

## THE HIGH COURT

[2017 No. 404COS]

## IN THE MATTER OF INDEPENDENT NEWS AND MEDIA PLC

AND

## IN THE MATTER OF THE COMPANIES ACT 2014

BETWEEN

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND

LESLIE BUCKLEY

RESPONDENT

**JUDGMENT of Mr. Justice Kelly, President of the High Court delivered on the 6th day of February, 2018****Introduction**

1. The Director of Corporate Enforcement ("the Director") seeks a determination as to whether information produced by the respondent (Mr. Buckley) the Chairman of Independent News and Media Plc (INM) in response to a request issued by the Director pursuant to s.780 of the Companies Act 2014 (the Act) contains privileged legal material. If it does it is not disclosable to the Director. This application is made pursuant to the provisions of s.795(4) of the Act.

2. The Director has been involved over the last number of months in what is described as a "detailed engagement with INM". This has given rise to a lengthy exchange of correspondence the detail of which has no relevance to the matters arising for determination in this application.

3. On 5th December, 2017 a notification in accordance with the requirements of s.782 of the Act was issued indicating that a Requirement pursuant to s.780 would be made of Mr. Buckley. The notification indicated that:-

(1) the Director proposed to make a Requirement of Mr. Buckley pursuant to s.781(c) in relation to the books or documents specified in the first schedule thereto, and

(2) that the Director was of the opinion that there were reasonable grounds for believing that the books or documents specified in the first schedule and the books or documents of INM were related to one another, and

(3) that the Director had furnished Mr. Buckley with a statement of the grounds for his opinion.

Mr. Buckley was invited to make submissions to the Director as to why he might believe that the Director's opinion was erroneous. Correspondence was exchanged between Mr. Buckley and the Director but on 27th October, 2017 the s.780 Requirement issued. It required the production of books and documents falling within its scope to be furnished by 17th November, 2017.

4. On 17th November, 2017 the Director received the documents from Mr. Buckley which included 11 documents in respect of which privilege was claimed. These are the documents which are the subject of this adjudication.

**The statutory provisions**

5. The statutory provisions relevant to this application are to be found in Part 13 of the Act. The Requirement for the production of the books and documents was made pursuant to s.780 of the Act and was preceded by the notification issued under section 782.

6. Section 795(3) provides that:-

*"The disclosure of information may be compelled, or possession of it taken, pursuant to the powers in Part 13 of the Act notwithstanding that it is apprehended that the information is privileged legal material provided the compelling of its disclosure or the taking of its possession is done by means whereby the confidentiality of the information can be maintained (as against the person compelling such disclosure or taking such possession) pending the determination by the court of the issue as to whether the information is privileged legal material."*

7. Section 795(4) of the Act provides that:-

*"Without prejudice to s.795(5), where, in the circumstances referred to in s.795(3), information has been disclosed or taken possession of pursuant to the powers in Part 13, the person –*

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

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

*shall .... apply to the court for a determination as to whether the information is privileged legal material...."*

An application under s.795(4) has to be made within 7 days after the date of disclosure or the taking of possession of the material.

8. Section 795(5) enables the person compelled to disclose the information to apply to court. In the absence of such an application (as is the case here) the person to whom the information has been disclosed must apply to court.

9. Section 795(6) provides for the making of interim or interlocutory directions which the court may consider appropriate. Such directions may include orders for the preservation of the information or the appointment of a person with suitable legal qualifications to examine the information and prepare a report for the court.

