be left with no alternative but to conclude that the party in*

*question has failed to establish the dominant purpose of the creation of the document”.*

63. Whilst McDonald J. was referring in that particular context to dominant purpose, it is clear that the same principle applies to every aspect of privilege.
64. In essence, it is essential that evidence is proffered to the court to enable the court to establish that the relevant document was created at a time when litigation either existed or was reasonably apprehended, and that the dominant purpose of creating the document was that litigation.
65. In addition, and having regard to the principles as set out above, it is imperative that the party asserting privilege is the party entitled to make that assertion and is required to put such evidence before the court.
66. The issue arises in circumstances where Mr. Delaney has claimed privilege in respect of extant proceedings involving the FAI, in direct conflict with the FAI’s position where it has averred that there is no continuing litigation involving it and Mr. Delaney. Where such conflict arises, the onus falls on Mr. Delaney to establish by evidence, firstly, that the litigation is ongoing and secondly, in the event that the litigation is over, that there is some reason why the privilege still exists.
67. Furthermore, where there appears to be more than one party to legal proceedings, e.g., the Olympic Council, FAI, etc., it is necessary for Mr. Delaney to show that the privilege is his to assert. It is not simply a matter of asserting it by virtue of the fact that he is named as a party to the proceedings.

#### **Legal professional privilege in the context of the within application**

68. The parties are in broad agreement regarding the applicable legal principles as set out above. What is at issue is how the principles are to be applied in the context of

this application and in particular, the evidence required to justify the claim of privilege.

**69.** As a starting point, counsel for Mr. Delaney submits that the court is bound by the recommendations of the report prepared by the independent reviewers pursuant to s. 795 (6) of the Act.

**70.** I propose to immediately discount that contention on the basis that whilst the legislation provides for the preparation of a report, it is readily apparent that the purpose of the report is for “*assisting or facilitating the court in the making by the court of its determination*”. In other words, the report is simply a tool to be utilised by the court to aid its considerations and does not usurp the function of the court.

**71.** Further, the decision in *Smurfit Paribas Bank Ltd v A.A.B. Export Finance Ltd* [1990] 1 I.R. 469, at p.475 provides clear authority for the proposition that the court cannot delegate the determination of privilege to a non-judicial body given the judicial function in determining privilege.

**72.** Accordingly, the ultimate task of determining whether the outstanding documentation is privileged rests upon the court and the court alone.

**73.** Thereafter, Mr. Delaney’s legal advisors submit that if the court is to look beyond the recommendations in the report in order to reach its determination pursuant to s.795(5), it must examine each and every document before making its finding in respect of legal professional privilege.

**74.** Further, it is contended that upon completion of that process, the court is obliged to:

“...receive further submissions from the Notice Party, based on him and his legal team being able to comprehensively re-familiarise themselves with the Deemed LPP Documents themselves.”

75. Conversely, the Director posits that in circumstances where there is a very considerable number of documents to which broad arguments apply; and the court finds that the documents concerned fall within these arguments, then the court will not be required to further enquire into such documents and can discount them and proceed to make a finding that legal professional privilege does not apply.

76. Further, the Director relies on the decision in *DPP v The Special Criminal Court* [1999] 1 IR 60 as persuasive authority to refute the suggestion by Mr. Delaney that the court is required to analyse each and every document with a view to reaching a determination.

77. Before embarking on any further discussion, it is useful to review the relevant evidence.

### **The evidence**

78. The initial exchange of affidavits *inter partes* dealt with procedural issues including the examination strategy, review of materials on behalf of the FAI and Mr. Delaney, and the delivery and circulation of the report.

79. Two volumes of the report issued in May 2021, one in respect of the FAI and the other in respect of Mr. Delaney.

80. In relation to Mr. Delaney, a total of 1,123 items were deemed to be privileged and were the subject of the crime-fraud exception application. I declined to make a determination in that regard for the reasons as set out in that judgment.

81. Thereafter, the Director sought further information from Mr. Delaney in an effort to probe and understand the basis upon which privilege was being asserted in respect of the 1,123 documents. No information was forthcoming.

**82.** At various intervals, I made directions in an effort to expedite matters between the parties and with a view to reaching a final determination on these issues, including orders directing the parties to furnish the independent reviewers with the “contextual information” sought.

**83.** As outlined above, all outstanding matters were resolved as between the Director and the FAI in September 2021, and I made orders that the recommendations (as set out and agreed upon consensually between the parties in the amended report) be adopted as final orders of the High Court.

