

THE HIGH COURT

[2021] IEHC 651

[2020 No. 66 COS]

IN THE MATTER OF THE COMPANIES ACT, 2014

BETWEEN

DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND

CUMANN PEILE NA HÉIREANN

"FOOTBALL ASSOCIATION OF IRELAND"

RESPONDENT

AND

JOHN DELANEY

NOTICE PARTY

JUDGMENT of Ms. Justice Reynolds delivered on the 10th day of August 2021

Introduction

1. On the 11th February, 2020, the Director of Corporate Enforcement ("the Director") applied for and obtained from the District Court a warrant permitting his servants and/or agents to enter the headquarters of Cumann Peile na hÉireann ("the FAI") and seize material comprising hard copy documents and an email folder pertaining to John Delaney during his period of employment with the FAI.
2. This arose in circumstances where the Office of the Director of Corporate Enforcement ("the ODCE") is undertaking a criminal investigation into suspected criminal wrongdoing relating to certain matters at the FAI.
3. On the 14th February, 2020, the Director's servants and/or agents entered the premises and seized materials. The warrant permitting the entry and seizure was obtained pursuant to s. 787 of the Companies Act, 2014 (the "2014 Act").
4. The Director issued a motion on 17th February, 2020 in which he sought, *inter alia*, a determination pursuant to s. 795(4) of the 2014 Act as to whether any communications contained in the seized materials were subject to legal professional privilege.
5. A number of procedural steps were embarked upon thereafter under the supervision of the court which allowed for considerable progress to be made in the proceedings.
6. Prior to the application being heard, the FAI and ODCE engaged further and have progressed matters to the extent that the s. 795(4) application as between them has essentially resolved.

Chronology

- **11th February, 2020:** Application to District Court for search warrant pursuant to s. 787 of the Companies Act, 2014 relating to the premises of the FAI, situate at the National Sports Campus, Abbotstown, Dublin 15.
- **14th February, 2020:** Search warrant executed and seizure of digital email folder of John Delaney and thirteen hardcopy documents.

- **17th February, 2020:** *Ex parte* application for short service of a notice of motion dated 17th February, 2020.
- **20th February, 2020:** John Delaney joined as a Notice Party to proceedings by order of the High Court.
- **24th June, 2020:** Examination Strategy for the purposes of privacy and privilege rights approved by the High Court and directions to the parties to liaise in relation to its implementation by 22nd July, 2020.
- **June, 2020:** The ODCE's Digital Forensics Specialist conducts an initial examination and assessment of the digital email folder consisting of 675,240 files. After removal of duplicate and immaterial items, remaining dataset constitutes 285,028 files.
- **6th July, 2020:** The Notice Party's review of the dataset commences.
- **15th July, 2020:** An extension of time granted to the Notice Party for implementation of the Examination Strategy.
- **20th July, 2020:** Notice Party's digital forensics team attend at the ODCE offices to assist in the notice party's review.
- **22nd July, 2020:** The High Court issues further directions to progress the review.
- **29th July, 2020:** Notice Party correspondence with the ODCE confirming approx. 29,500 documents "potential LPP".
- **31st July, 2020:** Further directions granted to assist in the isolation of the privacy and potentially privileged datasets.
- **August, 2020:** Notice Party identifies 35,406 records as "LPP/Privacy", 29,070 records as "Potential LPP" and 35,406 records as "Private".
- **3rd September, 2020:** Privacy aspect of the application (s. 788 of the Companies Act, 2014) is concluded. Further directions granted to progress legal professional privilege ("LPP") aspect of the review.
- **8th September, 2020:** Respondent commences review of the FAI dataset and upon completion, dataset is refined to 11,066 items.
- **10th November, 2020:** On foot of the Director's application, Mr. Niall Nolan BL appointed as an independent person to assist the High Court pursuant to s. 795(6) of the Companies Act 2014. The Court further directs the Respondent and Notice Party to complete the review of material and finalise their assertions of LPP by 11th January, 2021.

