THE COURT OF APPEAL
UNAPPROVED

Record Number: 2023/9
High Court Record Number: 2020/66 COS
Neutral Citation Number [2023] IECA 226

Costello J.

Noonan J.

Faherty J.

IN THE MATTER OF THE COMPANIES ACT 2014

BETWEEN/

CORPORATE ENFORCEMENT AUTHORITY

APPLICANT/RESPONDENT

-AND-

CUMANN PEILE NA HÉIREANN "FOOTBALL ASSOCIATION OF IRELAND"

RESPONDENT

-AND-

JOHN DELANEY

NOTICE PARTY/APPELLANT

JUDGMENT of Mr. Justice Noonan delivered on the 25th day of September, 2023

1. The issue in this appeal concerns claims of legal professional privilege ("LPP") asserted by the notice party (Mr. Delaney) over certain documents seized by the applicant

on foot of a search warrant in respect of the premises of the respondent ("the FAI"). Mr. Delaney's assertion of LPP over in excess of 1,000 of the seized documents was rejected in its entirety by the High Court (Reynolds J.). Mr. Delaney brings this appeal against that judgment and a subsequent costs judgment of the High Court. At the time the High Court delivered its judgment on the 21st October, 2022, the applicant was the Director of Corporate Enforcement, also referred to as the ODCE, now replaced by the applicant in the title hereof and for ease of reference, I shall refer to the applicant throughout as the CEA. The FAI is not a party to this appeal.

Background facts and chronology

- 11th February 2020 – The CEA applied for and obtained a search warrant from the District Court authorising it to search the premises of the FAI.
- 14th February 2020 – the warrant was executed and various items were seized by the CEA's officers which included electronic equipment containing a digital work email folder created by Mr. Delaney, the FAI's former Chief Executive Officer.
- 17th February 2020 – the CEA issued a motion pursuant to s. 795(4) of the Companies Act, 2014 seeking a determination as to whether LPP attaches to the seized material. Although the motion was initially directed only to the FAI, Mr. Delaney was joined as a notice party some days later.
- 24th June 2020 – The court approved an examination strategy and some 285,000 files were identified.
- 6th July 2020 – A review of the material was commenced by Mr. Delaney's solicitor who was subsequently assisted by an IT expert. Initial examination took some six months until January 2021.

- 29th July 2020 – Mr. Delaney's solicitor identified about 29,500 documents which were claimed to potentially attract LPP.
- 10th November 2020 – On the application of the CEA, the court made an order pursuant to s. 795(6) of the 2014 Act appointing an experienced barrister ("the First Assessor") to examine the documents and prepare a report for the court on the question of LPP.
- 28th January 2021 – Mr. Delaney's solicitors wrote a letter to the Assessor, which became known as the "context letter" and to which I refer further below.
- 5th March 2021 – The High Court appointed a second counsel ("the Second Assessor") to assist in examining and reporting on the documents.
- 12th May 2021 – The Assessors' Report was delivered to the court upholding LPP in respect of 1,123 documents. This led to a further application by the CEA asserting the crime/fraud exception over these documents.
- 10th August 2021 – Having heard the parties on the latter issue, Reynolds J. delivered judgment declining to hold that it had been established that the exception applied.
- 22nd October 2021 – The court made an order giving liberty to Mr. Delaney's legal team to attend at the CEA's office and further inspect the documents over five days. The order further directed Mr. Delaney to swear an affidavit clarifying certain specified issues in relation to each document in response to questions raised by the CEA.

2. Following this order, a number of additional affidavits were sworn, a further hearing held and the judgment under appeal was delivered.

The Companies Act 2014

3. The warrant obtained by the CEA was one provided for under the provisions of s. 787(1) of the Act which provides that a judge of the District Court may issue a search warrant under this section if satisfied by information on oath made by a designated officer that there are reasonable grounds for suspecting that any material information is to be found on any premises. *"Material information"* is defined as including, inter alia, any books, documents or other things (including a computer) which the designated officer has reasonable grounds for believing may provide evidence of, or be related to, the commission of an offence under the Act. The investigation undertaken by the CEA is accordingly criminal in nature, but nothing further is known of the subject of the investigation or what or whom is being investigated.

4. The application in the present case is one that arises under s. 795 which defines *"information"* as being information contained in a document, a computer or otherwise and *"privileged legal material"* as meaning information which, in the opinion of the court, a person is entitled to refuse to produce on the grounds of legal professional privilege. Section 795(3) provides:

> *"The disclosure of information may be compelled, or possession of it taken, pursuant to the powers in this part, 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."*

5. It is evident from the very fact of this application that the CEA apprehends that the information in its possession which was seized from the premises of the FAI is, at least potentially, the subject of legal professional privilege. Subsection (3) requires the CEA to maintain the confidentiality of the information until the court has determined whether it is privileged legal material. The CEA is accordingly unaware at this juncture of the nature of the information on the computers it has seized.

6. Subsection (4) goes on to provide in relevant part as follows:

> *"Without prejudice to subsection (5)* [which does not arise here], *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 … 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 seven days after the date of disclosure or the taking of possession."*

7. The obligation on the person seizing the material to apply to the court is avoided if the person from whom the material was taken themselves make an application to the court for a determination concerning privilege, but that does not arise here.

