Neutral Citation [2015] IEHC 650

THE HIGH COURT

Record No. 2014/6559P

SPORTS DIRECT INTERNATIONAL PLC

PLAINTIFF

AND

SANDRA MINOR, JOHN O'NEILL, MARK HEATON, HUGH HEATON AND WARRNAMBOOL

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 22nd October, 2015.

PART I: OVERVIEW

1. This judgment is concerned with three applications: (1) an application for further and better discovery brought by Sports Direct; (2) an application for further and better discovery brought by the Defendants; and (3) an application for discovery and inspection brought by the Defendants.

PART II: GENERAL BACKGROUND

2. In the mainstay of the within proceedings, Sports Direct International plc ("Sports Direct") is seeking an order for specific performance and various other reliefs in respect of a Share Subscription and Shareholders Agreement of 15th December, 1995 (the "1995 SHA") to which it alleges the first to fourth Defendants are bound as shareholders of the fifth Defendant (the "Company"), which is the ultimate parent company of the Heatons Group. In particular, Sports Direct seeks specific performance of the pre-emption provisions contained in the agreement. The dispute in respect of pre-emption rights arises because in April 2014, the second, third and fourth Defendants purported to purchase the first Defendant's shares in the Company in alleged breach of these pre-emption provisions. The Defendants deny that the shareholders of the Company are bound by all of the terms of the 1995 SHA. They plead that the parties have agreed that certain provisions of the 1995 SHA will not apply to their dealings, or that the parties have acted in such a manner as to estop the assertion that those provisions apply. These pleas are denied by Sports Direct.

3. Sports Direct also seeks an order for specific performance of agreements dated 3rd December, 2002 (the "December 2002 Agreement") and 1st July, 2007, which Sports Direct alleges to govern the relationship between the parties as shareholders of the Company. In particular, Sports Direct seeks an order of specific performance of cl.9 of the December 2002 Agreement. Clause 9 provides, *inter alia*, that the shareholders of the Company shall procure that the Company shall not, without the prior written consent of 60 per cent of the shareholders engage in various property transactions/developments. It is admitted by the Defendants that the parties have operated on the basis that the provisions of cl.9 are applicable; however, it is pleaded that numerous transactions were entered into by Heatons and the Company without the consent of Sports Direct, or any other shareholders, being sought, whether pursuant to cl.9 or otherwise.

4. There is, therefore, a dispute between the parties in relation to the applicability of the pre-emption provisions of the 1995 SHA and the manner in respect of which the shareholders have acted in respect of cl.9 of the December 2002 Agreement. The Defendants have also alleged that Sports Direct is conducting itself in a manner calculated to damage the Company and that it is seeking to block transactions that are in the best interests of the Company; this is denied by Sports Direct.

5. The dispute concerning the December 2002 Agreement only arose after the plenary summons in the within proceedings issued, when Sports Direct was informed that the board of the Company had decided to proceed with the acquisition of two properties, in ostensible breach of the 60 per cent requirement contained in cl.9. This led to an application for injunctive relief which was heard before the court (Costello J.) last October and resulted in an interlocutory injunction restraining the Defendants or any of them from procuring the Company to enter into certain property transactions without the prior consent in writing of Sports Direct pending the trial of proceedings.

6. By order dated 5th February, 2015, the court (Cregan J.) granted Sports Direct liberty to amend its statement of claim so as to deal with further issues that had arisen between the parties. These issues concerned the funding by the Company of the costs associated with the Defendants' defence of the above-mentioned interlocutory application. There are also allegations made that the decision by the second to fourth-named Defendants to resolve that the Company would meet the defence of the interlocutory injunction application constitutes a breach by those defendants of their fiduciary and common law duties.

7. There are, in short, several rows ongoing between the parties, all of them hard-fought. As part of this battle royal, two orders for discovery have been made to date: an order of 5th February, 2015 (Cregan J.), and an order of 27th April, 2015 (McGovern J.). Given the level of antagonism between the parties, it is perhaps unsurprising that disputes have now arisen between them as to the adequacy of the discovery each has afforded the other pursuant to those orders. These disputes are identified and considered below.

PART III: A QUESTION OF PRIVILEGE

8. Overview. The Defendants are disputing all of the claims to privilege made by Sports Direct in an affidavit of discovery sworn on 30th April pursuant to the order for discovery made by Cregan J. on 5th February. The Defendants dispute the claims of privilege on the following three grounds: (1) if purported legal advice was sought, Sports Direct was not the party seeking same and so is not entitled to claim privilege; (ii) Sports Direct cannot claim common interest privilege; and (iii) the Defendants are not convinced that the documents over which privilege is claimed are concerned with legal advice as opposed to legal assistance.

9. Some background detail is needed to flesh out the issues arising. As is evident from Sports Direct's affidavit of discovery, certain of the documents over which privilege has been claimed by Sports Direct are e-mails between a Mr Mellors and CMS Cameron McKenna, the renowned firm of solicitors. Mr Mellors is the former finance director of Sports World International Limited, Sports Direct, and other companies in the Sports Direct Group. Sports World International Limited, now known as Sportsdirect.com Retail Limited ("Sportsdirect.com") is a 100% wholly owned subsidiary of Sports Direct. Notably, the documents over which privilege is now claimed by Sports Direct were generated at a time when Sports Direct was not in existence; it was incorporated in 2006. The correspondence between Mr Mellors and CMS Cameron McKenna was for the purpose of obtaining legal advice for (a) Sports World International Limited and (b) Mr Ashley, the current executive deputy chairman of Sports Direct.

10. On the incorporation of Sports Direct in December 2006, Mr Mellors became its finance director also. Then, as part of a group reorganisation around the time of the flotation of Sports Direct in 2007, Sports Direct acquired the shares held by Sports World International Limited (now Sportsdirect.com) in Warrnambool, which entity acquired the entire share capital of Heatons Limited in 2004. It is pursuant to this last-mentioned acquisition that the shareholder rights asserted by Sports Direct in the within proceedings arise. Sports Direct claims that the documents concerning the interactions with Cameron McKenna have been acquired by Sports Direct as successor in title to Sports World International Limited (now Sportsdirect.com).

11. **No waiver of privilege**. Without prejudice to the foregoing, it is also claimed by Sports Direct that even if the documents are owned by Sportsdirect.com, they are now in the possession, power and procurement of Sports Direct, by virtue of Sportsdirect.com, (a) being a 100% subsidiary of Sports Direct, and (b) Mr Mellors having become an employee of Sports Direct following the reorganization of the Sports Direct Group. Consequently, it is claimed, there has been no waiver of privilege on the part of Sportsdirect.com or Mr Ashley, and consequently Sports Direct, it is asserted, does not have the permission of Sportsdirect.com or Mr Ashley to waive privilege over the documents in question. This being so, Sports Direct maintains its claim to legal advice privilege over the documents.

12. **Common interest; successor in title**. Separately, and again without prejudice to any of the foregoing, Sports Direct claims a joint or common interest privilege over the documents with Sportsdirect.com and Mr Ashley on the basis that Sports Direct is (a) Sportsdirect.com's successor in title to the shares, (b) part of the same group of companies with common directors, and (c) the parent company of Sportsdirect.com, with identical interest in the rights attaching to the shares. In the circumstances, it is claimed, Sports Direct had a clear common interest in the advice given to Mr Mellors when the documents came into its possession following the re-organization of the Sports Direct Group.

13. **Legal advice versus legal assistance**. The Defendants also allege that the documents over which privilege is claimed do not involve legal advice but are concerned with legal assistance. All of the documents were created around the time of the initial public offering (IPO) of Sports Direct on the London Stock Exchange; this was completed in 2007. Launching a company on such a reputable stock exchange is obviously a significant undertaking and generally requires significant legal advice and assistance. The vast majority of the documents in issue comprise various versions, all marked 'draft', of documents entitled 'issues lists and questionnaire' and/or 'Reorganisation Legal Steps Plan' which were prepared by Freshfields, the City of London-based law firm that advised Sports Direct on the flotation. It is accepted by Sports Direct that the documents, *inter alia*, record issues/steps in a transaction, and so veer towards the 'legal assistance' end of the scale. However, Sports Direct maintains that the documents reflect legal advice that was being sought and obtained in respect of the reorganization and that the documents in question are concerned with obtaining legal advice.A solicitor for Sports Direct avers in an affidavit of 6th July that *"I have reviewed the documents and confirm that Freshfields were engaged in providing legal advice to the Sports Direct group including the plaintiff on matters relating to the IPO and how it should be conducted and the documents are concerned with this legal advice."* Notably, something of a caveat follows a few sentences later when the same solicitor swears *"While it is the case that they do not contain any detailed analysis of the law, they nevertheless comprise information relevant to and collated for the purpose of providing legal advice and reflect the solicitors' advice on effecting and completing the transaction having regard to and in accordance with the applicable law."* Is that enough to convert the documents in dispute from documents providing legal assistance to documents providing legal advice? This is an issue to which the court returns later below.

PART IV: THE MISSING DEED

14. In June 2004, the Company was formed as a limited company and acquired the entire issued share capital of Heatons Limited. All shareholders who held shares in Heatons Limited had their shareholding transferred to the Company. The Company became an unlimited company later in the same year.

15. Sports Direct maintains that, at the time of the restructuring of Heatons Limited, it was agreed by the shareholders that the provisions of the 1995 SHA would apply equally to all shareholdings in the Company. As an alternative, it is pleaded that a key feature or condition of the restructuring was that all shareholders would be bound by the 1995 SHA and that each of the shareholders impliedly agreed to be bound by same or are estopped from denying the applicability of same.

16. So where does the missing deed come into things? Sports Direct claims, without prejudice to the foregoing, that, in or around December 2004, a Deed of Adherence was prepared, the parties to which were Heatons Limited, the Company, Mr Ashley, the Defendants and a Mr H.O. Heaton. In the Deed of Adherence, it is claimed, the parties expressly confirmed that they would observe and perform and be bound by all the terms and conditions of the 1995 SHA. However, in a twist worthy of a Jeffrey Archer novel, Sports Direct cannot at present locate a signed copy of the Deed of Adherence. A further problem for Sports Direct is that the Defendants have a very different recollection of the events just described. In their Defence of 28th October, 2014, the Defendants deny that there was any agreement that the provisions of the 1995 SHA would apply to shareholdings in the Company. They deny it was a key condition of the restructuring that all of the shareholders would be bound by the 1995 SHA, or that the shareholders impliedly agreed to be bound by the 1995 SHA, or that the shareholders are estopped from denying the applicability of the 1995 SHA.

17. The court has no idea where the truth lies as regards the execution of the Deed of Adherence, if indeed it was executed. Nor is the court required to reach any conclusion in this regard. The relevance of the foregoing in the within application is that, among the reliefs sought by the Defendants, is an order for further and better discovery by Sports Direct of all documents in its, power, possession or procurement in relation to Sports Direct's contention that Mr Ashley received, signed and returned the Deed of Adherence. This is considered later below.

PART V: APPLICABLE LEGAL PRINCIPLES

18. The court has been referred to various Irish and foreign cases and learned works concerning aspects of privilege that arise in the within application, especially as to the issue of common interest privilege, successor-in-title privilege and waiver of privilege, and also as to whether and when the court should order further and better discovery. These authorities and learned works are considered at some length in Appendix A, which forms a part of this judgment. The court outlines below various principles that it perceives to arise from those authorities and works. Supporting sources are also identified.