- **19th November, 2020:** Mr. Niall Nolan BL commences his review in furtherance of his appointment by the High Court pursuant to s. 795(6) of the Companies Act, 2014.
- **11th January, 2021:** The Respondent and Notice Party complete their review of the datasets. As a result, 3,818 items required to be reviewed by Mr. Nolan; 2,805 at the assertion of the Notice Party, and 1,013 at the assertion of the Respondent.
- **3rd March, 2021:** On foot of an application by the Director made by way of Notice of Motion dated 1st February, 2021, the High Court directs the further appointment of Mr. Patrick Mair BL pursuant to s. 795(6) of the Companies Act, 2014.
- **11th May, 2021:** The High Court directs the “Independent Persons Report” be delivered to the court on the 17th May, 2021.
- **17th May, 2021:** The Report is delivered to the court by the ODCE. Of the 1,013 items contained in the FAI volume of the Report, the Independent Persons make recommendations in favour of assertions of privilege as regards 976 of these items, representing approx. 96.35% of the material. Of the 2,805 items contained in the John Delaney volume of the Report, the Independent Persons make recommendations in favour of assertions of privilege as regards 1,613 items representing approx. 57.5% of the material.
- **18th May, 2021:** The High Court directs the circulation of the Report to the respective parties on the 19th May, 2021.
- **18th June, 2021:** The ODCE advises the High Court that there are approximately 1,100-1,200 documents which the Independent Persons have recommended as privileged but which it believes fall under the “crime/fraud” exception and in respect of which a preliminary ruling is sought from the court. The court sets a hearing date of 20th July, 2021 for the hearing of this application.
- **20th July, 2021:** The application for the preliminary ruling was heard by the court.

This application:

7. The within application is for a determination of a preliminary legal issue raised by the Director concerning the crime/fraud exception to a claim of legal professional privilege being asserted by Mr. Delaney and falls to be considered within the context of the s. 795(4) application.
8. It arises in circumstances where the Director has identified 1,120 documents among the tagged “LPP” items in the Report which he asserts are subject to the crime/fraud exception.
9. The application is grounded on the affidavit of Detective Garda Sergeant Richard Byrne, an investigator within the ODCE, sworn on the 29th June, 2021.

10. In the affidavit, he sets out the basis upon which the application is being made in circumstances where the process requiring Mr. Delaney to identify documents within the seized materials – over which he is asserting a right to privacy - has concluded. The outstanding issue for determination by the court is the s. 795 application with respect to material over which a claim of legal professional privilege is asserted.
11. He avers that the ODCE's review of the Report prepared by the appointed independent persons has been completed and, as regards John Delaney, 2,054 items set out in the Report remain at issue. Of these items, 1,120 are documents over which Mr. Delaney has claimed legal professional privilege.
12. Detective Garda Byrne states that he and other members of the ODCE investigative team have undertaken "*a painstaking and time consuming process utilizing very significant resources in order to refine the items over which the parties maintain an actual assertion of legal professional privilege and which are the subject of the crime/fraud exception*". As a result, the material at issue from an initial data set of some 285,000 documents has been refined to the 1,120 items in respect of Mr. Delaney over which legal professional privilege is being asserted and which form the subject matter of this application.
13. The ODCE's position is that the outstanding documents are relevant to the investigation having been seized pursuant to a search warrant issued by the District Court and asserts that it is entitled to examine them notwithstanding the recommendations in the Report that "LPP" applies.
14. In addition, Detective Garda Byrne highlights the logistical and practical difficulties for the court should it accede to Mr. Delaney's application to examine the materials and the risk that such a process would significantly impinge upon the integrity of the ongoing investigation.
15. A replying affidavit was furnished by Aidan Eames, solicitor for Mr. Delaney, sworn on the 13th July, 2021 and set out in brief terms his client's opposition to the ODCE's application.

Relevant provisions of the Companies Act, 2014

16. Under the provisions of the 2014 Act, the ODCE is provided with wide ranging powers which allow it to play a significant role in the prosecution of corporate offenders together with other regulatory functions.
17. Chapter 4 of Part 13 of the Act vests powers in the Director to require the production of documents relating to companies with a view to determining whether a formal investigation under an order of the court or in exercise of his or her own powers is necessary.
18. Such powers are reinforced by the provisions at s. 787 enabling the Director to obtain a search warrant from the District Court if he or she suspects that documents are being withheld.