8. It will accordingly be seen that s. 795 provides for a bespoke *sui generis* procedure to be availed of in order to obtain a determination from the court as to the privileged status of the information seized. As will be apparent from the cases I will shortly consider, a determination by the court of whether a communication benefits from LPP normally arises

in the context of inter partes litigation where pleadings define the issues between the parties. In that respect, the procedure involved in this instance is significantly different as there are no proceedings in being between the parties where the pleadings would assist in defining what is at issue and thus, in some cases at least, whether, for example, litigation privilege may attach to the communication concerned.

The Evidence before the High Court

9. A very large number of affidavits were exchanged between the parties in the course of this application but many are not relevant to the issues that arise in this appeal. From an early juncture following the appointment of the first Assessor, it is apparent that the Assessor was seeking information from Mr. Delaney's legal team in order to assist him in his task and in particular in reaching conclusions as to whether LPP attached to documents or not. It was with a view to providing this assistance that the context letter of the 28th January, 2021 was written by Mr. Delaney's solicitors to the then sole Assessor.

10. That letter had attached to it what are described as *"LPP schedules"* the purpose of which was to assist the Assessor in arriving at a conclusion concerning LPP. The context letter was in fact furnished to the Assessor on the 5th February, 2021. It was not however furnished to the CEA and this became a matter of considerable controversy. On the 16th February, 2021, Mr. Delaney's solicitors wrote to the Assessor making clear their objection to the context letter and schedules being furnished to the CEA. Various reasons were provided for this posture, including a suggestion that the LPP schedules had the potential to collaterally undermine Mr. Delaney's privilege in relation to the files in question. As matters transpired, at no time prior to the Assessors' report being completed and made available to the court in May 2021, was the CEA in possession of the context letter or made aware of its contents.

11. In an affidavit sworn on the 20th October, 2021, two days before the court made an order directing Mr. Delaney to swear a further affidavit responding to various questions raised by the CEA, Ms. Suzanne Gunn, Head of Criminal Enforcement in the CEA, swore an affidavit setting out the CEA's concerns about the Assessors' Report. In particular, Ms. Gunn explains in this affidavit that, having regard to the fact that Mr. Delaney was asserting personal LPP over documents on his employer's computer at its headquarters in Abbotstown, it was not anticipated that a large volume of documents would be involved.

12. She refers to the procedure agreed and directed by the court as to how the Assessors' Report would be dealt with and says:

> *"13. I say and believe that at the time the Director proposed the said procedure, and in light of the fact that the exercise in question involved assertions of privilege by Mr. Delaney in a private capacity within the confines of a work email folder, it was not within the Director's expectation that such a large volume of material would be subject to assertions of legal professional privilege. Indeed, throughout the currency of these proceedings, the Director has consistently, by way of correspondence, averment, and submission, been sceptical of such large amounts of material being subject to assertions of LPP by Mr. Delaney."*

13. Ms. Gunn went on to aver that following reviewing the Assessors' Report, it was not clear to the CEA on what basis they had recommended in favour of LPP. She also refers to the fact that the CEA only received the context letter for the first time six days earlier on the 14th October, 2021, some five months after the conclusion of the Assessors' Report. At para. 17 and 18 of her affidavit, she avers as follows:

> *"17. The context letter refers to the correspondence furnished by Eames Solicitors to [the First Assessor] on the 5th February 2021. This letter was subject to some*

significant controversy between the parties at the time and resulted in the short service of a notice of motion dated the 18th February 2021 by the Director for the provision by Mr. Delaney of a copy of this correspondence to the Director.

18. I say and believe, and as further elucidated in the paragraphs below, the Director has always understood, ***and indeed the court directed*** *that this material constitute defined, factual information underpinning Mr. Delaney's assertions of LPP in the within proceedings. However, as will be elaborated upon below, it transpires this correspondence actually contains substantive legal submissions addressed to the independent persons on a unilateral basis, without the knowledge or consent of the other parties to the proceedings, and in the absence of the other parties having an opportunity to make or to respond to those submissions. Further, it is entirely inappropriate that legal submissions be made in this manner, where any argument or submission in relation to the law should be dealt with by this Honourable Court."* (emphasis in original)

14. Ms. Gunn goes on to explain that while there had been an offer by Mr. Delaney's lawyers to make the context letter available as far back as February 2021, that offer was conditional upon undertakings being given by the CEA which it was felt could not be given having regard to the CEA's statutory functions. Ms. Gunn says that following receipt of the Assessors' Report, a wide range of queries was raised by the CEA with Mr. Delaney's lawyers in an effort to establish the basis upon which LPP was being asserted. She avers that this was not readily discernible from the Assessors' Report itself. She says that Mr. Delaney's legal representatives refused to disclose the information sought in the absence of significant undertakings which were completely unacceptable to the CEA as amounting to a fetter on the statutory functions of the office. Ultimately, it was only upon the urging of the

court, she deposes, that the context letter was made available to the CEA and only then with significant redaction.

15. At paragraph 30 of her affidavit, Ms. Gunn sets out the reasons why the CEA took issue with the contents of the context letter and these appear to me to have clearly fed into the terms of the order of the court of the 22nd October, 2021 so they should be set out fully:

> *"30. The Director takes significant and substantive issue with the contents of the context letter for a number of reasons, namely:*
>
> *(i) its contents are in direct contravention of the order of the court of the 3rd March 2021, which order was made by the consent of the parties in circumstances in which the context letter sets out matters far beyond those relating solely to factual matters and effectively contains substantive legal submissions addressed to the independent person. The legal submissions contained therein were made on a unilateral basis, without the knowledge or consent of the other parties to the proceedings, and without the other parties being given any opportunity to make or to respond to those submissions;*
>
> *(ii) the Director rejects the validity of much of the legal submissions in the context letter, upon which Mr. Delaney relies in seeking to influence the recommendations of the independent person. For example, Mr. Delaney appears to argue that: -*
>
> *(i) litigation privilege, as it applies to family law proceedings, is excluded from the temporal rule and is effectively permanent in nature, as proceedings*

relating to spousal maintenance, dependent children, and family property 'can never be said to be definitively concluded'.