A. What is common interest privilege?

19. (1). Common interest privilege arises in relation to documentation/materials which would be the subject of legal professional privilege or litigation privilege in the hands of one person but where the relevant materials are given to a third party who may be said to have a common interest in either the legal advice or litigation concerned. Two intrinsic questions arise. First, would the documents, in the hands of a single person, have the benefit of privilege to begin with? If no, there can be no common interest privilege. If yes, and the materials were released by one party to a second party, was the release on foot of a common interest in the relevant litigation or advice? If yes, the documents will remain privileged. If no, the release may be taken to be a waiver of any privilege that would otherwise attach. **[1]**

B. Common interest privilege not a separate form of privilege

20. (2) Common interest privilege is not a *sui generis* category of privilege. It entails the preservation of 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. **[2]**

C. Test for common interest privilege

21. (3) The correct test for common interest privilege is this. (1) By normal standards, would the documents be privileged in the hands of the party transmitting the information, assuming no disclosure had been made? If yes, the second part of the test arises, *i.e.* (2) was the relationship between the parties sufficiently close that the transmission of documents should not be held to amount to an implied waiver of the privilege? As to (2), the court should consider (a) the parties' relationship, (b) the nature and purpose of the disclosure, (c) whether there is an objective intention to waive privilege on the part of the holder, and (d) whether it is reasonable to conclude that there was an implied waiver of the privilege. **[3]**

D. No common solicitor test in Ireland
22. (4) It was at one time suggested that common interest privilege might apply only to parties represented by the same solicitors, the so-called 'common solicitor' test. This test does not apply in Ireland. **[4]**

E. Underlying principles of common interest privilege
23. (5) The principles underpinning common interest privilege can be summarised as follows: (1) disclosure to a third party of a document covered by legal professional privilege does not constitute waiver of the privilege where the recipient shares a common interest in receipt of the document; (2) a third party, having received a privileged document on foot of such common interest, is entitled to assert privilege over the document against the rest of the world; (3) it is possibly the case that a person cannot withhold from another having a joint (and perhaps even a common) interest, documents that are otherwise privileged as against the rest of the world. **[5]**

24. (6) A common thread underlying cases involving common interest privilege is that the subject matter of the privileged material concerns the legal interests of both parties, and their legal interests were aligned, albeit not necessarily identical, when the information was shared between them. **[6]**

F. Nature of mutual interest required for common interest privilege
25. (7) The mutual interest that parties must have before common interest privilege will attach is not fully defined. Relationships to which common interest privilege have been applied include agent/principal, insurer/insured, insurer/reinsurer, companies in the same corporate group, and cases in which parties have retained the same solicitor or could have done so. **[7]**

26. (8) The requisite common interest must exist at the time the documents are shared/disclosed, rather than created. **[8]**

G. Use of common interest privilege as a shield
27. (9) Where a communication is produced by or at the instance of one party for the purposes of obtaining legal advice or to assist in the conduct of litigation, then a second party that has a common interest in the subject-matter of the communication or the litigation can assert a right of privilege over that communication against a third party. This type of situation, where a second party resists the application of a third party for production of communications, has been called 'using common interest privilege as a shield'. **[9]**

H. Use of common interest privilege as a sword
28. (10) Use of common interest privilege as a sword is long-established in the law of England and Wales. The principle is that if party B has a sufficiently common interest in communications that are held by party A, then party B can obtain disclosure of those communications from party A even though, as against third parties, the communications would be privileged from production by virtue of legal professional privilege. There seems no reason in logic why the same would not apply in Irish law. **[10]**

29. (11) In England and Wales common interest privilege as a sword can be asserted in relation to both 'litigation' privilege and also 'legal advice' privilege. **[11]**

(12) In England and Wales, at least in cases of 'common interest as a sword', once a communication is subject to common interest privilege, it will always remain so. **[12]**

I. Joint interest versus common interest
30. (13) Joint client privilege is where parties jointly retain the same lawyer. Joint interest privilege is where the privilege holders obtain legal advice in furtherance of a joint interest with the third party. **[13]**

31. (14) Examples of where a joint interest might arise are between: a trustee and a beneficiary; a parent company and its wholly-owned subsidiary; a company and its shareholders; a company and a director, and partners. **[14]**

32. (15) A common interest is one whereby two or more parties are interested in legal advice given in respect of identical or very similar issues but in circumstances where their respective interests are distinct, *e.g.*, identical tenancy rights in separate flats in the same property. **[15]**

33. (16) While the principles applicable to common interest also apply to a joint interest, it appears that in England and Wales parties who enjoy a joint interest will usually also enjoy a right of access as against each other in respect of a privileged communication that concerns their 'joint interest'. Whether this applies in Ireland remains to be elaborated upon. **[16]**

J. Conflicts of interest versus common interest
34. (17) Conflicts of interest might preclude a claim to common interest privilege but not automatically. **[17]**

35. (18) Even if parties are to some extent at odds with each other, this will not automatically preclude common interest privilege. **[18]**

36. (19) The relationship between parties with a common interest in proceedings is not always harmonious. The mere existence of such disagreements does not necessarily yield the conclusion that the parties no longer have a common interest in the proceedings. **[19]**

K. Common interest privilege between companies
37. (20) When it comes to common interest privilege, documents passing to other companies where those companies have an interest in the advice or litigation concerned are also covered, as would documents informing such connected entities of such advice or the progress of such litigation. **[20]**

L. Loss of privilege
38. (21) Privilege is not lost where there is limited disclosure for a particular purpose or to parties with a common interest. **[21]**

39. (22) Privilege should not be overborne lightly. If an implied waiver cannot be found, the court should not otherwise interfere. **[22]**

M. Joint retainers and joint privilege

40. (23) Parties who grant a joint retainer to solicitors retain no confidence as against one another: if they fall out and sue one another, they cannot claim privilege. Against the rest of the world, they can maintain a claim to privilege for documents otherwise within the ambit of legal professional privilege. Because the privilege is joint, it can only be waived jointly. **[23]**

41. (24) One must distinguish between advice given an individual as client from advice given to another, in which the first individual is interested. The former supports a claim for joint privilege, not the latter. **[24]**

42. (25) If joint privilege exists, it affects the rights of those who share the joint privilege and the professional obligations of the lawyers. Statements of subjective belief by an individual claiming joint privilege without more are likely to be of little value. **[25]**

43. (26) For joint privilege to arise it is necessary for the facts to demonstrate that those sharing the privilege and the lawyers concerned knew, or from the objective evidence ought to have known, that they enjoyed legal professional privilege with the others. **[26]**

44. (27) Evidence of an understanding by the lawyer of potential conflicts of interest may provide evidential support for joint privilege; it is not a necessary ingredient. **[27]**

45. (28) In England and Wales, it appears that an individual claiming joint privilege with others in a communication with a lawyer, when there is no joint retainer, will need to establish the following, *viz*. that (1) he communicated with the lawyer for the purpose of seeking advice as an individual; (2) he made clear that he was seeking legal advice as an individual, rather than as a representative of a corporate body; (3) those with whom the joint privilege was claimed knew or ought to have appreciated the legal position; (4) the lawyer knew or ought to have appreciated that he was communicating with the individual *qua* individual capacity; and (5) the communication with the lawyer was confidential. **[28]**

N. Successor in title

46. (29) Legal professional privilege of a predecessor in title inures for the benefit of his successor. **[29]**

47. (30) Where a document changes hand before the ultimate recipient acquires title, the privilege may on the particular facts be lost. **[30]**

48. (31) Where the privilege can be characterised as an incident of a property right, the privilege may be asserted by subsequent property owners. **[31]**

49. (32) When contractual rights can be assigned/transferred, the rights to claim privilege over material relating to those rights may be asserted by the assignee. **[32]**

50. (33) Privilege survives the death of an individual privilege-holder and may be asserted by his/her heirs. **[33]**

51. (34) Situations in which a client's privilege can be asserted by another include where that other claims under or in the same interest as the client, and also where he is a successor in title to the client. In the latter case, the death of a client, for example, does not destroy his privilege since this can be asserted by his heirs; similar principles apply in a corporate context. **[34]**

52. (35) Privilege of a predecessor in title can be asserted by his successor **[35]**

53. (36) Where more than one person claims under or in respect of the interests of the original beneficiary of the privilege, none can assert that privilege as against any other claimants. **[36]**

54. (37) In proceedings brought by the next of kin of the deceased against his executors, no privilege can be asserted as against any of them in respect of professional communications between the testator and his solicitor. However, where that same solicitor acts for the executors, then in relation to communications between them, the privilege can be asserted as against next-of-kin. **[37]**

55. (38) A personal representative or successor in title to the deceased's privilege enjoys all the rights relating to the privilege as were engaged by the deceased. The deceased's personal representatives are entitled to waive this privilege. **[38]**

56. (39)A liquidator can enjoy and assert the company's privilege in any qualifying communications made before the date upon which the liquidation occurred. Similarly, a trustee in bankruptcy inherits any privilege previously enjoyed by the bankrupt. **[39]**

57. (40) Successor-in-title privilege operates where the privilege is an incidence of a title to property. **[40]**

58. (41) It is settled that an obligation of confidence in respect of a particular confider can be imposed after the information is communicated, provided that the information has not in the meantime been published and provided also that the fact that the obligation of confidence is asserted is drawn to the attention of the person to whom the information is confided. **[41]**

O. Sifting and editing of documents by court

59. (42) The proposition that the court ought to direct the production of the documents in respect of which legal professional privilege is claimed and then edit them so as to make factual matter in them disclosable, would (a) dilute in very considerable measure the whole notion and effect of legal professional privilege, (b) represent an unwarranted and dangerous course to embark upon, and (c) amount to a serious interference with a fundamental condition on which the administration of justice as a whole rests. **[42]**

P. Waiver of privilege

60. (43) Privilege may be waived by disclosure. If the document comes into the public domain, privilege will be lost. It will not, however, be lost where there is limited disclosure for a particular purpose or to parties with a common interest. **[43]**

61. (44) There is no universal rule that the disclosure of documents produced for the sole purpose of seeking legal advice or litigation to a stranger to that litigation constitutes a waiver of the privilege in the documents. **[44]**

62. (45) If legal advice obtained by one person is passed on to another person for the sake of informing that other person in confidence of legal advice which that person needs to know by reason of a sufficient common interest between them, it would be

contrary to the principle upon which all legal professional privilege is granted to say that the legal advice which was privileged in the hands of the first party should be lost when passed over in confidence to the second party, merely because it was not done in the context of pending or contemplated litigation. **[45]**

Q. Legal advice versus legal assistance
63. (46) The Irish courts have drawn a distinction between legal advice, which is privileged, and legal assistance, which is not. This contrasts with the position in England and Wales. **[46]**

R. Further and better discovery
64. (47) An order for further and better discovery will not be made when the application is based solely on an affidavit alleging that the other party has documents in his possession relevant to the action which have not been further disclosed by the first affidavit. The court will, however, order a further affidavit of documents when it is satisfied (a) from the pleadings, (b) from the affidavit of discovery already filed, (c) from the documents referred to in the affidavit of discovery, or (d) from an admission by the party who has made the affidavit of discovery that the party against whom the order is ought has other documents in his possession relating to the issues in the action which have not been disclosed by the first affidavit. **[47]**

65. (48) The court will also order a further affidavit when there are grounds, derived from the documents discovered, for suspecting that there are other relevant documents in the possession of the party who has made the affidavit or where there are reasonable grounds for believing that the person making the affidavit of discovery has misunderstood the issues in the case and has, in consequence, omitted documents from it. **[48]**

66. (49) The court should not order a further affidavit of documents unless it has been shown that there are other relevant documents in the possession of the defendants or that the person making the affidavits has misunderstood the issues in the action, or that his view that the documents are not relevant is wrong. **[49]**

67. (50) Difficulties arise in directing the discovery of documents or a particular range or class of document which the deponent denies are in his possession. To order a defendant to swear a further affidavit of discovery could result in his repeating statements made and sworn by him on several occasions, namely that he has not and never had any documents in addition to those already discovered In those circumstances the court would have to be satisfied on the evidence before it that it was making a meaningful order. **[50]**