**84.** In relation to Mr. Delaney, and where progress had stalled, I made a further order dated 22<sup>nd</sup> October, 2021 facilitating additional access to the Director’s offices, on the same basis as heretofore, for the purpose of reviewing the 1,123 digital documents that remained in issue and directed that specific issues be addressed on affidavit:

*“The Notice party is required to clarify with regard to each document in respect of which litigation privilege is claimed*

*a) identify the litigation in respect of which each claim of litigation privilege is made*

*b) whether each and every piece of such litigation is concluded*

*c) what the notice party means with regard to each individual piece of litigation when the assertion is relied upon by the Notice Party that the litigation is concluded*

*ii. where third parties are copied on many of the documents how such documents retain legal professional privilege*

*iii. where communications do not include a lawyer or legal adviser as either the sender or recipient how such documents retain legal professional privilege*

*iv. Whether assertions of privilege are made in Mr. Delaney's personal capacity or whether any privilege that might exist is for the Respondent or other parties to assert...."*

**85.** In his affidavit dated 9<sup>th</sup> November, 2021 para 9, Mr. Delaney states: -

*"The text of this Affidavit is not a suitable forum for providing any kind of "deep dive" analysis of what is in the report..."*

**86.** He purports thereafter to give a *"broad flavour of what the Report contains"* in terms of numerical analysis:

*"(a) 566 files (or just over half the total) relate to family law proceedings.*

*(b) 301 files (or just over a quarter of the total) relate to defamation proceedings.*

*(c) 71 files (or just over 6% of the total) relate to a shareholder dispute in which I was involved; and*

*(d) 81 files (or just over 7%) relate to property transactions.*

*(e) In relation to (a) to (d) above, there is a degree of overlap with some files relating to more than one category.*

*(f) 1,118 files are litigation privileged.*

*(g) 163 are legal advice privileged.*

*(h) 158 files qualify as both litigation and legal advice privileged.*

*Approximately 2842 actual emails were reviewed in total and while some were duplications the context differed depending on where they were situate and commented upon within the 1,123 documents comprising the Deemed LLP Items".*

**87.** Suffice to say the affidavit fails to comply with my order and provides no information of any substance that would assist the Director's efforts to understand the

claim being asserted and/or the findings in the report. A numerical analysis is of little or no assistance. What is required is a meaningful and considered narrative in respect of each document to assist the Director and the court to comprehensively assess whether the claim of privilege stacks up.

**88.** Furthermore, Mr. Delaney complains about a lack of resources and the inadequate time constraints within which to complete the task and requests that copies of the documents be furnished.

**89.** This averment has to be considered in light of Mr. Delaney's repeated protestations concerning these matters throughout the process and is indicative of his approach from the very outset - in stark contrast with the constructive approach adopted by the FAI which has long since completed the process in a markedly tighter time frame with less resources available to it.

**90.** Furthermore, and in circumstances where Mr. Delaney avers that he does not have the necessary information available to him to comply with the court's order, it begs the question as to how he asserts the right to privilege in the first instance. If he does know what the documents contain, how can he meaningfully assert privilege over them? I propose to return to this issue in due course.

**91.** Mr. Delaney accepts that his legal team had spent the additional time period afforded by the court at the Director's offices (an additional 5 days) and yet no attempt whatsoever was made to provide any of the information as per my order. In spite of that lack of progress, he now seeks yet further time for the same purpose. Had any meaningful attempt been made to comply with my order there may at least have been some merit in his application. However, I am satisfied that there was a singular lack of constructive engagement with the process on his part.

**92.** Detective Sergeant Byrne on behalf of the Director, in his affidavit dated 24<sup>th</sup> November 2021, highlights the access periods provided to Mr. Delaney’s legal team and IT expert to the offices which amounts to a six month period between July 2020 and January 2021 for the purposes of the initial review, a further three day period for the purpose of providing contextual information to assist with the preparation of the report and finally, an additional five days as directed by the court.

**93.** He states that on each occasion, significant resources and facilities were made available to Mr. Delaney’s legal team and IT expert.

**94.** He recounts the delay occasioned by Mr. Delaney in failing to provide the Director and the court appointed reviewers with contextual information (“*the context letter*”) justifying his assertions of privilege. That letter together with attached schedules was furnished on Mr. Delaney’s behalf to the independent reviewers in February 2021 to assist them in their review but was only subsequently furnished to the Director in September 2021.