(ii) The principles of 'dominant purpose' and 'temporal limitations', as they apply to regulatory privilege, are effectively disapplied and the independent person is urged, whether litigation is concluded or not, that litigation privilege attaches to material solely by virtue of potentially forming part of the ODCE's investigation or in any way forming part of this application.

(iii) The temporal limitations attaching to litigation privilege do not apply in circumstances in which the litigation was never actually instigated.

(iv) Mr. Delaney is entitled to assert privilege in a personal capacity over companies 'associated with him' and in respect of material in circumstances where he himself confirms that the law firm in question (A&L Goodbody) has stated that it acted not for him but for the FIA.

(iii) (sic) The manner and extent of the redactions made to the LPP schedules are inappropriate and unwarranted in that they appear to redact information that would not ordinarily attract legal professional privilege as

canvassed by Mr. Delaney (for example, what, in some instances, would appear to be record numbers);

(iv) (sic) such information is discernible from the LPP schedules appears to be erroneous, and inaccurate in places;

(v) (sic) the legal and factual basis upon which it is claimed that the material provided may breach the in camera rule such that it cannot be exhibited before the court is open to question."

16. Ms. Gunn goes on to say that on receiving the context letter, the CEA wrote to Mr. Delaney setting out in detail the nature of its concerns as already outlined, seeking disclosure of the LPP schedules in unredacted form and in particular, that Mr. Delaney confirm a clear and unambiguous list of outstanding litigation to which he is a party and for which he has asserted legal professional privilege for the purposes of the within proceedings. On this issue, she goes on to aver:

"34. Given that Mr. Delaney's legal representatives have been involved in the within process for in excess of 18 months now, six months of which were spent in the ODCE's offices reviewing tens of thousands of documents with the benefit of a team of digital forensics experts, and presumably having taken copious quantities of notes in relation to same, it would be expected that they would, at this remove, have detailed instructions relating to Mr. Delaney's outstanding litigation such to produce a clear and unambiguous list of ongoing litigation to which he is a party to disclosure to the ODCE and the court so as to facilitate the progress of the final s. 795 hearing without further delay."

17. These observations in Ms. Gunn's affidavit appear not to have been replied to by or on behalf of Mr. Delaney before the court made its further order herein on the 22nd of October 2021, to which I will refer as "the Disclosure Order". It is clear that the order was informed by the averments to which I have referred and it provided as follows:

"The court doth direct that –

1. The solicitor for the notice party, accompanied by junior counsel on behalf of the notice party, is given liberty to attend the office of the applicant between 10am and 6pm on the 28th and 29th October, 2021 and on the 1st, 2nd and 3rd November 2021 only, and on the same basis as previously directed, for the purpose of reviewing circa 1,120 documents that remain at issue between the parties, and to address questions raised by the applicant before this honourable court, in particular: -

The notice party is required to clarify with regard to each document:

i. in respect of which litigation privilege is claimed

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

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

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

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

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

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

2.(i) That thereafter and no later than close of business on the 10th November 2021, the notice party will file an affidavit addressing the matters referred to at (1) above …"

18. It seems therefore clear from the terms of this order that the court was not prepared to simply accept the report of the Assessors and their conclusions concerning LPP having regard to the significant controversy that arose concerning the context letter which was never seen by the CEA at any time prior to the preparation of that report. It is self-evident that if the court were simply accepting the terms of the report as presented, the order of the 22nd of October 2021 would have been entirely superfluous. Instead, the court required Mr. Delaney to provide, upon oath, clear and cogent explanations of certain factual matters which could only be directly relevant to LPP and which could potentially enable the court to arrive at conclusions concerning the specific documents in respect of which this information and explanation was sought.

19. In response to this order, Mr. Delaney swore a further affidavit on the 9th November, 2021. Mr. Delaney did not appeal the order or suggest that it could not be complied with.

He avers that in response to the Disclosure Order, his legal team attended at the CEA's office over a period of five days and prepared a detailed report in Excel spreadsheet format, which is exhibited in Mr. Delaney's affidavit as "JD1". This report purports to amount to compliance with the Disclosure Order.

20. In his affidavit, Mr. Delaney avers that the affidavit is not a suitable forum for providing any kind of *"deep dive"* analysis of what the report contains or how the columns in it were populated for 1,123 items. He does however make some general statements regarding the documents, including that over half relate to family law proceedings and over a quarter to defamation proceedings. He says that 1,118, or the vast majority, are litigation privileged and 163 are legal advice privileged, 158 of which are also litigation privileged.

21. Mr. Delaney then goes on to make a number of complaints about the process in order to apparently explain why his report is sub-optimal. He says that his legal team were given insufficient time to prepare it, the access afforded them was inadequate and they were not provided with copies of the documents, and in respect of the latter point that an application would be made to the court for Mr. Delaney's legal team to be provided with copies. He describes the CEA's refusal to provide copies as *"intransigence".*

22. With regard to this issue, Mr. Delaney says the following at para. 22 of his affidavit:

> *"22. More importantly perhaps, failure to provide copies of the documents render it effectively impossible to make meaningful submission to the court for the purposes of its assessment of the LPP claim. This goes for all of the items that were the subject of the claim to privilege – including those which the assessors recommended were not privileged. The latest inspection process has merely highlighted the concerns that I have about the recommendations made by reference to individual documents."*

23. Mr. Delaney therefore asserts that, notwithstanding the months of access to the documents already provided to his lawyers, he is not in a position to explain to the court why LPP applies to *any* of those documents, while simultaneously maintaining nonetheless that they attract LPP.