68. (51) The essential test as to whether to order further and better discovery is whether the evidence is insufficient to satisfy the court that relevant documents are or have been in the possession of the party against whom such order is sought which should have, but have not, been discovered in the original affidavit of discovery or its supplemental affidavit of discovery. **[51]**

69. **[1]** See further *Moorview Developments Ltd v. First Active plc* [2008] IEHC 274, *Hansfield Developments v. Irish Asphalt Limited* [2009] IEHC 420, *Svenska Handelsbanken v. Sun Alliance & London Insurance plc* [1995] 2 Lloyd's Rep. 84; see also Abrahamson, W., J.B. Dwyer and A. Fitzpatrick "*Discovery and Disclosure*"(2nd edition, Round Hall, 2013), para. 39-129; **[2]** see further *Hansfield; Dadourian Group International Inc. v. Simms* [2008] EWHC 1178; **[3]** see further *Hansfield;* see also Abrahamson, para.39–131ff; cf. *Formica Ltd. v. Export Credits Guarantee Department* [1995] 1 Lloyd's Rep.692; **[4**] see further *Ochre Ridge Ltd v. Cork Bonded Warehouses Ltd* [2004] IEHC 160, Moorview, Redfern Ltd v. O'Mahony [2009] IESC 18, *Hansfield*; see also Abrahamson, 39-134; **[5]** see further Abrahamson *et al*, para. 39–127; **[6]** see further Higgins, A., "*Legal Professional Privilege for Corporations*" (Oxford University Press, 2014), para.7.33; **[7]** see further Higgins, para.7.32; **[8]** see further Higgins, para.7.37; **[9]** see further *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 W.L.R. 1027, *Winterthur Swiss Insurance Company and Anor v. AG (Manchester) Limited (in liq.)* [2006] EWHC 839; see also *Phipson on Evidence* (16th ed., 2009), p.649; **[10]** *Cia Parca de Panama SA v. George Wimpey & Co Ltd* [1980] 1 Lloyd's Rep. 598, *Commercial Union Assurance Co plc v. Mander* [1996] 2 Lloyd's Rep. 640, *Winterthur*; **[11]** see further *Svenska; Winterthur*; **[12]** see further *Cia Parca; Mander; Winterthur*; **[13]** see further Higgins, para.7.32; Passmore, C., "*Privilege*" (3rd ed., Sweet & Maxwell, 2013), para. 6-005; Abrahamson, para. 39-135; **[14]** see further *The Sagheera* [1997] 1 Lloyd's Rep.160; *Love v Fawcett* [2011] EWHC 1686; see also Abrahamson *et al*, para. 39–139; **[15]** see further Passmore, para.6-005; **[16]** see further Passmore, para.6-002; see also Abrahamson et al,para. 39–137; **[17]** see further *Lee v. South West Thames Regional Health Authority* [1985] 1 W.L.R. 845 at 850, *Svenska; Ampolex Ltd v. Perpetual Trustee Co (Canberra) Ltd* (1995) 37 NSWLR 405; *Farrow Mortgage Services Pty Ltd v. Webb* (1996) 39 NSWLR 601 (NSWCA); see also Higgins, para.7.34; **[18]** see further *Hansfield; The World Era* [1993] 1 Lloyd's Rep.363; **[19]** see further *Hansfield; The World Era* [1993] 1 Lloyd's Rep.363; **[20]** see further *Moorview*; see also Abrahamson *et al*, para. 39-129; **[21]** see further *Redfern*; see also Abrahamson, para.39–130; **[22]** see further *Hansfield; Kershaw v. Whelan* [1996] 1 W.L.R.358; **[23]** see further *The Sagheera* [1997] 1 Lloyd's Rep.160; see also Abrahamson *et al,* 39–138; **[24]** see further *R. (Ford) v. Financial Services Authority* [2011] EWHC 2583; see also Abrahamson *et al*, para. 39–140; **[25]** see further *Ford*; see also Abrahamson *et al*, para. 39–140; **[26]** see further *Ford*; see also Abrahamson *et al*, para. 39–140; **[27]** see further *Ford*; see also Abrahamson *et al*, para.39–140; **[28]** see further *Ford*; see also Abrahamson *et al,* para. 39–140; **[29]** see further *Crescent Farm (Sidcup) Sports Ltd v. Sterling Offices Ltd* [1967] Ch. 553; **[30]** see further *Crescent Farm*; **[31]** see further Higgins, para. 6.23; **[32]** see further Higgins, para.6.23; **[33]** see further Higgins, para.6.23; **[34]** see further Passmore, para. 6–093; **[35]** see further *Minet v. Morgan* (1873) 8 Ch. App. 361, *Calcraft v. Guest* [1898] 1 Q.B.759; see also Passmore, para. 6–094; **[36]** see further *Re Pickering* (1883) 25 Ch.D. 247; see also Passmore, para. 6–097**; [37]** see further *Russell v. Jackson* (1851) 9 Hare 387; see also Passmore, para. 6–098; **[38]** see further *R. v Hickey and Others* [1997] EWCA Crim 743; see also Passmore, para. 6–099; **[39]** see further *Re Konigsberg* [1989] 3 All E.R. 289; see also Passmore, para. 6–100; **[40]** see further *Crescent Farm*; see also Passmore, para. 6–102; **[41]** see further *English and American Insurance Company Ltd. v. Herbert Smith* [1988] F.S.R. 232, *Surface Technology plc v. Young* [2002] F.S.R. 25; **[42]** see further *Duncan v. Governor of Portlaoise Prison* [1997] 1 I.R. 558; *The Irish Haemophilia Society Ltd v. Judge Lindsay and Anor* [2001] IEHC 240; *R. v. Derby Magistrates' Court, ex parte B* [1995] 3 W.L.R. 681; **[43]** see further *Redfern*; **[44]** see further *Fyffes plc v. D.C.C. plc* [2005] IESC 3; *Goldberg v. Ng* [1994] 33 N.S.W.L.R. 639; **[45]** see further *Svenska;* **[46]** see further Abrahamson *et al*, para.39–35; **[47]** see further *Sterling Winthrop Group Limited v. Farbenfabriken Bayer A.G.* [1967] I.R. 97; *O'Leary v. Volkswagen Group Ireland Ltd* [2015] IESC 420; **[48]** see further *Sterling Winthrop; O'Leary;* **[49]** see further *Sterling Winthrop Group; Phelan v. Goodman* [2000] 2 I.R. 577; *O'Leary;* **[50]** see further *Phelan; O'Leary*; **[51]** see further *Phelan; O'Leary*.

PART VI: APPLICATION OF SPORTS DIRECT FOR FURTHER AND BETTER DISCOVERY
70. Following the order of 5th February, 2015, an affidavit of discovery was sworn by Mr John O'Neill, the chairman and managing director of the fifth Defendant. A supplemental affidavit of discovery was sworn by Mr O'Neill on 20th May, 2015. Various documents were furnished with these affidavits. Sports Direct now comes to court seeking, *inter alia*, (a) an order directing that the Defendants make further and better discovery of the documentation required to be discovered by the court in the orders of 5th February and 27th April. No rule of court is invoked in this regard but the notice of motion is formulated in wording which echoes O.31, r.20(3) of the Rules of the Superior Courts (1986), as amended; the court proceeds on the assumption that it is pursuant to this Order that the relief is sought.

71. Further, or alternatively, Sports Direct, seeks an order pursuant to O.31, r.21 of the Rules seeking that the Defendants defence and counterclaim be struck out for failure to make proper discovery. This latter application is what Sir Humphrey Appleby might describe as 'courageous', and can be shortly dealt with: there is nothing in the evidence before the court to suggest that the actions of the Defendants come even remotely close to a failure to make proper discovery. Moreover, even if such a failure was considered by the court to arise (and it is not), it could only be in the most egregious of circumstances that, in a first application for further and better discovery, the court would accede to a strike-out application without affording the offending party some opportunity to cure any failure considered to present. For the reasons just stated, this relief is refused. The court returns therefore to the application for further and better discovery.

A. Alleged issues concerning discovery order of 5th February, 2015.

72. ***General allegation as to deficiencies in electronic documentation furnished***. The solicitors for Sports Direct contend that there are serious deficiencies in the Defendants' discovery, especially as regards electronic communications provided. There has been some 'to-ing' and 'fro-ing' between the parties in this regard. In essence, the solicitors for Sports Direct are not satisfied that they have been provided with all the electronic documentation that they ought to have received. They seem to place little premium on the fact that a reasonable, sworn explanation of matters has been provided to them in an affidavit of Mr O'Neill sworn on 6th July. The court places a premium on what parties swear in an affidavit, not least because of the serious consequences if a party were deliberately to swear an untruth. Having due regard to this affidavit, the court considers that it has no reason to suspect that any electronic records that exist and ought to have been provided have not been provided. To order Mr O'Neill to swear a fresh affidavit would essentially yield a re-statement of his existing averments.

73. ***Alleged deficiencies in Category 1 documentation***. The solicitors for Sports Direct have sought an indication as to whether there is a signed and dated copy of a certain document that has been discovered. The Defendants' solicitors have indicated in writing that the Defendants do not have same which seems an adequate answer in the context of discovery. The issue has also been addressed in similar terms by Mr O'Neill in his affidavit of 6th July. The court is not about to order further and better discovery by the Defendants of documents which it has been sworn they do not have.

74. ***Alleged deficiencies in Category 2 documentation.*** The solicitors for Sports Direct have sought an indication whether there is a signed and dated copy of a certain document that has been discovered. The Defendants' solicitors have indicated in writing that they do not have same which seems an adequate answer in the context of discovery. The issue has also been addressed in similar terms by Mr O'Neill in his affidavit of 6th July. The court is not about to order further and better discovery by the Defendants of documents which it has been sworn they do not have.

75. Further queries have been raised under the Category 2 heading regarding certain electronic correspondence. The court has nothing to add in this regard to what it stated above in the context of the general deficiencies in electronic evidence alleged by the solicitors for Sports Direct to present.

76. ***Alleged deficiencies in Category 3 documentation***. The solicitors for Sports Direct have sought confirmations regarding certain e-mail correspondence involving Mr O'Neill. In his affidavit of 6th July, Mr O'Neill deals comprehensively with this issue; he indicates that there are no e-mail archives dating back to the relevant time. The court is not about to order further and better discovery by the Defendants of documents which it has been sworn they do not have.

77. Further queries have been raised under the Category 3 heading regarding certain electronic correspondence. The court has nothing to add in this regard to what it stated above in the context of the general deficiencies in electronic evidence alleged by the solicitors for Sports Direct to present.

78. ***Alleged deficiencies in Category 4 documentation***. Further queries have been raised under the Category 4 heading regarding certain electronic correspondence. The court has nothing to add in this regard to what it stated above in the context of the general deficiencies in electronic evidence alleged by the solicitors for Sports Direct to present.

79. Sports Direct also seeks confirmations as to who received a draft deed of adherence. In his affidavit of 6th July, Mr O'Neill addresses this issue comprehensively. There is therefore no need for further and better discovery in this regard and the court declines to make the order sought.

80. ***Alleged deficiencies in Category 8 documentation***. Further queries have been raised under the Category 8 heading regarding certain electronic correspondence. The court has nothing to add in this regard to what it stated above in the context of the general deficiencies in electronic evidence alleged by the solicitors for Sports Direct to present.

81. As to the insistence by Sports Direct that there be discovery of a record of a conversation in circumstances where Sports Direct has been expressly advised in writing by the solicitors for the Defendants that no such record exists, the court declines to make further and better discovery of a record that Sports Direct has now repeatedly been advised does not exist and in circumstances where there appears to be no basis to believe the contrary.