### **The claim to privilege**

10. In his first affidavit sworn on 7th December, 2017 Mr. Buckley set out the background to the Director's request. This is what he said:-

*"9. By way of background, the documents sought in that (the Director's) request relate to a cost reduction exercise. That exercise necessitated the engagement of external technical expertise. Such assistance was provided, in the first instance, by a Mr. Derek Mizak, an IT expert, and he, in turn, recommended the engagement of a specialist IT company to perform certain work.*

*10. That cost reduction exercise, in particular the engagement of the specialist IT company, was the subject matter of a separate request made by the Director under s.778 of the Companies Act 2014 on 11th August, 2017. It is in this context that the documents, over which I have claimed privilege, were generated. In summary, the documents over which privilege is claimed are documents to and from my solicitors relating to the preparation of my response to that statutory request.*

*11. I identify and briefly describe each document in the Schedule hereto. One document (doc. ID No. LB00009922) of the 11 documents included in the sealed envelope, referred to at paragraph 7 above, is an attachment to a privileged communication (doc ID No. LB00009920). It consists of a letter which was addressed to me from the Director. The contents of this letter will, therefore, be known to the Office of the Director of Corporate Enforcement.*

*12. I should briefly explain the involvement of two named individuals to whom reference is made in the schedule. As mentioned above, Mr. Mizak provided expert technical advice and assistance in the cost reduction exercise to which the documents sought by the Director on 27th October, 2017 relate. When explanations were sought from me by the Director in August 2017, certain technical questions arose which were outside my expertise and which Mr. Mizak was best placed to answer. Accordingly, his assistance was sought in those respects. The documents furnished to him were furnished by my solicitors with an express statement that the documents were privileged and confidential and were being provided to him without any waiver of privilege.*

*13. Mr. John Henry provides certain security services to me, including IT security, through his business, Specialist Security Services. Mr. Henry was the person who initially introduced me to Mr. Mizak in order to assist with the cost reduction exercise. He made contact with Mr. Mizak at the outset of the cost reduction exercise and I forwarded to him an initial email communication from my solicitors concerning the Director's request of 11th August, 2017.*

*14. In light of the foregoing, I respectfully ask the court to determine, in accordance with section 795(4), that the material set out above is legally privileged material, having been produced during the course of an ongoing investigation by the Office of the Director of Corporate Enforcement for the purpose of obtaining instructions and giving legal advice and in contemplation/furtherance of litigation and an investigation by the Office of the Director of Corporate Enforcement."*

11. The schedule to that affidavit set forth in tabular form an identification number for each of the eleven documents, the date, the sender/author, the recipient, the description and an explanation.

12. Mr. Buckley's affidavit was in turn responded to by an affidavit sworn on behalf of the Director by Mr. Dermot B. Morahan who is a solicitor at the office of the Director. In the course of that affidavit he called attention to a number of inaccuracies in Mr. Buckley's affidavit. These were admitted to in a subsequent affidavit of Mr. Buckley sworn on 15th December, 2017. They were inadvertent errors and he apologised in respect of them.

13. An interlocutory hearing took place before me on 18th December, 2017 when a number of issues were canvassed by counsel. These in turn were responded to by a final affidavit sworn by Mr. Buckley on 9th January, 2018. This affidavit sets out Mr. Buckley's definitive position in respect of the claim to privilege over the documents in question. This is what he says:-

*"3. I say that the first issue raised relates to my affidavit of 7th December, 2017 in which I said that the 11 documents, which documents are the subject matter of this motion, were legally privileged both for the purposes of providing instructions and obtaining legal advice and also in contemplation of litigation. I have been asked to clarify in respect of each of the 11 documents whether I am claiming legal advice privilege, litigation privilege or both.*

*4. I say that as previously set out by me in my second affidavit of 15th December, 2017, the 11 documents are documents to and from my solicitors relating to the preparation of my responses to two statutory requirements made by the Director, both of which are part of an ongoing engagement by the Director with Independent News and Media plc (INM). Documents 1-8 relate to the preparation of my response to a statutory requirement made of me by the Director under section 784 of the Companies Act 2014 on 11th August, 2017. Documents 9-11 relate to the preparation of my response to INM for the purposes of assisting INM in preparing its response to the section 784 requirement of 21st August, 2017.*