19. Section 787 provides as follows:-

- "(1) A judge of the District Court may issue a search warrant under this section if satisfied by information on oath laid by a designated officer that there are reasonable grounds for suspecting that any material information is to be found on any premises (including a dwelling).*
- (2) A search warrant issued under this section shall be expressed and operate to authorise a named designated officer (the "officer"), accompanied by such other persons as the officer thinks necessary, at any time or times within the period of validity of the warrant, on production of the warrant if so requested, to—*
- (a) enter the named premises, if necessary by force;*
 - (b) search the premises;*
 - (c) require any person found on the premises to—*
 - (i) give to the officer his or her name, home address and occupation; and*
 - (ii) produce to the officer any material information that is in the custody or possession of that person; (d) seize and retain any material information found on the premises or in the custody or possession of any person found on the premises; and*
 - (d) seize and retain any material information found on the premises or in the custody or possession of any person found on the premises; and*
 - (e) take any other steps that appear to the officer to be necessary for preserving or preventing interference with material information.*
- (3) Without prejudice to subsection (4), where—*
- (a) the officer finds anything at, or in the custody or possession of any person found on, the premises named in the warrant that the officer has reasonable grounds for believing may be or may contain material information, and*
 - (b) it is not reasonably practicable for a determination to be made on the premises—*
 - (i) whether what he or she has found is something that he or she is entitled to seize under the warrant (whether as mentioned in subsection (2)(d) or (4)), or*
 - (ii) the extent to which what he or she has found contains something that he or she is entitled to seize under the warrant in either of those cases,*
- the officer's powers of seizure under the warrant shall include power to seize so much of what he or she has found as it is necessary to remove from the premises to enable that to be determined (referred to subsequently in this section as an 'extended power of seizure')."*

20. Section 787(13)(b) defines "material information" as including books, documents and computers.
21. Section 795(1) thereafter defines "information" and "privileged legal material" as follows:-

"information" means information contained in a document, a computer or otherwise;

'privileged legal material' means information which, in the opinion of the court, a person is entitled to refuse to produce on the grounds of legal professional privilege."

22. Section 795(4) provides:-

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

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

(b) who has taken possession of it,

shall (unless the person has, within the period subsequently mentioned in this subsection, been served with notice of an application under subsection (5) in relation to the matter concerned) apply to the court for a determination as to whether the information is privileged legal material and an application under this subsection shall be made within 7 days after the date of disclosure or the taking of possession."

The within application was issued by the Director within six days of the seizure of the documentation.

23. Section 795(5) provides:-

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

No such application has been brought in the within proceedings by the FAI or Mr. Delaney. The determination is being sought by the Director pursuant to s. 795(4).

24. In addition, and with a view to assisting the court in its "final determination",

s. 795 (6) further provides:-

"Pending the making of a final determination of an application under subsection (4) or (5), the court may give interim or interlocutory directions as the court considers

appropriate including, without prejudice to the generality of the foregoing, directions as to –

(a) ...

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

(i) *examining the information, and*

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

25. As already outlined above, Mr. Nolan BL and Mr. Mair BL were appointed by the court to prepare a report for the purposes of “*assisting the court*” with its determination. The Report facilitated engagement between all parties and resulted in a significant whittling down of the volume of documentation at issue between them.

The functions and powers of the Director

26. Before embarking on any consideration of the legal issues raised in this application, it is important to reflect upon the context within which the application is being made having regard to other provisions in the legislation.

27. Section 949(1) of the Act provides that the Directors functions are:-

“(1) The functions of the Director are—

(a) *to encourage compliance with this Act,*

(b) *to investigate—*

(i) *instances of suspected offences under this Act, and*

(ii) *instances otherwise of suspected non-compliance with this Act or with the duties and obligations to which companies and their officers are subject,*

(c) *to enforce this Act, including by the prosecution of offences by way of summary proceedings,*

(d) *at his or her discretion, to refer cases to the Director of Public Prosecutions where the Director has reasonable grounds for believing that an indictable offence under this Act has been committed,...”*

28. Pivotal to the success of the Director’s investigations is the role played by members of An Garda Síochána who have been seconded to the Director’s office for the purpose of ensuring that the quality of evidence seized by them will support referrals under s. 949(1)(d) to the DPP, i.e. for the commencement of criminal proceedings.