82. ***Alleged deficiencies in Category 9 documentation***. Sports Direct had sought discovery of an option agreement which Mr O'Neill swears in his affidavit of 6th July that the Defendants do not possess. It appears from para.20 of a replying affidavit of 17th July sworn by a solicitor for Sports Direct that Sports Direct does not intend to pursue this matter further by way of discovery.

83. ***Alleged deficiencies in Category 12 and Category 13 documentation***. Further queries have been raised under these Categories heading regarding certain electronic correspondence. The court has nothing to add in this regard to what it stated above in the context of the general deficiencies in electronic evidence alleged by the solicitors for Sports Direct to present.

84. ***Alleged deficiencies in Category 15 documentation***. Sports Direct queried the absence of documentation concerning certain properties. There seems to have been a genuine misunderstanding between the parties in this regard and a supplemental affidavit of discovery has now been sworn by Mr O'Neill. The court therefore declines to order the further and better discovery sought under this category heading.

85. ***Alleged deficiencies in Category 16 documentation***. A single document that appears inadvertently to have been left out of the original bundle of documents discovered has now been furnished under cover of a supplemental affidavit of discovery. The court therefore declines to order the further and better discovery sought under this category heading.

86. ***Alleged deficiencies in Category 17 documentation***. As the court understands matters, the alleged deficiency arising concerns the absence of documentation concerning certain properties. There seems to have been a genuine misunderstanding between the

parties in this regard and a supplemental affidavit of discovery has now been sworn by Mr O'Neill in this respect. The court therefore declines to order the further and better discovery sought under this category heading.

87. ***Form of first affidavit of discovery***. The form of the first affidavit of discovery sworn by Mr O'Neill does not comply with the form contemplated by the Rules of the Superior Courts. The court will order that a supplemental affidavit of discovery be sworn in the form contemplated by the Rules of the Superior Courts, which supplemental affidavit of discovery, once sworn, shall operate in lieu of the first affidavit of discovery.

B. Issues concerning discovery order of 27th April, 2015.

88. ***Alleged deficiencies in Category 1 and Category 2 documentation***. Further queries have been raised under these Categories heading regarding certain electronic correspondence. The court has nothing to add in this regard to what it stated elsewhere above in the context of the general deficiencies in electronic evidence alleged by the solicitors for Sports Direct to present.

89. As to the difficulties raised by Sports Direct regarding the claim for privilege asserted by the Defendants, this has comprehensively been addressed in Mr O'Neill's affidavit of 6th July. The court declines to order that Sports Direct be furnished with documentation in respect of which an ostensibly valid claim of privilege has been made.

90. For the avoidance of doubt, the court notes in passing that in its considerations it has also had regard, *inter alia*, to the replying affidavit of 17th July sworn by a solicitor for Sports Direct.

PART VII: APPLICATION FOR DISCOVERY OF DOCUMENTS RE. MISSING DEED

91. Pursuant to a notice of motion of 15th July 2015, the Defendants have sought an order of discovery pursuant to O.31, r.20(3) of the Rules of the Superior Courts (1986), as amended, ordering *"that the Plaintiff make further and better discovery of all documents in its power possession or procurement in relation to the Plaintiff's contention that Mike Ashley signed the Deed of Adherence furnished to him by Gerry McErlean and the Plaintiff's contention that Mike Ashley returned the signed Deed of Adherence to Gerry McErlean at some unspecified date in November or December 2004 and, if necessary, an Order that the Plaintiff swear a supplemental affidavit of discovery explaining the basis upon which the Plaintiff continues to assert that such documents exist."*

92. The court notes in passing that an application under O.31, r.20(3) must *"be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the cause or matter, or to some of them."* Unstated in r.20(3), but intrinsic to a process which is designed to facilitate the efficient despatch of litigation, is the requirement that such belief must enjoy some support in the facts as established in evidence and/or as a matter of general logic. Otherwise what hope has a deponent of satisfying the court that, to echo the wording of Laffoy J. in *O'Leary* (considered later below), at para.56, *"relevant documents are or have been in the possession of the Defendant which should have, but have not, been discovered in its original affidavit of discovery or its supplemental affidavit of discovery"?*

93. Here, the documentation of which further and better discovery is sought clearly comes within Category 3 of the Schedule to the Order for Discovery made by Cregan J. on 5th February requiring that Sports Direct make discovery of, *inter alia, "All documents from the period 1 January 2004 to 31 December 2005 relating to the Deed of Adherence…to include, but not limited to all communications during that period as between Mike Ashley, Bob Mellors and any third party or advisor to the Plaintiff…with respect to the Deed of Adherence."* However, no proper basis is offered in the affidavit grounding the motion of 15th July as to the foundation for the Defendants' belief that Sports Direct has, or at some time had, in its possession or power the document or documents specified in the application. Moreover, the Defendants' application in this regard has been met with by an affidavit of 17th July, sworn by a solicitor for Sports Direct, in which she states that (a) she personally is of the view that there is no basis for the further and better discovery sought, and (b) as averred by her in an affidavit of 6th July, 2015, Sports Direct is satisfied that it has fully and properly complied with the order for discovery of 5th February. The court places a premium on what parties swear in an affidavit, not least because of the serious consequences if a party were deliberately to swear an untruth. Having regard to (a) the weakness in the application made by the Defendants (the evidence presented is simply insufficient to satisfy the court that relevant documents are or have been in the possession of Sports Direct which should have, but have not, been discovered in its original affidavit of discovery or its supplemental affidavit of discovery)and (b) the just-mentioned averments sworn by the solicitor for Sports Direct, the court declines to make the order sought.

94. As to the supplemental affidavit sought as to the basis of Sports Direct's continuing assertion, the basis for its assertion is apparent from the correspondence between the parties to this time and can be further teased out and explored, as appropriate, at trial. The court therefore declines to order that such a supplemental affidavit be sworn.

PART VIII: FURTHER APPLICATION OF DEFENDANTS FOR INSPECTION AND FURTHER AND BETTER DISCOVERY

95. **Overview**. Pursuant to a notice of motion of 24th June, 2015, the Defendants gave notice of their intention to seek inspection of certain documentation and further and better discovery of other documentation. The notice was overtaken by the progress of events and the court understands from counsel that all that is now being sought by way of principal reliefs are (a) the order for inspection and (b) further and better discovery of "[a]*ll documents in relation to the 'concerns' referred to in the e-mail exchange disclosed at document 38 in the…affidavit as to documents of Cameron John Olsen sworn on 30 April 2015."*

96. **Basis for orders sought**. The application for inspection is sought pursuant to O.31, rr.15 and 18 of the Rules of the Superior Courts. Any order to be made falls to be made under r.18, though for such order to be made notice must have been served under r.15. The application for discovery is made under O.31, r.20(3).

97. Application for inspection order. So far as the application for inspection of documents is concerned, subject to the proviso that follows, the court considers that Sports Direct is entitled to claim privilege in respect of such documents by virtue of its being successor in title (*i.e.* its now owning Sportsdirect.com). To the extent that there was disclosure of advices between Mr Mellors and/or Mr Ashley, both Sports Direct group company officers operating sometimes in various capacities, the court considers common interest privilege to arise. The information was privileged while in the possession of Mr Mellors. Moreover, the relationship between the two parties and the context of the disclosure was such that there can have been no intention to waive privilege, which waiver does not in any event fall lightly to be inferred and is found by the court not to present. The proviso to all of the foregoing is this: as mentioned by the court in its summary of applicable principles above and its more detailed consideration of the relevant law in Appendix A, the Irish courts have drawn a distinction between legal advice, which is privileged, and legal assistance, which is not. So to the extent that any of the documents of which inspection is sought comprise (a) information relevant to and/or collated for the purpose of providing legal advice whether (i) in the context of, or in respect of, the flotation of Sports Direct, or (ii) otherwise, as opposed to (b) the actual tendering of legal advice, the court does not consider that such documentation is privileged as a matter of Irish law. However, having regard to the provisions of O.31, r.18(2) of the Rules of the Superior Courts, the court is of the view, on

the basis of the argument and evidence before it, that discovery of the non-privileged documentation is not necessary (a) for disposing fairly of the dispute arising between the parties, or (b) for saving costs. The court therefore declines to order inspection of the non-privileged documentation.

98. **Application for further and better discovery**. The court notes that in an affidavit of 6th July, sworn by a solicitor for Sports Direct, it is indicated that even if the court were to grant an order for further and better discovery in this regard, *"any such order, if granted would not lead to any further documents being discovered".* As mentioned above, the court places a premium on what parties swear in an affidavit, not least because of the serious consequences if a party were deliberately to swear an untruth. Having due regard to the affidavit evidence before it, in particular the affidavit of the solicitor just referred to, the court declines to make the order for further and better discovery sought.

PART IX: CONCLUSION
99. The process of discovery is intended to facilitate the efficient despatch of litigation, not to frustrate it. The court would urge the parties to remember that coopetition, not confrontation will better serve them in securing a less costly, more timely, and still-thorough resolution of the issues now arising between them.

100. For the reasons stated above, the court will order that a supplemental affidavit of discovery be sworn for the Defendants in the form contemplated by the Rules of the Superior Courts, which supplemental affidavit of discovery shall, once sworn, operate in lieu of the first affidavit of discovery hitherto sworn for the Defendants. All other reliefs sought are refused.

APPENDIX A: SOURCES AND AUTHORITIES TO WHICH THE COURT WAS REFERRED

i. Learned commentary

(1) Higgins, A., Legal Professional Privilege for Corporations, (Oxford University Press, 2014)

a. Successors in title
101. When it comes to successors in title, Higgins makes the following observations at para.6.23:

> *"**6.23** The right to assert privilege extends to a privilege holder's successors in title including a trustee in bankruptcy, a liquidator, and administrators of a company in administration. Where the privilege can be characterised as an incident of a property right, the privilege may be asserted by subsequent property owners. Where contractual rights can be assigned or transferred the rights to claim privilege over material relating to those rights may also be asserted by the assignee. Privilege survives the death of an individual privilege holder and may be asserted by his or her heirs."*

b. Common interest privilege
102. As regards common interest privilege, this is a category of privilege that is still in a state of relative infancy, with courts defining the indicia of a common interest in different ways. Historically, a common solicitor was treated as a pre-cursor to common interest privilege; more recently, a less restrictive approach has tended to apply. Higgins considers the issues arising, *inter alia*, at paras.7.31-7.37 of the above-mentioned text, stating as follows:

> "7.31 *In* Formica Ltd. v. Export Credits Guarantee Department [[1995] 1 Lloyd's Rep.692 at p.699], *Colman J. formulated a test as follows*:
>
> > *Where in circumstances of a mutual interest in a particular transaction or transactions the recipient of legal advice relating to such transactions passes documents or information containing that advice to someone who shares that interest, the essential question in each case is whether the nature of their mutual interest in the context of their relationship is such that the party to whom the documents are passed receives them subject to a duty of confidence which the law will protect in the interests of justice.*
>
> *7.32 The difficulty with this formulation, as noted by several commentators, is its circularity and the fact that it fails to identify the nature of the mutual interest that the parties must have before common interest privilege will attach. The relationships to which common interest privilege have been applied include agent and principal, insurer and insured, insurer and reinsurer, companies in the same corporate group, and cases in which parties have retained the same solicitor or could have done so. As has been suggested, some of these cases are better classified as instances of joint client privilege (because the parties jointly retained the same lawyer) or joint interest privilege (where the privilege holders obtained legal advice in furtherance of a joint interest with the third party).*
>
> *7.33 If a common thread underlying the cases properly classified as a common interest privilege can be identified, it is that the subject matter of the privileged material concerns the legal interests of both parties, and that their legal interests were aligned, although not necessarily identical, at the time the information was shared between them.*
>
> 7.34 ***Conflicts of interest might preclude a claim to common interest privilege but not automatically*** *There is Court of Appeal authority* in Lee v. South West Thames Regional Health Authority [[1985] 1 W.L.R. 845 (CA) 850] *suggesting that common interest privilege cannot be claimed where there is a clear conflict of interest between the parties. In that case a claimant had suffered brain damage either as a result of treatment in Hillingdon Hospital or while being transferred by an ambulance provider, South West Thames. Hillingdon requested a memorandum from South West Thames about the incident in order to obtain advice about the claim. The claimant sought pre-action disclosure of the memorandum. South West Thames argued the memorandum was subject to common interest privilege. The Court of Appeal held that privilege in the memorandum belonged to the hospital, but that common interest privilege could not be claimed by South West Thames as they were alternative defendants to the claim. In any event the Court of Appeal refused disclosure on the grounds that this would render Hillingdon's claim to privilege worthless. Several Australian cases have also suggested in obiter remarks that common interest privilege will not apply where two persons' interest are 'selfish and potentially adverse to each other' [Farrow Mortgage Services Pty Ltd v. Webb* (1996) 39 NSWLR 601 (NSWCA) 609, citing *Ampolex Ltd v. Perpetual Trustee Co (Canberra) Ltd* (1995) 37 NSWLR 405, pp.409–410].
>
> *7.35 The proposition that common interest cannot be claimed where the parties have a conflict of interest, even of the cut-throat variety in Lee, is arguably too narrow. Unless the privilege holder and the third party have identical interests (which is rare) there is always a possibility that their interests may later come into conflict given the vicissitudes of litigation. Two potential defendants may have a common interest in defeating a claim against them, even if they are*

alternative defendants, or there is an obvious conflict regarding the share of liability between them, or if only one of them is liable for the damage suffered by a claimant.

7.36 *More recent authorities stress that potential conflict of interest is no bar to a claim of common interest privilege. In* Svenska, *Rix J stated:*

> *…it is clear that the fact that differences may arise between parties of whatever closeness of interest, such as prevent them from at all times using the same lawyers, or such as may indeed even cause them to find themselves ultimately on opposite sides of litigation, does not necessarily mean that they cannot be parties with a common interest for the purpose of this concept…*

7.37 ***The common interest must exist at the time the documents are shared/disclosed rather than created*** *There is some uncertainty around this issue partly because some of the cases are really instances of joint interest privilege where privilege only applies to communications and documents prepared in furtherance of the joint interest. In common interest privilege cases (properly classified) the common interest must subsist at the time the document was shared, which means that a document disclosed prior to the time a common interest arose, or after it ended, cannot qualify for common interest privilege."* [Emphasis in original].

(2)Abrahamson, W., J.B. Dwyer and A. Fitzpatrick, Discovery and Disclosure, (2nd edition, Round Hall, 2013)

a. Applicability of legal professional privilege
103. Closer to home, Abrahamson *et al*, in their account of Irish law on discovery and disclosure, make the following observation, at para 39–35 about legal professional privilege generally:

> *"Having established the existence of a confidential communication between lawyer and client arising out of their professional relationship, the final limb of the test to establish the applicability of privilege is to identify whether the communication was for the purpose of giving or receiving legal advice. In this regard, the Irish courts have drawn a distinction between legal advice, which is privileged, and legal assistance, which is not."*

104. They contrast this with the position in England and Wales, where legal advice privilege is available in respect of both legal advice and legal assistance.

b. Common interest privilege
105. The court has also been furnished with an extract from *Discovery and Disclosure*, in which Abrahamson *et al* consider the law in Ireland pertaining to common interest privilege. It is worth quoting this text (paras.39–126 to 39–135) in some detail:

> "***39–126*** *Within the sphere of legal professional privilege, there exist principles governing the exchange of privileged documents between parties with a common interest. Although generally known as 'common interest privilege', it is incorrect to categorise these principles as a separate form of privilege because they apply only to documents to which legal professional privilege already applies. In* Hansfield Developments v. Irish Asphalt Limited [[2009] IEHC 420], *McKechnie J. stated as follows:*
>
> > '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.'
>
> ***39–127*** *In essence, the principles are as follows.*
>
> > *(a) The disclosure to a third party of a document covered by legal professional privilege does not constitute waiver of the privilege where the recipient shares a common interest in the receipt of the document.*
> >
> > *(b) A third party, having received a privileged document on foot of such a common interest, is thereby himself entitled to assert privilege over the document against the rest of the world, despite not having been a party to the original privileged communication.*
> >
> > *(c) A person cannot withhold from another having a joint interest documents that are otherwise privileged as against the rest of the world. This principle does not yet appear to have been considered in Ireland. It has been suggested that it applies to parties sharing a 'joint interest' only, and not to mere common interest.*
>
> ***39–128*** *There is limited authority in this jurisdiction concerning the existence and application of common interest privilege. Although the principles are still evolving in England and Wales also, the law on this issue is more advanced there, and a more complex and nuanced series of rules are emerging. In particular, the courts in England and Wales have placed some emphasis on the distinction between joint and common interests, to which different, albeit related, principles apply. As set out below, the Irish courts have referred to both but have not to date been called on to analyse the distinction in any detail.*
>
> ***39–129*** *The first explicit reference to common interest privilege in this jurisdiction appears in the judgment of Clarke J. in Moorview Developments Ltd v. First Active plc[[2008] IEHC 274; [2009] 2 I.R. 788]. He characterised common interest privilege in the following terms:*
>
> > 'It is clear to me that common interest privilege arises in relation to documentation or materials which would be the subject of either legal professional privilege or litigation privilege in the hands of one person or body but where the relevant materials are given to a third party who may be said to have a common interest in either the legal advice or the litigation concerned: see for example *Svenska Handelsbanken v. Sun Alliance & London Insurance plc* [[1995]

2 Lloyd's Rep. 84]. Two questions therefore arise. The first is as to whether the documents would, in the hands of a single party, have the benefit of privilege in the first place. If not, then no question of common interest privilege could arise. If, however the materials pass that first test but have been released by one party to a second party then it follows that it is also necessary to ask whether the release was on foot of a common interest in either the relevant litigation or advice. If so then the documents will remain privileged, notwithstanding their release, by virtue of the document of common interest. If not, then the release may be taken to be a waiver of any privilege which would otherwise have attached to the documents concerned. I should note that documents passing to other companies where those companies have an interest in the advice or litigation concerned are also covered, as would documents informing such connected entities of such advice or the progress of such litigation.

39–130 *The relevance of common interest to waiver of privilege arose for consideration by the Supreme Court* in Redfern Ltd v. O'Mahony [[2009] IESC 18; [2009] 3 I.R.583]. *Finnegan J. recognised that the privilege is not lost* "…where there is limited disclosure for a particular purpose or to parties with a common interest". *On the facts of the case, he held that privilege had not been waived, because the documents in question had been disclosed only to parties connected to a joint venture agreement with the plaintiff, who accordingly shared a common interest.*

39–131 *The application of common interest privilege also arose in* Hansfield Developments*…which concerned damage to houses built by the plaintiffs, allegedly caused by defective materials supplied by the defendants. The defendants sought to inspect certain communications between the plaintiffs and Homebond, an insurance scheme for structural defects of which the plaintiffs were members. McGovern J. rejected the plaintiffs' claim to share a common interest with HomeBond. In reaching that conclusion, he referred briefly to some English authorities on the subject.*

39–132 *The matter arose again in a later judgment in the same proceedings. McKechnie J. described common interest privilege in similar terms to those used by Clarke J. in* Moorview Developments…

> *'Before it is possible to claim this type of privilege, it must first be established that the documents in question would attract in the hands of the issuer either legal advice or litigation privilege. If this is established, then it must be shown that the receiver of the document has a sufficiently close interest in the subject matter of the primary privilege (i.e. in the proceedings, if litigation privilege applies, or in the advice if legal advice applies), before the common interest privilege can be said to attach to the documents. Indeed, it has been suggested that such an interest should be more particularly of a legal rather than of an economic nature…If the documents pass the first part of the test but fail the second, by there being insufficient common interest between the parties, then the disclosure of the documents will amount to a waiver of any claim of privilege which otherwise would have attached to them."*

39–133 *McKechnie J. analysed the English authorities, together with* Moorview *and* Redfern, *in some detail. He concluded as follows:*

> 'Having considered the above authorities, I feel that the correct test where common interest privilege is claimed is thus: the Court must first determine by normal standards whether the documents would be privileged in the hands of the party transmitting the information, assuming that no disclosure had in fact been made. If it is found that the documents would be so privileged, then the court must ask whether the relationship between the parties was sufficiently close that the transmission of documents should not be held to amount to an implied waiver of the privilege. In considering this the Court should take into account the relationship between the parties, as well as the nature and purpose of the disclosure and whether there could be held to be an objective intention to waive privilege on the part of the holder. Privilege should not be overborne lightly, and therefore the ultimate question must be whether it is reasonable in the circumstances to conclude that there was an implied waiver of the privilege. If such an implied waiver cannot be found, the Court should not otherwise interfere. As Ebsworth L.J., in *Kershaw v. Whelan* [[1996] 1 W.L.R.358 at p.370], said:
>
> > *'Waiver is not lightly to be inferred; although privilege is an aspect of the law of evidence and not of constitutional rights it is firmly established in our law for sound reasons of public policy.'*

39–134 *McKechnie J. referred to a series of English decisions in which the existence of a so-called putative solicitor test was mooted. It had at one time been suggested that common interest privilege might apply only to parties represented by the same solicitors. Later, it was suggested that this was not required, but that the parties' interests must be sufficiently close to enable them to share legal representation. This became known as the putative solicitor test. Its appropriateness has been a matter of some controversy in the English decisions. McKechnie J. held that the test does not apply in this jurisdiction:*

> "…I would note that the controversy surrounding the putative common solicitor test might be seen as a conflict between the law in this area being in a state of expansion or contraction: if such a requirement exists, there would be little difference in practice between joint privilege and common interest privilege; where the former is available there should be no need to rely on the latter. It does not in my view serve the interests of justice by further assimilating both. There is a call for each to play its part. The greater interest is served by rejecting the restrictive approach. This in my view is what the High Court did in *Moorview* and the Supreme Court did in *Redfern*. Moreover Lavan J. in *Ochre [Ochre Ridge Ltd v. Cork Bonded Warehouses Ltd* [2004] IEHC 160], when referring to 'the Common Interest' test said that *'A broad construction of this principle appears possible'.* I would therefore hold that the common putative solicitor test does not have to be satisfied before common interest privilege can arise. That is not to say that whether the parties could be represented by the same solicitor is not a relevant consideration, but it will in no way be determinative. It is merely a factor to be taken into account in deciding whether the parties were sufficiently closely related that the disclosure should not amount to an implied waiver."

39–135 *Thus, it appears that common interest privilege, as a set of principles within the sphere of legal professional privilege, is now established in this jurisdiction. It has also been recognised in* Hansfield Developments*…that there is a distinction between the rules applicable to privilege held by parties sharing a joint interest and those sharing a common interest. The precise nature and effect of that distinction – and, in particular, the entitlement of a person to demand inspection of a privileged document held by another with a joint or common interest – remain to be considered here."*

106. Abrahamson *et al* then move on to consider the position in England and Wales as regards joint interest and common privilege. Their observations at paras.39–136 to 39–141 have been furnished to the court. They, to some extent overlap with the observations

of Higgins, as quoted and considered above, but are nonetheless worthy of quotation and consideration:

*"**39–136** The courts in England and Wales have given greater consideration to joint interest and common interest privilege. The following have been suggested as appropriate definitions of joint and common interests for this purpose:*

> '…a joint interest is usually one in which two or more parties either share in or require advice on the exact same right or interest – for example a joint or shared interest in the same property rights, such as a trust, a joint tenancy or a tenancy in common; a common interest is one whereby two or more parties are interested in legal advice given in respect of identical or at least very similar issues but in circumstances where their respective interests are distinct – for example, identical tenancy rights in separate flats in the same property.'[Passmore, "*Privilege*" (2013), para.6-005].