24. This affidavit was replied to in the affidavit of Detective Sergeant Richard Byrne, the CEA's designated person and principal deponent for the purposes of the proceedings, sworn on the 24th November, 2021. He commences by referring to the fact that Mr. Delaney's lawyers and IT experts had been given access to the documents at the CEA's offices over a six month period between July 2020 and January 2021. Access was granted for a further three days between the 28th and 30th January, 2021 to provide the Assessors with contextual information to assist them in completing their report and finally for a period of five days from the 28th October, 2021 to further facilitate Mr. Delaney in complying with the Disclosure Order. He refers to the fact that the parties had agreed to the procedure to be adopted for the examination of the documents and this procedure had been sanctioned by the court.

25. Detective Sergeant Byrne then goes on to set out details of the information sought by the CEA from Mr. Delaney to justify the basis of his assertions of privilege, in particular in the context of litigation. He refers to the context letter and Mr. Delaney's refusal to provide it to the CEA on the grounds that it might undermine his privilege.

26. He avers that Mr. Delaney has not yet, either in his affidavit or the report exhibited therein, identified what litigation is currently ongoing, either to the CEA or to the court. In particular, Detective Sergeant Byrne refers to the Disclosure Order requiring Mr. Delaney *"to identify the litigation in respect of which each claim of litigation privilege is made"*. He avers that Mr. Delaney does not identify any specific litigation but rather provides

completely generic terms such as family, defamation/reputation, shareholder dispute, property advice and combinations of same. He offers the view that this does not comply with the order of the court.

27. He further observes that the same order required Mr. Delaney to clarify with regard to each document in respect of which litigation privilege was claimed whether the litigation was concluded. He notes that of the 988 documents over which Mr. Delaney has asserted litigation privilege, 910 are marked *"not concluded"*. He notes that this includes items going back as far as 2014. He further notes that the order required Mr. Delaney to clarify what he means with regard to each individual piece of litigation when the assertion is relied upon that it is concluded or not and in *"report JD1"* in 432 out of the 988 cases in which it is claimed that litigation is *"not concluded"*, the column is marked *"N/A"*.

28. Detective Sergeant Byrne analyses in some detail the claims of privilege as they appear in report JD1 in a number of other respects also. These include, inter alia, where the communications in question did not include a legal adviser as sender or recipient how they retained legal privilege and in respect of all but 7 of 289 such files, Mr. Delaney's answer is *"third party acted as legal advisor"* without further explanation. Other claims are based on statements such as *"prepared in the context of family law proceedings", "financial advisors contacted regarding legal issue",* and *"family/friend consulted regarding family law issue".* Detective Sergeant Byrne observes that Mr. Delaney's affidavit offers no evidence whatsoever as to any factual basis upon which such assertions might justify a claim of privilege. Another issue highlighted by Detective Sergeant Byrne is that Mr. Delaney's affidavit claims LPP in respect of communications with A&L Goodbody Solicitors, who dispute that Mr. Delaney was their client but rather that they represented the FAI.

29. He observes that despite Mr. Delaney's assertion in his affidavit that the absence of delivery to him of copy documents renders it impossible for him to make meaningful submissions regarding his LPP claims, this has not prevented Mr. Delaney from asserting privilege over the documents in question. He says that Mr. Delaney's affidavit does not set out the methodology used to tag documents as LPP and notes that in previous correspondence, Mr. Delaney's solicitors had adopted the approach of *"if in doubt, tag it"*. This would appear to suggest that if Mr. Delaney's lawyers were not in a position to establish definitively whether a document was LPP or not, they would claim that it was. Detective Sergeant Byrne offered the view therefore that Mr. Delaney had not complied with the terms of the Disclosure Order and said (at para. 36):

> *"36. In the context of the foregoing it is asserted on behalf of the Director that the onus is on the notice party to provide a basis upon which the court can make a finding that legal professional privilege attaches to each particular document, and in the absence of further clarity (and despite every opportunity being provided to the notice party to set out the basis for such assertion) the notice party has failed to engage at a level which would allow him to assert LPP before this Honourable Court."*

30. He goes on to outline the CEA's objection to providing copies of the documents to Mr. Delaney. He says that in the light of the extensive period of time already spent by Mr. Delaney's lawyers and IT experts on examining the documents, this is not necessary and further, it would be inappropriate to provide copies of potentially evidential material in a criminal investigation to a third party.

31. In a further affidavit sworn by Mr. Delaney on 2nd December, 2021, in response to misgivings evidently expressed by the court as to the sufficiency of report JD1, he says (at para 24):

"…my legal team and I have looked at revising the Report to provide more contextual information in relation to each of the individual litigations. Naturally, this exercise has involved inserting into the Report material that is somewhat conjectural and needs to be read subject to the proverbial 'health warning' and wide caveat as to its accuracy. However, as the Court has given a clear indication of its desire to see more information and I have attempted to provide this as best I can. I beg to refer to a copy of the revised version of the Report upon which and marked with the letter ***'JD4'*** *I have signed my name prior to the swearing hereof."*

32. It is evident from this statement that Mr. Delaney was by then in no doubt that the court was not accepting the Assessors' conclusions as they stood without further information from him. In another affidavit sworn on 11th March, 2022 responding to the new report JD4, Detective Sergeant Byrne exhibits a document at "RB1" which combines the Assessors' Report with report JD4 and colour codes the various categories of LPP claimed.