*5. I say and believe and am advised that litigation privilege attaches to the 11 documents in the following circumstances. The Director has set out that over a number of months in 2017, the Director has been involved in a detailed engagement with INM which has included lengthy correspondence with INM. As part of this engagement, the Director has sought my assistance by way of statutory requirements for certain books and documents and, to a lesser extent, for explanations of same. In respect of the statutory requirements, both those made of me on 11th August, 2017 and in relation to the statutory requirement made of INM on 21st August, 2017, I sought legal advice from my solicitors and the 11 documents all relate to my preparation of our responses to these statutory requirements. My solicitors had detailed engagement with the Director to ensure full compliance by me with the various statutory*

requirements that had been made to date and I believe that both INM and I have provided all documentation and information requested of us to date, by the Director. I should also say that the ODCE engaged with INM in the context of an existing dispute between certain executives in INM, and in respect of which there was a resolution process in place, and in respect of which litigation was also contemplated. There was a considerable degree of overlap between this process and the ODCE engagement and in this regard I say and am advised that litigation privilege is also engaged in respect of the 11 documents.

6. I say and believe and that having regard to the statutory functions of the Director and various applications and proceedings which are open to him, and the fact that I make my living as a company director, that in these and the aforementioned circumstances in which I engage my solicitors, each and every document of the 11 documents are privileged by virtue of litigation privilege. For the avoidance of doubt, while I say and believe that the 11 documents are appropriately described as falling within the privilege category of 'litigation privilege', I say and believe and am advised that given the aforementioned circumstances which I say ground litigation privilege, that should there be any doubt as to the application of litigation privilege in relation to any of the 11 documents, then any such document(s) might still be appropriately described as falling within the category of 'legal advice privilege'.

7. I say that the second issue raised by the Director relates to the schedule included in my affidavit of 7th December, 2017. For the purposes of clarity, I include below an amended schedule which reflects the clarifications made by me in my second affidavit of 15th December, 2017. I say that this amended schedule is an accurate representation and description of the 11 documents. I say that the amendments made are highlighted by way of strike through and underline.

8. I say that the third issue raised by the Director is in relation to Mr. John Henry. As set out by me, Mr. Henry provides certain security services to me, including IT security, through his business, Specialist Security Services. I further say and believe that Specialist Security Services provide a range of security services including security consultancy and training, personal security, corporate security and security services to protect against cyber attacks and other forms of data breaches. I felt that Mr. Henry's area of expertise in IT systems would be of relevance at the time of the proposed cost reduction exercise so I contacted him at the outset of the exercise for advice. Mr. Henry was the person who recommended that Mr. Mizak could assist with the cost reduction exercise. He had made contact with Mr. Mizak at the outset of the cost reduction exercise. When I received a copy of the statutory requirement of 11th August, 2017, I realised I would need some assistance in providing certain of the information requested relating to the cost reduction exercise, including information of a technical IT nature. I therefore forwarded Mr. Henry the initial email from my solicitors enclosing and advising on the statutory requirement of 11th August, 2017, with a view to discussing it with him. The email was sent by me on a strictly confidential basis and was clearly headed 'confidential and privileged'. While I appreciate this is a matter for the court to determine I can say that in sharing this email from my solicitors with Mr. Henry on a confidential basis, I in no way intended to waive any claim of privilege I may have in respect of the email to me, from my solicitors."

## **Agreement**

14. There is a measure of agreement between the Director and Mr. Buckley as to the exercise which I have to undertake in respect of these documents. It is agreed that I should read each of them in the light of the claims to privilege made by Mr. Buckley. If I am of opinion that the documents attract either legal professional privilege or litigation privilege as claimed by Mr. Buckley then the documents will be returned to him unseen by the Director. If, on the other hand, I form the view that Mr. Buckley's assertion of privilege is not made out then the documents will fall to be disclosed to the Director. I therefore turn to a consideration of each document by reference to its description in the schedule, the claims to privilege made and my reading of it.