***39–137** While the principles applicable to common interest also apply in the case of a joint interest, an additional right arises in the latter case, namely that 'parties who enjoy a joint interest will usually also enjoy a right of access as against each other in respect of a privileged communication that concerns their 'joint interest'.* [Passmore, *"Privilege"* (2013), para.6-002]. *It appears that, in England and Wales, this does not apply in cases of common interest.*

***39–138** Broadly speaking, there are two categories of joint interest to which the principles under consideration have been held to apply. The first of these arises where two or more clients retain the same lawyer to advise them in relation to such issue. In* The Sagheera [[1997] 1 Lloyd's Rep. 160], *Rix J. identified the effect of such a relationship for the purposes of privilege:*

> 'Parties who grant a joint retainer to solicitors of course retain no confidence as against one another: if they subsequently fall out and sue one another, they cannot claim privilege. But against all the rest of the world, they can maintain a claim to privilege for documents otherwise within the ambit of legal professional privilege; and because their privilege is a joint one, it can only be waived jointly, and not by one party alone.'

***39–139** The second category of joint interest arises where the parties share a joint interest in a privileged communication in respect of which just one of them has sought legal advice. The existence of such a joint interest depends on the facts of each case. In* Love v Fawcett [[2011] EWHC 1686 (Ch.)], *Morgan J. cited the following non-exhaustive list of examples of joint interests* [extracted from Bankim T. (ed.) *"The Law of Privilege"*, (2nd ed., Oxford University Press, para.6.09)]:

'Whilst not a rigidly defined concept, common examples of where such a joint interest might arise are between:

a trustee and a beneficiary;

a parent company and its wholly-owned subsidiary;

a company and its shareholders;

a company and its director, and

partners.'

***39–140** Burnett J. in* R. (Ford) v Financial Services Authority [[2011] EWHC 2583 (Admin)], *stated that the existence of a joint interest will be a question of fact in each case:*

> 'In searching for the true factual position at the time that the contentious communication was made it is necessary to distinguish between advice being given to an individual as client from advice which is being given to another, but in which the first individual is interested because it impacts upon his personal position. It is the former that supports a claim for joint privilege, not the latter. It is also necessary to recognise that if joint privilege exists it affects the rights of all those who share that joint privilege and also the professional obligations of the lawyers. For this reason statements of subjective belief by an individual claiming joint privilege without more are likely to be of little value. Joint privilege should not arise casually or accidentally. For joint privilege to arise it is necessary for the facts to demonstrate that all those sharing the privilege and the lawyers concerned knew, or from the objective evidence ought to have known, that they enjoyed legal professional privilege with the others. Evidence of an understanding by the lawyer of potential conflicts of interest may provide some evidential support for joint privilege, but it is not a necessary ingredient. It is not unknown for conflicts of interest to arise but those advising to be slow to appreciate their significance. In my judgment, apart from those cases in which there is no legal distinction between those claiming joint privilege…and individual claiming joint privilege with others in a communication with a lawyer, when there is no joint retainer, will need to establish the following facts by evidence:
>
> (i) That he communicated with the lawyer for the purpose of seeking advice in an individual capacity;
>
> (ii) That he made clear to the lawyer that he was seeking legal advice in an individual capacity, rather than only as a representative of a corporate body;
>
> (iii) That those with whom the joint privilege was claimed knew or ought to have appreciated the legal position;
>
> (iv) That the lawyer knew or ought to have appreciated that he was communicating with the individual in that individual capacity.
>
> (v) That the communication with the lawyer was confidential.'

***39–141** As indicated above, the Irish courts have adverted to the existence of a distinction between joint interest and common interest in this context but, to date, appear to have dealt with the application of the latter only. It may be*

assumed that the English jurisprudence in this area will be of assistance in determining the application of joint interest privilege when the opportunity presents itself."

(3) Passmore, C., Privilege, (3rd ed., Sweet & Maxwell, 2013)

107. The third learned text to which the court has been referred, and an extract of which has been furnished to it, is Mr Passmore's text, *Privilege*, which contains, *inter alia*, the following helpful observations as to the law of England and Wales insofar as it pertains to privilege attaching to successors in title:

> ***"6–093*** *Two other situations in which a client's privilege can be asserted by another are where that other claims under or in the same interest as the client, and also where he is a successor in title to the client. In the latter case, the death of a client, for example, does not destroy his privilege since this can be asserted by his heirs; and, as will be seen, similar principles apply in a corporate text.*
>
> ***6–094*** *The first decision to establish clearly that the privilege of a predecessor in title can be asserted by his successor was* Minet v Morgan[(1873) 8 Ch. App. 361], *where the defendants sought orders for production of documents in the possession of the plaintiff. The plaintiff claimed privilege for some of them, which included 'correspondence between himself and his family solicitors and his present solicitors', and 'letters between his mother and her solicitors with reference to questions connected with the matters in dispute in this cause'.*
>
> ***6–095*** *These claims to privilege were upheld, the Lord Chancellor, Lord Selborne, making it clear 'that the only issue was whether the plaintiff had sufficiently claimed protection for these confidential letters.'*
>
> ***6–096*** *The issue arose again in the Court of Appeal's decision in* Calcraft v Guest [[1898] 1 Q.B.759]. *One of the questions dealt with here concerned the privileged status of certain relevant documents which had come into existence in relation to Mr Calcraft's forebear in an action which had taken place over 110 years previously. Once again, there appears to have been no challenge to the principle that a successor in title can assert and maintain his predecessor's privilege.*
>
> ***6–097*** *Consistent with the principles that have been discussed in this Chapter, where more than one person claims under or in respect of the interests of the original beneficiary of the privilege, none can assert that privilege as against any other claimants. Thus in* Re Pickering [(1883) 25 Ch.D. 247] *a partner in a two-man partnership died and his surviving partner and the testator's estate. The Court of Appeal refused to allow the surviving partner the usual liberty to seal up entries in the partnership documents which did not relate to matters in dispute. The child, in effect as beneficiary under the estate, was entitled to access to the partnership books. Though a decision primarily concerned with irrelevant entries, it is clear from the court's judgment that any privileged communications between one of the partners (before his death) and his lawyer relating to partnership matters could not have been withheld in litigation against a legatee.*
>
> ***6–098*** *Similarly, in* Russell v Jackson [(1851) 9 Hare 387], *it was held that in proceedings brought by the next of kin of the deceased against his executors, no privilege could be asserted as against any of them in respect of professional communications between the testator and his solicitor. However, where that same solicitor acted for the executors, then in relation to communications between them, the privilege could be asserted as against the next of kin.*
>
> ***6–099*** *A personal representative or successor in title to the deceased's privilege enjoys, not surprisingly, all the rights relating to the privilege as were engaged by the deceased. So in* R v Hickey and Others [[1997] EWCA Crim 743], *the Court of Appeal held that the deceased's personal representatives were entitled to waive this privilege.*
>
> ***6–100*** *But it is not only upon the death of an individual that these issues arise. A liquidator can enjoy and assert the company's privilege in any qualifying communications made before the date upon which the liquidation occurred. Similarly, a trustee in bankruptcy inherits any privilege previously enjoyed by the bankrupt. This is illustrated by the decision in* Re Konigsberg [[1989] 3 All E.R. 289], *in which a husband and wife jointly instructed a solicitor in relation to a property transaction. The husband subsequently became bankrupt, whereupon his trustee in bankruptcy sought to set the transaction aside. The wife swore an affidavit asserting that the transaction had been for valuable consideration. The solicitor who had acted for them both swore an affidavit which contradicted that assertion. The wife applied to exclude the solicitor's affidavit from use at the hearing of the trustee's motion in so far as it trespassed, inter alia, on communications between the solicitor and both the husband and wife.*
>
> ***6–101*** *Peter Gibson J. rejected the submission that the trustee was a third party against whom Mrs Koningsberg, one of two joint clients, could insist on the maintenance of her privilege (even if the solicitor's other joint client was prepared to waive it). As to this, the judge ruled:*
>
> > 'Important and desirable though I recognise it is to maintain the principle of legal professional privilege I can see no sufficient reason to treat the trustee as a third party for that purpose. The rule recognises that joint clients cannot maintain privilege against each other and as the privilege of the bankrupt has devolved onto the trustee who is entitled to obtain the privileged information from the bankrupt, in my judgment it is appropriate to treat the trustee as being in the shoes of the bankrupt for the purpose of privilege in proceedings against the joint client.'
>
> ***6–102*** *This 'successor in title' principle operates also where the privilege is an incidence of a title to property. This aspect featured in the decision in* Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd [[1972 Ch. 553]. *The plaintiff and first defendant were purchasers and sub-purchasers of land under a 1959 conveyance which granted the plaintiffs a first option over any of that land which the first defendant wished to sell. The first defendant agreed to sell the land to the second defendant, subject to obtaining a release of the plaintiff's pre-emptive rights under the 1959 conveyance. In the event, the plaintiff decided to exercise its right to purchase but there was a difficulty in working out the arrangements by which the sale price should be agreed. The first defendant then sold the land to the second defendant whereupon the plaintiff sued for breach of contract and conspiracy. A preliminary issue arose as to the plaintiff's entitlement to production of counsel's opinion obtained by the first defendant, which it sent to the second defendant prior to the conveyance of the land to the second defendant.*
>
> ***6–103*** *It was accepted that the opinion was privileged in the hands of the first defendant, but it was argued that since*

it had been sent to the second defendant in circumstances where there was no litigation contemplated or pending, then that could not be a privileged communication. The defendants met this argument by asserting that the opinion was a document which was a matter of title: since the second defendant was the successor in title to the first defendant, then it was entitled to the first defendant's privileges, even though the second defendant received the opinion before completion, that is, before they succeeded to the first defendant's title. Goff J. held that it was impossible to say:

> '…that the second defendants did not receive the documents as successors in title, and whether or not they could have called for them at any stage is in my judgment irrelevant. They were prospective purchasers. They had actually entered into a conditional contract and the documents were sent to them with a view to persuading them to complete.'"

ii. Some leading cases

108. The court turns now to consider various of the Irish and foreign cases to which it has been referred on the issue of common interest privilege and successor in title privilege.

(1) Irish authorities

a. Duncan v. Governor of Portlaoise Prison [1997] 1 I.R. 558

109. This application concerned the production and further and better discovery of, and certain claims of privilege made in connection with, documentation that it had been ordered be discovered in the context of an inquiry into the lawfulness of Mr Duncan's ongoing detention following his release from imprisonment and subsequent immediate arrest and detention. Per Kelly J., at pp.575–576:

"Mr. McEntee does not contest the existence of legal professional privilege or the form in which it is claimed in respect of these documents. However, he says that the documents, in addition to containing legal advice, may also contain factual matter and that legal professional privilege would not extend to such matter. He invites me…

> *(b) to direct the production of these documents with a view to the court reading them and extracting from them the factual content in respect of which he says a claim to legal professional privilege would not apply….*

If the contention made by Mr. McEntee for a severance to be made of documents in respect of which legal professional privilege is claimed is a good one, then of course such documents must be examined by the court with a view to carrying out the exercise sought.

It is not without significance that Mr. McEntee was unable to cite any authority from any country in the world supporting his argument that the court could or should embark upon the exercise which he suggests. It is unprecedented and, in my view, such is the case for very sound reasons.