Judgment of the High Court

33. Having set out the factual background, the trial judge embarked on an analysis of legal professional privilege which I do not understand to be in dispute between the parties on this appeal and therefore gratefully adopt. Having looked at the relevant authorities, the judge observed that the onus lay upon Mr. Delaney to establish LPP saying:

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

45. Again, this can only be achieved by providing a comprehensive narrative of all the relevant facts pertaining to the documents in issue to facilitate a reasoned

analysis of the evidence and valid determination as to whether the documents are exempt from disclosure."

34. She then went on to consider when waiver of LPP might arise, the position regarding common interest privilege and the burden of proof. In that latter context, the judge cited passages from a number of relevant authorities including *Colston v Dunnes Stores* [2019] IECA 59 where Irvine J. (as she then was), speaking for this Court, said (at para. 45):

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

At para 61-62, Reynolds J. said:

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

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

62. Similarly, the [*Artisan Glass Studio Limited v Liffey Trust Limited* [2018] IEHC 278] *case referred to above, also set out what is required: -*

'... It is therefore essential that the court should be provided with sufficient material to enable it to properly and comprehensively assess that contention. Otherwise, the court will not be in a position to carry out the objective

determination which is required in accordance with the case law. Where a party claiming privilege fails to provide the necessary material to the court, the court may be left with no alternative but to conclude that the party in question has failed to establish the dominant purpose of the creation of the document'."

35. The judge went on to make observations about what was required of Mr. Delaney in terms of evidence to establish the LPP claimed by him:

"64. In essence, it is essential that evidence is proffered to the court to enable the court to establish that the relevant document was created at a time when litigation either existed or was reasonably apprehended, and that the dominant purpose of creating the document was that litigation.

65. In addition, and having regard to the principles as set out above, it is imperative that the party asserting privilege is the party entitled to make that assertion and is required to put such evidence before the court.

66. The issue arises in circumstances where Mr. Delaney has claimed privilege in respect of extant proceedings involving the FAI, in direct conflict with the FAI's position where it has averred that there is no continuing litigation involving it and Mr. Delaney. Where such conflict arises, the onus falls on Mr. Delaney to establish by evidence, firstly, that the litigation is ongoing and secondly, in the event that the litigation is over, that there is some reason why the privilege still exists.

67. Furthermore, where there appears to be more than one party to legal proceedings, e.g. the Olympic Council, FAI, etc, it is necessary for Mr. Delaney to

show that the privilege is his to assert. It is not simply a matter of asserting it by virtue of the fact that he is named as a party to the proceedings."

36. Again, I do not understand either party to this appeal to dispute the correctness of these statements of principle.

37. However, there is a significant dispute concerning the judge's determination to depart from the recommendations of the Assessors regarding LPP and it is therefore appropriate that I should set out in full the judge's observations on this issue:

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

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

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

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

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

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

> *'... receive further submissions from the notice party, based on him and his legal team being able to comprehensively refamiliarise themselves with the deemed LPP documents themselves.'*

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

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

38. The judge then turned to an analysis of the evidence and made specific reference to the terms of the Disclosure Order and Mr. Delaney's affidavit of the 9th November, 2021 in purported compliance therewith. Referring to Mr. Delaney's affidavit, the judge said:

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

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

39. The judge referred to Mr. Delaney's complaints about inadequate resources, inadequate time constraints, a failure to provide copy documents and so forth which she contrasted with what was described as the constructive approach adopted by the FAI which had long since completed the process in a markedly tighter time frame with less resources available to it. She then said:

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

40. The judge also referred to the fact that though the context letter was provided to the Assessors in February 2021, it was not subsequently furnished to the CEA until September 2021, although in fact it appears to have been October 2021. She refers to the other shortcomings in Mr. Delaney's affidavit and JD1 Report which are identified in Detective Sergeant Byrne's affidavit. She notes that in response to this criticism, Mr. Delaney in a further affidavit stated his belief that he had complied with *"the spirit of the order"* and again looks for copies of the documentation to enable him to comply fully.

41. She also refers to the fact that Mr. Delaney had said that his relationship with his former solicitors (A&L Goodbody and Patrick M. Goodwin & Company), had broken down and consequently he had no access to his legal files retained by those firms. The judge also

makes reference to the RB1 document referred to above and notes from a perusal of this document that most of the information directed to be provided pursuant to the court order is simply absent.

42. In the concluding section of her judgment, the judge carried out an analysis of the evidence and the principles to be applied, noting again that the onus remains on Mr. Delaney to explain all relevant facts and processes which led to the creation of the material in respect of which he asserts privilege so that the evidence can be tested and probed in due course. At para. 114, the judge said:

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

43. It is clear from this paragraph that the judge implicitly rejected the findings of the Assessors' Report on the basis that Mr. Delaney had provided insufficient evidence to allow the CEA to scrutinise his claims of privilege. As the judge said, the Disclosure Order was specifically directed towards the evidence that would be required to sustain the LPP claims, irrespective of what the Assessors had decided.

44. The judge also made clear that she did not accept the suggestion by Mr. Delaney that he required, yet again, more time to comply with the order, considering that this had a *"hollow ring to it".* Her view was that every opportunity had been afforded to Mr. Delaney and his legal team to adequately review the documents and put forward clear and cogent evidence as required by the court. She characterised the evidence which had been put forward by Mr. Delaney as *"no more than vague and nebulous claims which are wholly unsubstantiated. They are essentially so generalised as to lack substance and are devoid of*

any material evidence which could assist the Director and indeed this court with the task at hand." – at para. 116.