29. As part of the duties to investigate suspected offences, the Director is entitled to seek a warrant from the District Court pursuant to s. 787 for the purposes of search and seizure at a premises.
30. Under that procedure, a District Court judge may grant a search warrant where satisfied by information on oath laid by a "designated officer" that there are reasonable grounds for suspecting that "material information" is to be found on a premises.
31. A "designated officer" is defined as the Director or a duly authorised officer of the Director.
32. There are enhanced provisions enabling the officer to access data on a computer seized as part of material information, and disclosure of passwords and other assistance can be required of persons identified as having that knowledge.
33. Further extended powers of seizure are conferred by s. 787(3) which operates in circumstances where the officer finds material which he or she is not certain is covered by the warrant. Under s. 788, this extended power can be invoked provided certain safeguards are put in place regarding the safe storage, confidentiality and access to the material during the time it remains seized.
34. The publication or disclosure of any material information obtained pursuant to a search warrant to anyone other than a "competent authority", save for the exceptions cited in the Act, is a criminal offence sanctioned by way of fine and/or term of imprisonment.
35. The within process commenced via *ex parte* application made by the ODCE to the District Court for a warrant pursuant to s. 787 of the Act. This was an application made on foot of a sworn information, which required the judge of the District Court to be satisfied that there were "*reasonable grounds for suspecting that*" material information was to be found on the FAI's premises.
36. In issuing the warrant, the District Court judge determined that there were reasonable grounds for believing that the documents subsequently seized "*may provide evidence of or relating to the commission of an offence*".

Legal professional privilege

37. Section 795(6) requires the court to make a determination as to whether information which has been disclosed or taken possession of pursuant to the search warrant is privileged legal material.
38. "*Privileged legal material*" is defined as information which "*in the opinion of the court*" a person is entitled to refuse to produce on the basis of that privilege.
39. In the within application, recommendations have been made in the Report prepared to assist the court that the 1,120 documents at issue are "LPP".
40. Legal professional privilege protects all communications between a professional legal advisor and his or her clients from being disclosed without the permission of the client.

41. The principles underlying the claim of privilege properly applicable to communications between a client and his or her lawyers were discussed by Finlay C.J. in *Smurfit Paribas Bank Ltd v. A.A.B. Export Finance Ltd* [1991] I.R. 469 where he stated:-

"The existence of a privilege or exemption from disclosure for communications made between a person and his lawyer clearly constitutes a potential restriction and diminution of the full disclosure both prior to and during the course of legal proceedings which in the interests of the common good is desirable for the purpose of ascertaining the truth and rendering justice. Such privilege should, therefore, in my view, only be granted by the Courts in instances which have been identified as securing an objective which in the public interest in the proper conduct of the administration of justice can be said to outweigh the disadvantage arising from the restriction of disclosure of all the facts."

42. It is evident that the recognition of legal professional privilege applies only in circumstances where the public interest and the proper conduct of the administration of justice favours the privilege being extended. Therefore, whenever a potential conflict between an individual right and the public interest in the proper administration of justice arises, whether the privilege applies in any given instance involves a balance being struck between the protection of that right and the identified public interest.
43. In *Smurfit*, a case regarding disclosure of legal assistance as opposed to legal advice, the court was concerned with discovery in civil proceedings. In determining whether an entitlement to rely on legal professional privilege arose, the court identified that the key justification for it was to ensure that the client would not be inhibited in the conduct of litigation or in obtaining legal advice and stated:-

"It is necessary to bear these general considerations in mind in attempting to ascertain the underlying principle which appears to have led to the expansion of the privilege for communications with a lawyer from cases of actual or contemplated litigation to cases of communications seeking legal advice and/or legal assistance other than advice."