In R. v. Derby Magistrates' Court, ex parte B *[1995] 3 W.L.R. 681, Taylor of Gosforth L.C.J., in delivering the leading speech in the House of Lords set forth in a succinct form the history of legal professional privilege. He concluded (at p.695) as follows:*

> 'The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests'.

It appears to me that the proposition advanced by Mr. McEntee to the effect that the court ought in this case to direct the production of the documents in respect of which legal professional privilege is claimed and then, in effect, edit them so as to make factual matter in them disclosable to him, would be to dilute in very considerable measure the whole notion and effect of legal professional privilege. It would, in my view, be an unwarranted and dangerous course to embark upon and would amount to a serious interference with what the then Lord Chief Justice of England described as 'a fundamental condition on which the administration of justice as a whole rests'.

Quite apart from the objection in principle, Mr. McEntee's formulation has many practical difficulties attendant upon it. If he is correct in his submission, any case in which legal professional privilege is claimed may, on the simple request of the opponent, result in the court being called upon to go through the entire of the documents with a view to ascertaining, not the validity of the claim to legal professional privilege, but rather to engage in the work of editing the documents with a view to extracting from them factual material to be disclosed to the other side. This exercise would have to be conducted at a time in advance of the trial when no judge can be fully apprised of the entire factual matrix against which the action is brought. The conduct of such an exercise would, in my view, be much more likely to work against the administration of justice than in its favour…..

There may well be a case (although I hope a rare one) where cogent evidence might be adduced to suggest that a claim to legal professional privilege is being wrongfully asserted. In such a case I do not exclude an ability on the part of the court to direct production of the documents in question. Such an exercise would be with a view to ascertaining whether or not the documents were truly privileged."

b. The Irish Haemophilia Society Ltd v. Judge Lindsay and Anor [2001] IEHC 240

110. This was an application for leave to seek judicial review of a decision by Judge Lindsay, in her capacity as sole member of the Lindsay Tribunal, that a claim of legal professional privilege over various documents had been properly made. In the course of his judgment, Kelly J. considered, *inter alia*, the nature of legal professional privilege and the same issue that had arisen in Duncan*, viz.* the inspection by the court of documents to determine whether or not they were truly privileged. As to this latter issue, Kelly J. indicated, at p.15 of his judgment, that the rare circumstances which he had referred to in the ultimate paragraph of the extract quoted above did not present in the case before him. As to the more general issue of a claim of legal privilege in the context of discovery, Kelly J. observed as follows, at pp.11–12 of his judgment:

"Legal professional privilege is a fundamental condition on which the administration of justice as a whole rests. The issue was considered in some depth in my judgment in Miley v. Flood *[2001] 1 I.L.R.M. 489. The existence of legal professional privilege is not in dispute here. Care must be taken to ensure that the privilege is not abused on the one hand and on the other that the requirements for its assertion are not such as to in effect dilute or destroy it….*

I cannot see that the applicant has demonstrated an arguable case to the effect that the respondent was wrong…There is in my view no necessity to describe the documents in greater detail than has been done here. To do so would run the risk of diluting or perhaps even destroying the privilege which is being asserted."

c. Redfern Ltd v. O'Mahony [2009] 3 I.R.583

111. The decision of the Supreme Court in *Redfern* has already been touched upon in the learned commentary referred to above. So far as relevant to the within proceedings, the facts of that case were that the third and fourth defendants sought inspection of an opinion of a senior counsel, in respect of which a claim of privilege had been made, on the basis that privilege had been waived by the plaintiff through the furnishing of a copy of the opinion to third parties. The High Court refused the inspection. Upon unsuccessful appeal being made by the third and fourth defendants, Finnegan J. (with whom Denham and Geoghegan JJ. concurred) made, *inter alia*, the following comments as to waiver of professional privilege, at pp.589–590 of his judgment:

***"[13]** It is well established that the legal professional privilege may be waived expressly or by implication. In* Kershaw v. Whelan *[1996] 1 W.L.R. 358 at p.370, Ebsworth J. said:-*

> 'Waiver is not lightly to be inferred; although privilege is an aspect of the law of evidence and not of constitutional rights it is firmly established in our law for sound reasons of public policy.'

***[14]** In* Paragon Finance v. Freshfields *[1999] 1 W.L.R. 1183 Bingham C.J. dealt with the nature and basis of legal professional privilege at p.1188:-*

> 'At its root lies the obligation of confidence which a legal adviser owes to his client in relation to any confidential professional communication passing between them. For readily intelligible reasons of public policy, the law has, however, accorded to such communications a degree of protection denied to communications, however confidential, between clients and other professional advisers. Save where client and legal advisor have abused their confidential relationship to facilitate crime or fraud, the protection is absolute unless the client (whose privilege it is) waives it either expressly or impliedly.'

[15] Fyffes plc v. D.C.C. plc *[2005] IESC 3…dealt with implied waiver of privilege. At p.68 Fennelly J. said:-*

> "[26] The plaintiff, nonetheless, argues for the broad proposition that any disclosure to a third party leads to loss of privilege. No authority has been cited in support of such a far-reaching principle….Apart from the more specific cases of waiver, most of which have been discussed in these proceedings, the authors pose the question whether relevant information was supplied 'with the intention of abandoning'; the privilege. They footnote instances of communication to the public generally or to the media. Indeed, these references are the only support for the general proposition that disclosure defeats the privilege.'

***[16]** Fennelly J. accepted as a correct statement of the law dicta of Clarke J.A. in* Goldberg v. Ng *[1994] 33 N.S.W.L.R. 639 that there is no universal rule that the disclosure of documents produced for the sole purpose of seeking legal advice or litigation to a stranger to that litigation constitutes a waiver of the privilege in the documents.*

***[17]** It is accordingly clear that privilege may be waived by disclosure. If the document comes into the public domain privilege will be lost. It will not, however, be lost where there is limited disclosure for a particular purpose or to parties with a common interest. The disclosure relied upon by the third and fourth defendants here is limited and was to parties having a common interest with the plaintiff in the proposed development of the car park. Such disclosure does not evince an intention to waive privilege. I am satisfied there has been no waiver of privilege in respect of the opinion sought to be inspected."*

d. Moorview Developments Ltd v. First Active plc [2009] 2 I.R.788

112. The decision of the High Court in *Moorview* has already been touched upon in the learned commentary referred to above. This was a case in which, *inter alia*, the issue of common interest privilege arose. The relevant text, for the purposes of the within judgment, appears at p.821 judgment and is quoted in the extract from Abrahamson *et al* considered above.

e. Hansfield Developments v. Irish Asphalt Ltd [2009] IEHC 420

113. The decision in *Hansfield* arose out of a dispute regarding in-fill provided by the defendants in the construction of hundreds of houses in the Drynam, Beaupark and Myrtle estates in North Dublin. The application before the court sought a review of privilege claimed by the plaintiffs in certain affidavits. In the course of his judgment, McKechnie J. undertook a comprehensive and instructive analysis of common interest privilege. This judgment has already been touched upon elsewhere above but is considered more extensively hereafter. McKechnie J. began his consideration of common interest privilege, at p.19, stating as follows:

*"**35**. 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. I would agree with the comments of Patten J. in Dadourian Group International Inc. v. Simms [2008] EWHC 1178 (Ch.) at para.88 where he stated:*

> 'This is not a separate type or category of legal professional privilege. It is simply a convenient way of describing the principle under which communications between parties with a common interest may be entitled to protection from disclosure.'

36. *Common Interest Privilege, used as described above, arises where a document has been passed between two legal entities who are sufficiently connected that what would otherwise amount to a waiver of privilege does not, as the persons or organisations could be seen to be effectively one. As put by an Australian commentator (Desiatnik, 'Legal Professional Privilege in Australia (2nd Ed.)' (2005)), common interest privilege is:*

> '…the common law equivalent of one person passing a document from one hand to another as it were, the right hand does known what the left hand knows, but no-on else does – or, more importantly, should be allowed to.'

37. *Before it is possible to claim this type of privilege, it must first be established that the documents in question would attract in the hands of the issuer either legal advice or litigation privilege. If this is established, then it must be shown that the receiver of the document has a sufficiently close interest in the subject matter of the primary privilege (i.e. in the proceedings, if litigation privilege applies, or in the advice if legal advice applies), before the common interest privilege can be said to attach to the documents. Indeed, it has been suggested that such an interest should be more particularly of a legal rather than of an economic nature….If the documents pass the first part of the test but fail the second, by there being insufficient common interest between the parties, then the disclosure of the documents will amount to a waiver of any claim of privilege which otherwise would have attached to them."*

114. McKechnie J. then proceeds to consider the decisions in *Redfern, Fyffes* and *Moorview*, and *Colman*, all referenced above, before continuing, at p.25 of his judgment:

> "***45***. *What constitutes a 'sufficient common' interest has been considered in a number of cases, although there is some disagreement as to how broad the test is. For example,* in Buttes Gas and Oil Co. v. Hammer (No. 3) *[1981] WB 233, Brightman L.J. spoke of parties with 'a common interest and a common solicitor', whereas in the same case Lord Denning M.R. made no mention of the solicitor requirement, and Donaldson L.J., the third member of the court, saw difficulties with such a condition."*

115. In this way, McKechnie J. introduces a consideration of the 'putative common solicitor' test which, as mentioned later above, he later concludes, at p.31, as a matter of Irish law *"does not have to be satisfied before common interest privilege can arise."*

116. Continuing more generally with his consideration of common interest privilege, McKechnie J. states as follows, commencing at p.28 of his judgment:

> "***49****…[I]t is clear that even if the parties are to some extent at odds with each other, this will not automatically preclude common interest privilege. In* The World Era *[1993] 1 Lloyd's Rep.363, at p.366, Phillips J. stated:*
>
> > 'The relationship between parties with a common interest in proceedings is not always harmonious: they may quite legitimately hold different views about who is to conduct the litigation and how. Such views may be strongly held and vigorously expressed. But the mere existence of such disagreements does not necessarily entail the conclusion that the parties no longer have a common interest in the proceedings themselves.'"

117. After referring to the observations of Rix J. in *Svenska*, quoted elsewhere above, McKechnie J. continues as follows, at p.30:

> "*Common interest privilege nevertheless may not apply if parties are potential adversaries or if they are acting from purely selfish motives* (Todd v. Novotny [1999] WASC 28). *From U.S. jurisprudence, although not entirely consistent between states, it is generally accepted that the common interest must be a legal rather than a purely commercial interest. In* Duplan Corporation v. Deering Milliken, Inc. *397 F. Supp. 1146 the court found that the patent-owner's legal success would benefit the patent-licensee only financially; the licensee had no legal interest in common with the patent-owner. The court reasoned:*
>
> > '[W]here there is no legal interest…the mere interest of a non-party client in legal transactions between the prime client and an outsider is not sufficient to prevent a waiver of the attorney-client privilege. This is true no matter how commercially strong the non-party client's interest is, or how severely the non-party client may be legally affected by the outcome of the transaction between the prime client and an outsider.'"