45. She then said:

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

46. The judge indicated that she agreed with the CEA's proposition that it was unnecessary for the court to go through each and every document to arrive at a conclusion, continuing:

> *"120. However, even if I am wrong in this, and having considered a random sample of documents from each category, I am left in the invidious position whereby I simply do not have the requisite information to carry out the necessary analysis and to scrutinise the documents in the manner as required before reaching a reasoned determination.*
>
> *121. To embark on the exercise as contended for by Mr. Delaney would prove fruitless, time consuming and utterly meaningless …"*

47. This led to the judge's final conclusion:

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

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

48. The judge added that in reaching that conclusion, she was mindful of the provisions of the Act which rendered disclosure of material obtained pursuant to a search warrant to anyone other than *"a competent authority"*, an offence and further that in the event that a prosecution ensues, it will be open to Mr. Delaney to raise the issue of privilege within the context of a criminal trial and similarly, it would be open to the Director to raise the crime/fraud exception at such trial.

The Appeal

49. I think it fair to say from the grounds of appeal and the written and oral argument before the court, that Mr. Delaney's primary complaint is that the High Court in substance and effect entirely disregarded the Assessors' Report without giving any reasons for doing so. Secondary to this contention is a complaint that if the High Court was going to reject the report of the Assessors in its entirety, it was at a minimum obliged to examine the documents in question before coming to a conclusion concerning their status.

50. Allied to that, it is said that the judge purported to examine a sample of the documents only without identifying the documents examined or the reasons for deciding that they were not privileged. Although perhaps less emphasis was placed on these grounds, Mr. Delaney also submits that the judge failed to correctly apply the appropriate legal principles in a case of this type and ought to have directed copies of the documents be made available to Mr. Delaney before deciding the matter.

51. Mr. Delaney's counsel submits that where there is a dispute as to whether LPP attaches to a document or not, the normal and correct procedure is for the court to examine the document before reaching a conclusion and the authorities they rely upon support that approach.

Legal Professional Privilege

52. As already noted, the parties are *ad idem* regarding the High Court's statement of the legal principles in relation to LPP, albeit that Mr. Delaney argues that having correctly identified the principles, the High Court incorrectly applied them. It is perhaps relevant to observe that although s. 795(1) of the Act expressly refers to the concept of *"legal professional privilege"*, it does not define that expression. In my view, the Oireachtas must be taken to have intended the expression to bear the meaning attributed to it by the relevant common law authorities since, were it otherwise, the Oireachtas would have so provided.

53. To summarise the principles identified by the High Court, LPP will generally attach to communications which:

(1) are made for the purpose of obtaining legal advice, as distinct from assistance, where:

(a) the communication is between a lawyer acting in a professional capacity and his/her client or the agent of such client appointed for the purpose of obtaining legal advice on behalf of the client, and

(b) the document is confidential. The document will generally lose its confidentiality and thus privilege if published to a third party unless

the third party has a common interest in the subject of the privilege, e.g., where the person claiming the privilege and the third party jointly retain a solicitor;

(2) are made in contemplation of litigation where the dominant purpose for which the document was created is litigation and where it is established:

(a) that the litigation was reasonably in prospect when the communication occurred;

(b) the litigation, or closely related litigation, is extant. If the litigation has concluded, there is in general no continuing privilege attaching to such communication;

(c) the communication is confidential.

54. Counsel for Mr. Delaney relied on a number of authorities in support of the proposition that it was incumbent on the High Court in this case to examine the documents in question before rejecting Mr. Delaney's claim of LPP.

55. In *Keating v RTE* [2013] IESC 22, the plaintiff sued RTE for defamation arising out of a Prime Time current affairs programme about the illegal importation of controlled drugs into the State which identified the plaintiff as being involved. RTE sought third party discovery from An Garda Síochána and the Customs and Excise division of the Revenue Commissioners. The discovery sought against Revenue included all documents referable to the plaintiff's involvement in the unlawful importation of controlled drugs into the State and all documents referable to the plaintiff's detention by an officer of Customs and Excise at Ringaskiddy on the 3rd June, 1998.

56. Revenue resisted the application on the basis that the information in the documents was obtained in confidence and disclosure would impact their ability to obtain it in the future.

It was also said that disclosure would be prejudicial to the ability of State agencies such as Customs and Excise to function successfully and also to the State's Witness Protection Programme. Revenue argued that since third party discovery is discretionary, the court should refuse an application where the claims of privilege are almost bound to succeed, and this was such a case.

57. The High Court held against Revenue who appealed to the Supreme Court, whose judgment was delivered by McKechnie J. In his judgment, he referred to the earlier decision of the Supreme Court in *Murphy v Dublin Corporation and the Minister for Local Government* [1972] IR 215, where the plaintiff had sought discovery of an inspector's report prepared for the Minister for the purposes of a compulsory purchase order. The Minister resisted the application on the basis that the document should be withheld on public interest grounds and he had so certified. Central to this submission was the claim by the Minister that as he had certified the document as one which should not be disclosed, that should be regarded as determinative of the matter.