### **Document No. 1**

15. This is an email dated 11th August, 2017 from Mr. Kenan Furlong, solicitor to Mr. Buckley which bears a heading "confidential and privileged". This document is described in the schedule as "an email from the respondent's solicitor to the respondent which relates to the Office of Director of Corporate Enforcement's (the ODCE) letter of 11th August, 2017 and the statutory requirement contained therein. The email evidences the respondent solicitor's advice to the respondent relating to content of the letter and the respondent's obligations in respect of same".

16. I have read the email. It falls within the description which I have just quoted and is privileged.

### **Document No. 2**

17. This document is the letter from the ODCE which was attached to document no. 1. The letter is the original letter from the Director to Mr. Buckley so no privilege attaches to that.

### **Document No. 3**

18. This is an email dated 14th August, 2017 from Mr. Kenan Furlong, solicitor to Mr. Derek Mizak which is headed "confidential and privileged". It is described as "an email from the respondent's solicitor to the respondent's IT expert, attaching the respondent's draft response to the ODCE statutory requirement which issued on 11th August, 2017. The email was sent for the purposes of advancing the respondent's draft statement and was sent on a confidential basis and without waiver of privilege by the respondent".

19. Having read the document I am of opinion that it is privileged. It was sent to Mr. Mizak for his input into the draft statement which was being prepared for Mr. Buckley in order to enable him to respond to the statutory Requirement from the Director.

### **Document No. 4**

20. This is the draft statement which was attached to document no. 3 and was prepared in the context of the legal advice being furnished to Mr. Buckley as to the preparation of his response to the Director's statutory Requirement. In my view, it is privileged.

### **Document No. 5**

21. This is an email of 15th August, 2017 sent by Kenan Furlong to Mr. Buckley and Derek Mizak. It is headed "confidential and privileged". It attaches a revised version of Mr. Buckley's draft response to the statutory Requirement of the Director. It was sent for "the purposes of advancing Mr. Buckley's draft statement". That is so. The document is privileged.

### **Document No. 6**

22. This is the attachment to document no. 5 and is the draft response. In my view this document is privileged since it is a version of

the draft statement and is the product of legal advice furnished to Mr. Buckley concerning his response to the Director's Requirement.

**Document No. 7**

23. These are emails of 15th August, 2017 sent by Mr. Mizak to Mr. Buckley and Mr. Furlong, solicitor, in response to a request made to him in respect of the draft statement. The response was in respect of a draft document which is covered by legal advice privilege. This email attracts similar privilege. It was sent for the purpose of "*advancing the respondent's draft statement*".

**Document No. 8**

24. These are emails of 15th August, 2017 from Mr. Kenan Furlong to Mr. Mizak and Mr. Buckley and conclude the chain of email correspondence dealing with the preparation of the draft statement. As both the draft statement and the email correspondence attract privilege so too do these documents.

**Document No. 9**

25. This is an email of 21st August, 2017 from Mr. Kenan Furlong to Mr. Mizak. It was sent for the purposes of preparing Mr. Buckley's response to INM in relation to the section 784 requirement made on 21st August, 2017 of INM. I am satisfied that this attracts legal advice privilege since Mr. Mizak was being consulted for input by reference to advice being furnished to Mr. Buckley by Mr. Furlong concerning Mr. Buckley's response to INM in respect of a statutory requirement from the Director.

**Document No. 10**

26. These are emails dated 21st August, 2017 from Mr. Furlong to Mr. Mizak and Mr. Buckley and Mr. Mizak's reply in the context of legal advice in respect of the preparation of Mr. Buckley's response to them in respect of the Director's Requirement to INM. They are privileged.

**Document No. 11**

27. These are emails from Mr. Mizak to Messrs. Furlong and Buckley and from Mr. Furlong to Messrs. Mizak and Buckley. They were exchanged in the context of and for the purposes of preparing Mr. Buckley's response to INM on foot of the Director's section 784 Requirement to that entity. All of this was done by reference to legal advice being tendered by Mr. Furlong. The documents are privileged.

**Conclusion**

28. All documents save number 2 are privileged and are not disclosable to the Director.