118. McKechnie J. then touched on the decision of McGovern J. in the course of the *Hansfield* proceedings before reaching the following conclusion, at pp30–31:

> "***53.*** *Having considered the above authorities, I feel the correct test where common interest privilege is claimed it thus: the Court must first determine by normal standards whether the documents would be privileged in the hands of the party transmitting the information, assuming that no disclosure had in fact been made. If it is found that the documents would be so privileged, then the court must ask whether the relationship between the parties was sufficiently close that the transmission of documents should not be held to amount to an implied waiver of the privilege. In considering this the Court should take into account the relationship between the parties, as well as the nature and purpose of the disclosure and whether there could be held to be an objective intention to waive privilege on the part of the holder. Privilege should not be overborne lightly, and therefore the ultimate question must be whether it is reasonable in the circumstances to conclude that there was an implied waiver of the privilege. If such an implied waiver cannot be found, the Court should not otherwise interfere. As Ebsworth L.J., in* Kershaw v. Whelan *[1996] 1 WLR 358 at p.370, said:*
>
> > 'Waiver is not lightly to be inferred; although privilege is an aspect of the law of evidence and not of constitutional rights it is firmly established in our law for sound reasons of public policy.'"

f.O'Leary v. Volkswagen Group Ireland Ltd [2015] IESC 420

119. The court has been referred to this very recent decision of the Supreme Court, as offering, *inter alia*, guidance on whether and when to order further better discovery. Per Laffoy J., at paras.52–56:

> *"52. The legal principles applicable to the determination of the issues on this appeal require to be considered, first by reference to jurisprudence as to the circumstances in which the Court may order further and better discovery….*
>
> *53. In* Sterling Winthrop Group Limited v. Farbenfabriken Bayer A.G. *[1967] I.R. 97, Kenny J., having reviewed the*

authorities, summarised the circumstances in which it is appropriate to make an order for further and better discovery as follows (at p.100):

> *'Such an order will not be made when the application is based solely on an affidavit alleging that the other party has documents in his possession relevant to the action which have not been further disclosed by the first affidavit. The Court will, however, order a further affidavit of documents when it is satisfied (a) from the pleadings, (b) from the affidavit of discovery already filed, (c) from the documents referred to in the affidavit of discovery, or (d) from an admission by the party who has made the affidavit of discovery that the party against whom the order is ought has other documents in his possession relating to the issues in the action which have not been disclosed by the first affidavit. The Court will also order a further affidavit when there are grounds, derived from the documents discovered, for suspecting that there are other relevant documents in the possession of the party who has made the affidavit or where there are reasonable grounds for believing that the person making the affidavit of discovery has misunderstood the issues in the case and has, in consequence, omitted documents from it.'*

In this Court, delivering a judgment in Phelan v. Goodman *[2000] 2 I.R. 577, Murphy J. quoted the final paragraph of the judgment of Kenny J. (at p.105), where he concluded as follows:*

> 'The authorities which I have mentioned establish that the Court should not order a further affidavit of documents unless it has been shown that there are other relevant documents in the possession of the defendants or that the person making the affidavits has misunderstood the issues in the action or that his view that the documents are not relevant is wrong. None of these matters has been established and I must therefore, refuse to make the order sought.'

54. In Phelan v. Goodman, Murphy J. *considered two situations which frequently arise and, indeed, which arise on this appeal, namely where the deponent of the affidavit of discovery avers that the party ordered to make discovery has documents but they do not require to be discovered on the grounds of irrelevancy and where the deponent avers that the party against whom discovery has been ordered has no documents….*

56. In relation to the second situation, Murphy J. stated (at p.584):

> 'Difficulties obviously arise in directing the discovery of documents or a particular range or class of document which the deponent denies are in his possession. To order the first defendant to swear a further affidavit of discovery presumably would result in his repeating the statements made and sworn by him on several occasions, namely that he has not and never had any documents in addition to those already discovered in his power or possession relating to the matters in issue in the present proceedings. In those circumstances the court would have to be satisfied on the evidence before it that it was making a meaningful order.'

It follows, that the test for this Court, formulated on the subsequent observations of Murphy J., is whether the evidence presented to the High Court was insufficient to satisfy the Court that relevant documents are or have been in the possession of the Defendant which should have, but have not, been discovered in its original affidavit of discovery or its supplemental affidavit of discovery."

(2) Foreign authorities

a. Crescent Farm (Sidcup) Sports Ltd v. Sterling Offices Ltd [1967] Ch. 553

120. The facts of *Crescent Farm* have been outlined elsewhere above. There, access to the instructions to counsel and counsel's opinion were successfully claimed to be privileged by a successor in title to the party that obtained the opinion. It is notable in the context of the within proceedings for the following observations of Goff J., commencing at p.562:

> *"[I]n my judgment it is clearly established that legal professional privilege of a predecessor in title does enure for the benefit of his successor. This is so stated in Halsbury's Laws of England…and in my judgment correctly so."*

121. Goff J. then considers a number of 19th-century precedents before mentioning, at p.563, the decision of the Court of Appeal in *Schneider v. Leigh* [1955] 2 Q.B. 195:

> *"[I]n* Schneider…Hodson *L.J. said, at p.203*:
>
> *'I have emphasised that the privilege is the privilege of the company. This statement is subject to the qualification that the privilege enures for the benefit of successors in title to the party to an action, at any rate, where the relevant interest subists. (See* Minet v. Morgan *(1873) 8 Ch.App. 361.)'*
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> *….Of course, where a document changes hand before the ultimate recipient acquires title, the privilege may on the particular facts be lost and that may justify the decision in* Greenlaw v. King *(1838) 1 Beav. 137 on which the plaintiffs placed much reliance, but here the nexus between the predecessor and successor is altogether too close. Of course, as…Lindley M.R. said in* Calcraft v. Guest *[1898] 1 Q.B. 759, 761, privilege may be waived, but I cannot regard communicating this confidential information to a prospective purchaser as a waiver."*

b. Svenska Handelsbanken v. Sun Alliance and London Insurance plc [1995] 2 Lloyd's L.R. 84

122. This was an insurance law case in which discovery was sought from Svenska of certain legal advice which it had obtained and then passed to its reinsurers. Sun Alliance claimed the documents were privileged on the ground of common interest. It was held by the High Court (Rix J.) that privilege for the legal advice was not lost in circumstances when it was passed over in confidence to the reinsurers for the purpose of informing them of legal advice which they needed to know by reason of the sufficient common interest between the reinsurers and Sun Alliance, merely because it was not done in the context of pending or contemplated litigation. Per Rix

J., at p.88 of his judgment:

> *"It seems to me that if legal advice obtained by one person is passed on to another person for the sake of informing that other person in confidence of legal advice which that person needs to know by reason of a sufficient common interest between them, then it would be contrary to the principle upon which all legal professional privilege is granted to say that the legal advice which was privileged in the hands of the first party should be lost when passed over in confidence to the second party, merely because it was not done in the context of pending or contemplated litigation."*

c. Surface Technology plc v. Young [2002] F.S.R. 25

123. The claimants in this case objected to the defendants' solicitors accepting instructions by reason of conflict of interest. One of the claimants was successor in title to a company which had previously been a client of the solicitors in question; it claimed it was entitled to the benefit of privilege over certain files of the instructed solicitors and that so far as any matter in the files was confidential or was confidential to that predecessor in title, it was now confidential to the claimant. Having made reference to the standard panoply of case-law, such as *Crescent Farm* and *Konigsberg*, Pumfrey J. concluded, *inter alia*, at p.399:

> *"As to the claim which arises on the basis of the communication of confidential information, it seems to me that this question should be determined first on a construction of the agreement. It is settled that an obligation of confidence in respect of a particular confider can be imposed after the information is communicated, provided that the information has not in the meantime been published and provided also that the fact that the obligation of confidence is asserted is drawn to the attention of the person to whom the information is confided. If authority is needed for this proposition it can be found in* English and American Insurance Company Ltd. v. Herbert Smith *[1988] F.S.R. 232. In the present case it is not clear to me that there is any information which is not also privileged that needs to be considered under this head, but the information is to be treated as confidential and must not be used to that extent."*

d. Winterthur Swiss Insurance Company and Anor v. AG (Manchester) Limited (in liq.) [2006] EWHC 839 (Comm)

124. This was a judgment concerning certain directions as to privilege that were issued in the context of litigation concerning 'After the Event' legal expenses insurance. It is of note in the context of the within proceedings for its comprehensive consideration of common interest privilege. Per Aikens J., at paras.76–81 of his judgment:

> *"The concept of 'common interest privilege derives from Jenkyns v. Bushby[(1866) L.R. 2 Eq. 547], a decision of Kindersley V-C. He held that a case for the opinion of counsel, prepared in relation to separate litigation for the benefit of the predecessor in title to the defendant in the action, but after the present dispute had arisen, was privileged from production in the later action. The concept was developed in the Court of Appeal's decision in* Buttes Gas and Oil*....Brightman LJ expressed the proposition of law to which he gave assent in this way:*
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> > '...if two parties with a common interest and a common solicitor exchange information for the dominant purpose of informing each other of the facts, or the issues, or advice received, or of obtaining legal advice in respect of contemplated or pending litigation the documents or copies containing that information are privileged from production in the hands of each'.
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> *77 In* Guinness Peat Properties Ltd v Fitzroy Robinson Partnership [[1987] 1 W.L.R. 1027], *the defendants in the action had, as insureds, written a letter report to their insurers about a claim made against them by the plaintiffs. The Court of Appeal held that the letter had been brought into existence at the instance of the insurers in order to obtain legal advice or to assist in the conduct of litigation. Solicitors for the defendants had inadvertently allowed the plaintiffs' solicitors to inspect the letter and it was referred to in the plaintiffs' expert's report. The Court of Appeal upheld the judge's decision to grant an injunction to restrain the plaintiffs from using the letter further and ordering them to return all copies to the defendants. Slade LJ noted that although it was the insurers that had caused the letter to be created, it was the defendant insured that now claimed that it was covered by 'litigation privilege'. He held, following the statement of law of Brightman LJ in the* Buttes Gas *case, that the document was privileged in the hands of the defendant insured.*
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> *78 These cases demonstrate that where a communication is produced by or at the instance of one party for the purposes of obtaining legal advice or to assist in the conduct of litigation, then a second party that has a common interest in the subject matter of the communication or the litigation can assert a right of privilege over that communication as against a third party. The basis for the right to assert this 'common interest privilege' must be the common interest in the confidentiality of the communication. The cases I have referred to concerned applications for production of communications concerned will be covered by one or other sub-type of legal professional privilege in the hands of the party that caused the communication to be produced in the first place. That type of situation, where a second party resists the application of a third party for production of communications, has been called 'using common interest privilege as a shield' [Phipson on Evidence* (16th ed., 2009), p.649].
>
> *79 However, it is not this use of common interest privilege that arises in the present applications. The submission…is that NIG (and Winterthur) can rely on 'common interest privilege as a sword'.* [Phipson on Evidence (16th ed., 2009), p.649]. *That type of common interest privilege is established by such cases as* Cia Parca de Panama SA v George Wimpey & Co Ltd [[1980] 1 Lloyd's Rep. 598], and Commercial Union Assurance Co plc v Mander [[1996] 2 Lloyd's Rep. 640]. *The principle is that if party B has a sufficiently common interest in communications that are held by party A, then party B can obtain disclosure of those communications from party A even though, as against third parties, the communications would be privileged from production by virtue of legal professional privilege. In* Svenska Handelsbanken*…Rix J (as he then was) held that 'common interest privilege as a sword' could be asserted in relation to both 'litigation' privilege and also 'legal advice' privilege. I respectfully agree.*
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> *80 The questions of what type of relationship between the two parties can give rise to a 'common interest' in the communication covered has been considered in a number of cases. Amongst the types of relationship that can give rise to a 'common interest' are those of insured and insurer and insurer/reinsured and reinsurer. The cases have refused to be prescriptive about the circumstances in which the two parties will have a sufficient 'common interest' in the particular communications concerned. The issue has to be decided on the facts of the individual case.*
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> *81 Two cases deal with the time at which the common interest in the privileged communication must exist in order to permit the exercise of 'common interest privilege as a sword'. In* Cia Barca*…Bridge LJ formulated the principle on the*

*basis that the two parties (A and B in my example) have a common interest in the communication at the time the relevant communication was created. It will not matter that, subsequently, the two parties (A and B) fall out. That analysis was followed by Moore-Bick J…in…*Mander. *It therefore appears to follow that, at least in cases of 'common interest as a sword', once a communication is subject to common interest privilege, then it will always remain so."*