58. That submission was roundly rejected by Walsh J. who held that it was solely a matter for the judicial rather than executive branch of government to determine the claim of privilege. A similar result was reached in *Ambiorix & Ors. v Minister for the Environment & Ors. (No. 1)* [1992] 1 IR 277 where the Supreme Court again held that the sole arbiter of the public interest in the production of evidence alleged by the Executive to be confidential and exempt from production is the judicial branch. Counsel for Mr. Delaney placed particular reliance on the following passage in the judgment of McKechnie J.:

> *"36. In the implementation of* [the Ambiorix] *principles the following practice has developed:*

(i) In general, where competing interests conflict the court will examine the text of the disputed document and determine where the superior interest rests: it will carry out this enquiry on a case by case basis;

(ii) this exercise may not always be necessary. On rare occasions, it may be possible for the court to come to a decision solely by reference to the description of the document as set out in the affidavit; that is, without recourse to an examination of the particular text of the document itself (Breathnach page 469);

(iii) in all cases however (and this is the crucial point) it will be for the examining court to both make the decision and to decide on what material is necessary for that purpose; finally

(iv) in performing this exercise, no presumption or priority exists as between conflicting interests.

37. As can therefore be seen, as a result of this constitutional position, which is mandated by the separation of powers and which permits of no exception, it is for the courts alone to resolve, in a justiciable setting, any conflict or tension which may arise between the public interest in the administration of justice on the one hand, and the public interest, howsoever articulated, which is advanced as a ground for non-disclosure of documents on the other. That being so, neither the Executive nor any other person can arrogate to themselves the power to make a decision such as the one in issue in this appeal."

59. Ultimately, the court held against Revenue on the basis that if it were to accede to its submission, it would effectively be making Revenue a judge in its own cause contrary to the

clearly stated principles in *Murphy* and *Ambiorix*. Consequently, the court directed that an order for discovery should be made against Revenue and the question of privilege claimed and disputed in the normal way at the appropriate stage.

60. Public interest privilege was also the subject of *McGuinness v Garda Commissioner* [2016] IEHC 549 where the plaintiff sued the Commissioner arising out of the execution of a search warrant issued by the District Court relating to premises owned by him. He sought production of the document relied upon to ground the application for the warrant, being a sworn information. This was resisted by the Commissioner on the ground that the document was protected by public interest privilege, namely in this case, informer privilege.

61. The application was not strictly arising in the course of discovery but rather by way of motion seeking an order compelling the Commissioner to furnish the plaintiff with a copy of the sworn information. In that instance, Keane J. noted that the application was being resisted on the basis that the document might identify the informant in question whereas in the court's experience, such documents tended to refer to confidential informants without actually naming or otherwise identifying them. In those circumstances, Keane J. proposed to examine the text of the sworn information to identify and weigh the competing interests in compelling or withholding its production.

62. It is unclear to me that either *Keating* or *McGuinness* are of particular assistance to Mr. Delaney in the circumstances of this case. Both of those cases were factually significantly different from this case, the issue being public interest privilege arising in the course of inter partes litigation and the court considered it appropriate to examine the documents in order to reach a conclusion as to which interest should prevail as between the plaintiff and the public body claiming the public interest privilege. It is understandable why the court in those cases felt it appropriate to examine the documents in issue, since the

validity of the claim of public interest privilege was likely to be readily ascertainable from the content of the documents themselves. Thus, for example, in *McGuinness* a reading of the document would have disclosed whether the informant was actually identified or identifiable from it, the issue highlighted by the court in its judgment. In any event, neither case is authority for the proposition that it is incumbent on the court to review documents in respect of which privilege is claimed before adjudicating on that claim, quite the contrary in fact.

63. Public interest privilege does not arise on the facts of this case and the LPP asserted by Mr. Delaney is one purely personal to him. With regard to *Keating*, it is however in my view of some relevance that McKechnie J. placed emphasis on the fact that it would be for the examining court to decide what material is necessary for the purpose of enabling it to decide on the privilege point. That appears to me to be precisely what the High Court decided in this case in making the Disclosure Order.

64. A judgment that did consider legal professional privilege and in particular litigation privilege more recently is *Artisan Glass Studio Limited v The Liffey Trust Limited and Ors.* [2018] IEHC 278. On the 2nd November, 2002, a fire occurred in the plaintiff's premises which caused extensive damage. The plaintiff claimed that the fire spread from the adjoining premises owned and occupied by the defendants. The defendants were insured by Aviva Limited who instructed loss adjusters to deal with the claims likely to arise, both in respect of the plaintiff and Aviva's own insured. The loss adjusters in turn engaged a firm of forensic scientists, Burgoynes, to inspect and report on these matters in relation to the fire including its likely origin and cause.

65. The plaintiff sought an order for discovery in the normal way and in their affidavit of discovery, the defendants disclosed two documents over which they claimed LPP being a

Burgoynes' inspection record of the 15th November, 2002 and a Burgoynes' report of the 20th March, 2003. In support of the claim for LPP, Aviva's solicitor swore an affidavit deposing that both documents had been created for the dominant purpose of the litigation and thus attracted privilege. At para. 3 of his judgment, McDonald J. succinctly stated the relevant considerations that arose in the context of claims for LPP:

> *"3. The parties are agreed that – based on the case law – the following questions and considerations arise on an application of this kind, namely: -*
>
> *(a) whether litigation was reasonably apprehended at the time the documents in question were brought into being;*
>
> *(b) whether the documents in question were brought into being for the purpose of that litigation;*
>
> *(c) If the documents were created for more than one purpose, the documents will be protected by litigation privilege in the event that the litigation was the dominant purpose;*
>
> *(d) the party claiming privilege has the onus of proving that the documents are protected by privilege."*

66. Notwithstanding the fact that Aviva's solicitor deposed on affidavit that both documents were prepared for the dominant purpose of litigation, McDonald J. held that this was something that was to be objectively determined and for that purpose, the defendants made the documents available to the court. The judge concluded that at the time both documents were created, litigation was reasonably apprehended and it then became a question of determining whether the dominant purpose for which the document was created was the litigation. In the case of Burgoynes' inspection record, the court concluded that the

evidence, including the document itself, did not establish that it was created for the dominant purpose of litigation. However, in respect of the Burgoynes' report, having considered its contents, the court was satisfied that the dominant purpose for its creation was in fact litigation.