Crime/fraud exception to legal professional privilege

44. The Director asserts that the 1,120 documents at issue and over which Mr. Delaney maintains an assertion of legal professional privilege are the subject of the crime/fraud exception to legal professional privilege and thus would have the practical effect of displacing such privilege.
45. There appears to be little or no dispute between the parties but that these are documents which have all the characteristics indicative of legal professional privilege. However, the ODCE now asserts that the documentation has been generated in furtherance of crime or fraud and to which privilege cannot consequently attach.
46. It is well established that privilege may be lost if used as a guise to conceal and further crime or fraud, hence the crime/fraud exception.

47. The underlying legal principles applicable to the crime/fraud exception were summarised by Stephen L.J. in *R. v. Cox and Railton* (1884) 14 QBD 153, 167 as follows:-

"The reason on which the rule is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice."

48. Those principles were cited with approval by Finlay C.J. in *Murphy v. Kirwan* [1993] 3 I.R. 501 in which he summarised the Irish legal position on the crime/fraud exception:-

"[T]he essence of the matter is that professional privilege cannot and must not be applied so as to be injurious to the interests of justice and to those in the administration of justice where persons have been guilty of conduct of moral turpitude or of dishonest conduct, even though it may not be fraud."

Nothing could be more injurious to the administration of justice nor to the interests of justice than that a person should falsely and maliciously bring an action, and should abuse for an ulterior or improper purpose the processes of the court."

49. The Supreme Court in that case extended the crime/fraud principle in Ireland to cases of malicious prosecution and abuse of process.
50. It is evident that legal professional privilege does not apply to communications in furtherance of crime or fraud. It cannot be invoked to protect from disclosure communications in furtherance of a criminal or fraudulent purpose.
51. The principles applied by Finlay C.J. in *Murphy* were more recently applied in *McMullen v. Kennedy* [2008] IESC 69. That case involved *"a long running saga of litigation involving the plaintiff and a number of other parties including two firms of solicitor and a barrister (since deceased)"*.
52. Macken J., whilst emphasising that privilege could not be used as a cloak for concealing conduct injurious to the administration of justice and endorsing the principles, set out in *Murphy*, stated:-

"Here the allegation on its face is clearly a very serious one indeed, made against an officer of the court and allegedly constituting an attempt to persuade a counsel to give evidence, in order to 'buy off' a possible or likely claim against that very counsel, falling into the category of moral turpitude, if it were true. It would in my view be injurious to the interests of justice to permit legal professional privilege to be applied in such circumstances, so as to prevent proper disclosure. That said, however, it is only in such unusual circumstances that I am prepared to make an exceptional order, which in ordinary course would not be made, having regard to the importance attaching to the principle of legal professional privilege."

53. In that case, Macken J. determined that the correct approach was for the court to view the documents in question and determine whether they included information relevant to the proceedings which should be disclosed.
54. Notably, Fennelly J. dissented from the decision to order disclosure because in his view the appellant had not produced any evidence to support his underlying contention. However, on the broad and general proposition that privilege cannot be used as a cloak for crime, fraud or moral turpitude, Fennelly J. was in agreement with the majority.

Standard of proof applicable to crime/fraud exception

55. In *McMullen*, Macken J. emphasised that the displacement of privilege is undoubtedly an exceptional occurrence which “*in the ordinary course would not be made*”.
56. In the *Murphy* case, Egan J. referred to the standard of proof that must be met by a party seeking to defeat an assertion of privilege by invoking the crime/fraud exception and stated:-

“The rule does not apply merely because fraud is alleged in the action. There must be some prima facie evidence that the allegation has a foundation in fact.”