**95.** He avers that upon receipt of that information, concerns were raised in relation to the validity of the assertions being made by Mr. Delaney giving rise to requests for further information which was not forthcoming.

**96.** He highlights the evidential deficiencies in Mr. Delaney’s affidavit in respect of the order dated 22<sup>nd</sup> October, 2021 as follows: -

*“I say that a plain reading of the Order requires that specific litigation being relied upon in justification of the privilege claimed be identified. At a minimum the name and record number of proceedings, together with details of court and jurisdiction might reasonably have been expected”.*

**97.** Further, he identifies the lack of specificity and use of generic terms in respect of the assertion of extant litigation, in contrast with the court order directing clear



identification of particular litigation in respect of each document where an assertion of litigation privilege is made.

**98.** He states that Mr. Delaney's affidavit is so vague in content as to be entirely unhelpful and fails to deal with all of the other provisions of the court order in respect of legal advice privilege, and in particular, his failure to address the fact that one of his alleged legal advisors, being A&L Goodbody solicitors, has disputed his assertion that he was their client. A&L Goodbody's affidavit avers that they have acted for the FAI alone.

**99.** In response to Mr. Delaney's request for copy documents, D.S. Byrne states that acceding to this request would be tantamount to providing a third party with copies of potentially evidential material, seized by way of search warrant in furtherance of a criminal investigation, which could have possible far-reaching consequences beyond the parameters of this investigation and in these circumstances, the Director maintains a strenuous objection to such a course of action.

**100.** Mr. Delaney, by way of further affidavit dated 2<sup>nd</sup> December, 2021, states his belief that he has complied with "*the spirit of the Order*" and reiterates his request that copy documentation be provided to him to enable him to comply fully.

**101.** By way of explanation for the deficiencies in his earlier affidavit, Mr. Delaney asserts that he is in a rather unique position in circumstances where his relationship with his former solicitors (A& L Goodbody and Patrick M. Goodwyn & Co.) has broken down and hence, he has no access to his legal files.

**102.** In a further affidavit dated 11<sup>th</sup> March, 2022, D.S. Byrne exhibits a document at "*RBI*" which was prepared to assist the court in its deliberations ("*the working document*"). It seeks to simplify the process in terms of the court's evaluation of the Director's submissions by proffering arguments covering broad categories of

documentation which the Director contends would enable the court to rule that large numbers of the documents concerned do not attract legal professional privilege.

**103.** The working document incorporates the independent reviewers' report alongside Mr. Delaney's analysis of the documents pursuant to the court order. The latter deals with the following heads of information, each of which is represented by an Excel column (columns L-V) for the purpose of providing the information directed by the court:

“...

*(L) Document name;*

*(M) Legal Advice Privilege*

*(N) Litigation Privilege*

*(O) Litigation Privilege – Identify the litigation in respect of which each claim of litigation privilege is made*

*(P) Litigation privilege – whether each and every piece if such litigation is concluded;*

*(Q) If litigation privileged, what is meant with regard to each individual piece of litigation when the assertion is relied upon that the litigation is concluded;*

*(R) Where third parties are copied on documents how such documents retain legal professional privilege;*

*(S) Where communications do not include a lawyer or legal adviser as either the sender or recipient how such documents retain LPP*

*(T) Whether assertions of privilege are made in Mr. Delaney's personal capacity or whether any privilege that might exist is for the Respondent or other parties to assert*

*(U) Redaction Required*

*(V)Comment”*

**104.** The purpose of setting out the “heads of information” above is to observe that even at a cursory glance, most of the information directed to be provided pursuant to court order is simply absent.

**105.** The Director has very helpfully categorised the documents by way of colour coding in ease of the court, making the various types of litigation readily identifiable e.g., yellow representing the 556 files relating to family law matters (just over half the total), which has been of considerable assistance.

### **Analysis**

**106.** As a starting point, the court has to view the evidence in the context that Mr. Delaney has asserted privilege, the onus therefore resting upon him to justify that claim.

**107.** It is readily apparent from the authorities cited above that this can only be achieved by reference to real and tangible evidence.

**108.** In respect of legal advice privilege, it is for Mr. Delaney to satisfy the court, on the balance of probabilities, that each document contains legal advice (not legal assistance) **and** that the document is confidential. If I am not so persuaded, the claim of privilege fails.

**109.** In relation to litigation privilege (which accounts for the majority of the documents in issue), Mr. Delaney is required to establish, firstly, that the material is confidential; secondly, that litigation had commenced or was closely anticipated at the time the material was created **and** thirdly, that the dominant purpose for the creation of the material was actual or reasonably anticipated or apprehended litigation

(applying an objective test as per McDonald J in *Artisan Glass Studio* and cited with approval by the Court of Appeal in *Colston*).