57. Egan J. cited with approval the decision of the House of Lords in *O’Rourke v. Derbyshire* [1920] AC 581, where it was held that a party seeking to displace privilege must show good grounds for saying that *prima facie* a state of things exist which, if not displaced at the trial, will support a charge of fraud.
58. It is evident that in determining whether legal professional privilege should be cast aside on the basis of the crime/fraud exception, there must be some *prima facie* evidence that the allegation “*has a foundation in fact*”. Beyond that, it would appear that each case must be judged on its own facts (*Derby & Co. v. Weldon* (no. 7) [1991] WLR 1156).
59. It is notable that all of the relevant authorities cited above, and relied upon by the parties, relate to civil proceedings and the standard of proof required to displace a claim of legal professional privilege.
60. Further, what was at issue was the assessment of material and a determination of whether it “*included information relevant to the proceedings*” which should be disclosed. In each case, the proceedings were well advanced and the court was fully apprised of what the issues between the parties were and was, therefore, in a position to make an informed decision against a fully contextualised background where the parameters of the proceedings were clearly defined.
61. The within application arises in the context of an ongoing criminal investigation into suspected wrongdoing relating to the management of affairs at the corporate headquarters of the FAI. The issue of whether or not proceedings will ensue has yet to be determined.

Discussion

62. This application was brought pursuant to the statutory provisions of the Companies Act, 2014, s. 795(4) of which obliges the Director to apply to the court for a determination as to whether the information seized pursuant to a search warrant is "privileged legal material".
63. The application triggered a process of engagement under the close supervision of the court that has proven most productive. At the outset, the material at issue comprised an initial data set of 285,00 documents. After the implementation of the Examination Strategy (for the purpose of protecting privacy and privilege rights), the totality of material which remained in issue was 3,818 items: 2,805 at the assertion of the Mr. Delaney and 1,013 at the assertion of the FAI.
64. Mr. Nolan and Mr. Mair reviewed the 3,818 items. Of the 1,013 documents contained in the FAI volume of the report, recommendations were made in favour of assertions of privilege representing approximately 96% of the material. As already outlined above, the outstanding matters were resolved by way of further engagement between the parties.
65. Of the 2,805 items contained in Mr. Delaney's volume of the report, recommendations were made in favour of assertions of privilege as regards 1,613 items representing approximately 57% of the material.
66. Of those 1,613 items, the Director has now identified 1,120 over which it is now asserted that the crime/fraud exception applies.
67. In the ordinary course, this discreet body of documents would attract legal professional privilege as on the face of it they involve communications between Mr. Delaney and his legal advisors.
68. However, the Director has raised the crime/fraud exception to legal professional privilege and submits that the ODCE requires sight of the documents in furtherance of its investigation where they are relevant to that investigation.
69. Central to the Director's application is the assertion that the documents were seized pursuant to a search warrant and that the issue of their relevance has already been adjudicated upon by the District Court Judge in determining whether or not to grant the warrant. Implicit in that argument is that relevancy of itself is capable of generating sufficient grounds in a general way in which otherwise privileged documentation can be disclosed and further, that the statutory regime provided for in the legislation is effectively redundant.
70. However, it is clear from the principles enunciated in the authorities cited above that a party seeking disclosure of otherwise privileged material must demonstrate clear evidence of crime or fraud, or at least demonstrate that "*the allegation has a foundation in fact*".
71. To date, the Director has made no attempt to outline the rationale or basis for his belief that the documentation was generated in furtherance of crime or fraud.

72. Further, it is clear that the vast majority of the documentation seized pursuant to the warrant has now been excluded from the investigation by agreement between the parties on the basis that they are not relevant.
73. In the circumstances, I simply cannot accept the proposition that the issuance of the warrant in itself is somehow sufficient to satisfy the court of the applicability of the crime/fraud exception. In my view, it does not amount to "prima facie evidence".
74. This court is now placed in this somewhat invidious position of being invited to make a determination on the crime/fraud exception directing the disclosure of material which would otherwise attract privilege in circumstances where it has limited knowledge of the nature of the ongoing investigation, the full context within which it arises and the relevant time frame which it encompasses.
75. It is difficult to envisage how I could embark on any meaningful determination in respect of resolving the outstanding privilege and crime/fraud exception issues when to all intents and purposes I would be required to do so in a vacuum. Ultimately, I am of the view that it would be premature to engage in a highly nuanced assessment of the material to determine whether the crime/fraud exception arises when the nature, scope and parameters of any alleged crime or fraud have not as yet been disclosed.
76. In the circumstances, I am not in a position to resolve the issue as to whether the crime/fraud exception applies at this time for the reasons outlined above and will hear further from the parties as to how the next phase of the process is to be advanced.