**110.** The authorities clearly demonstrate that it is for Mr. Delaney as the person asserting privilege to explain all the relevant facts and processes which lead to the creation of the material so that the evidence can be tested and probed in due course.

**111.** Where litigation has ended and Mr. Delaney continues to assert privilege, he must establish by evidence that closely related litigation continues (as per the *Ryanair* decision).

**112.** Finally, where it is evident that issue of waiver arises, the onus rests upon Mr. Delaney to establish that the sharing of documents was on a confidential basis **or** with a third party who is able to assert common interest privilege.

**113.** These are evidential prerequisites which require evidence of a cogent nature which is capable of being scrutinised and probed by the Director in the first instance and thereafter by the court. Otherwise, the claim fails.

**114.** And, lest there had been any doubt in Mr. Delaney's mind about the nature of the evidence required to justify his claim of privilege, the order dated 22<sup>nd</sup> October, 2021 made it crystal clear that there was insufficient evidence elicited on his behalf to allow the Director to probe, either adequately or at all, his assertions of privilege.

**115.** The averment by Mr. Delaney in his most recent affidavit that he yet again requires more time to comply with the order quite simply has a very hollow ring to it. I am satisfied that every opportunity has been afforded to Mr. Delaney and his legal team to adequately review the documents and put forward clear and cogent evidence (where such evidence exists) as required by the court.

**116.** The only evidence which has been proffered essentially amounts to no more than vague and nebulous claims which are wholly unsubstantiated. They are

essentially so generalised as to lack substance and are devoid of any material evidence which could assist the Director or indeed this court with the task at hand.

**117.** Mr. Delaney's bald and blanket assertions are entirely inadequate and the expectation on his part that his mere assertion of privilege over documents together with a belief that his perceived compliance with "the spirit" of my order will suffice is misconceived. Not only has he failed to comply with "the spirit" of the order, he has manifestly failed to comply with it in its entirety.

**118.** Further, the mere existence of outstanding litigation (should such outstanding litigation exist) does not of itself provide a shield for Mr. Delaney to seek to hide behind. What is required is much more, as outlined above.

**119.** I am in broad agreement with the Director's proposition that it is unnecessary for the court to go through each and every outstanding document individually and that a consideration of the categories of documentation is sufficient.

**120.** However, even if I am wrong in this, and having considered a random sample of documents from each category, I am left in the invidious position whereby I simply do not have the requisite information to carry out the necessary analysis and to scrutinise the documents in the manner as required before reaching a reasoned determination.

**121.** To embark on the exercise as contended for by Mr. Delaney would prove fruitless, time consuming and utterly meaningless. It would also, of course, create further needless delay in the Director's investigations.

**122.** It is not my role to make out the claim of privilege for Mr. Delaney - the onus rests squarely upon him to so do. He has been afforded every opportunity to furnish the necessary information to substantiate his claim but has resolutely failed to do so.

**123.** In circumstances where he has failed to discharge the necessary burden of proof required, I must reject Mr. Delaney's claim of privilege and direct that the outstanding documentation in its entirety, both soft and hard copies, be disclosed to the Director.

**124.** In doing so, I am mindful of the provisions of the Act (s. 790) which provide that the publication or disclosure of any material information obtained pursuant to a search warrant (i.e., the documents) to anyone other than "a competent authority", save for the exceptions cited in the Act, is a criminal offence sanctioned by way of fine and/or a term of imprisonment.

**125.** Notably, these are preliminary enquiries being carried out by the ODCE to establish whether a formal criminal prosecution is warranted.

**126.** In the event that a prosecution ensues, it will be open to Mr. Delaney to raise the issue of privilege within the context of a criminal trial. Equally, it will be open to the Director to raise the issue of crime/fraud exception having had the opportunity to consider the documentation should the Director maintain the view that it applies. Ultimately, it would be a matter for the trial judge to resolve these issues in the ordinary way.

### **Conclusion**

**127.** I am satisfied that Mr. Delaney has failed to discharge the requisite burden of proof required to maintain his assertion that the documents at issue are privileged. In the circumstances, I propose to make the necessary determination pursuant to s. 795 of the Act and will hear from the parties in terms of the form of order required and other ancillary matters including the issue of costs.

René Keyll  
26/10/22  
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