67. Counsel for Mr. Delaney laid emphasis on the fact that in order to determine the question of privilege, the court in *Artisan Glass* had regard not only to the affidavit evidence but to the documents themselves or *"the materials"* before the court. McDonald J. said (at para. 28):

> *"28. The question which I therefore have to consider, on the basis of the materials before the court, is whether Aviva has demonstrated that the dominant purpose of the Burgoynes' report and the record of inspection was apprehended litigation by third party claimants against* [the defendants] *in respect of the fire. In this context, it is very important to bear in mind that it is necessary for the party claiming litigation privilege over a discoverable document to prove that the dominant purpose for which the document was created is the litigation …*
>
> *29. In determining whether the defendant has discharged the onus of proving that the dominant purpose of a document was apprehended litigation of the kind mentioned above, the court is not bound by a bald assertion in an affidavit contending that litigation is the dominant purpose of a document. On the contrary, the question of dominant purpose is a matter for objective determination by the court …"*

68. One of the difficulties identified by the court in that case was that the affidavits sworn on behalf of Aviva, while they averred that the dominant purpose for which the documents were created was litigation, did not identify what the other purposes were.

69. McDonald J. also explained why the onus lies upon the party asserting privilege to establish it in the following terms (at para. 33):

> *"33. As stated above, the onus lies on the party claiming privilege to prove that the dominant purpose for which the document was brought into existence was to enable his solicitor to prosecute or defend the anticipated litigation. The observations of Lord Wilberforce in Waugh v British Railways Board [1980] AC 521 and Finlay CJ in Smurfit Paribas Bank Limited v A.A.B Export Finance Limited [1990] 1 IR 469 must be borne in mind. If the public interest in the due administration of justice is to be overridden by the public interest in ensuring that the parties to litigation can properly prepare their case, the party claiming privilege must be in a position to justify that claim. As Lord Wilberforce made clear, to carry the protection of litigation privilege into cases where the litigation purpose is secondary or equal with another purpose would be excessive and unnecessary."*

70. He then went on to consider how the court should assess the dominant purpose in the passage already cited in the judgment of Reynolds J. and quoted above. As noted already, McDonald J. ultimately concluded, contrary to what had been averred on behalf of Aviva, that it had not objectively been established that the record of inspection created by Burgoynes was created for the dominant purpose of litigation. *Artisan Glass* was approved and applied subsequently by this court in *Colston v Dunnes Stores* [2019] IECA 59.

71. Counsel for Mr. Delaney contends that *Artisan Glass* is clear authority for the proposition that the court cannot, in a contested case, properly determine the question of LPP without having regard to the particular document in issue itself. I do not accept that that is necessarily the case. There may well be cases, and *Artisan Glass* was one, where an inspection of the document itself, coupled with the other evidence before the court, enabled

the court to come to a conclusion on LPP, but that is by no means a universal requirement. As Clarke CJ observed in *A.P. v Minister for Justice and Equality* [2019] 3 IR 317, at 331, a case also concerning public interest privilege, *"if it is considered necessary, the court may itself look at the documents concerned to enable the court to make an appropriate assessment."* It may be that the evidence adduced (or not adduced, as the case may be) is such as enables the court to conclude that a claim of privilege has not been made out without the necessity of the court inspecting the documents.

72. Whether a review of the documents is necessary or even helpful must depend on the circumstances of each case. Clearly the facts in this case involving in excess of 1,000 documents in litigation which is not inter partes are very far removed from the two documents examined by the court in *Artisan Glass*.

73. In my view, this becomes even more obvious when one has regard to the particular claims advanced in this case by Mr. Delaney as set out in Report RB1.

Report RB1

74. Report RB 1 is a composite document which, as already indicated, combines the Assessors' Report with report JD4. It is in a spreadsheet format containing 21 columns marked A to V. Columns A to J comprise the original Assessors' Report while columns L to V encompass report JD4. The columns have the following headings:

(a) Document ID

(b) File Name

(c) File Type.

(d) To

(e) Cc

(f) From

(g) Subject

(h) Communication Date

(i) Tags

(j) Comment

(k) [There is no column under this letter]

(l) Document Name

(m) Legal Advice Privilege

(n) Litigation Privilege

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

(p) 1(b) Litigation Privilege – Whether each and every piece of such litigation is concluded

(q) 1(c) Litigation Privilege – What the notice party means with regard to each individual piece of litigation when the assertion is relied upon by the notice party that the litigation is concluded.

(r) 2. Where third parties are copied on many of the documents how such documents retain legal professional privilege

(s) 3. Where communications do not include a lawyer or legal advice as either the sender or recipient how such documents retain LPP

(t) 4. Whether assertions of privilege are made in Mr. Delaney's personal capacity or whether any privilege that might exist is for the respondent or other parties to assert.

(u) Redaction Required

(v) Comment

75. As can be seen from the above, columns L to V explicitly incorporate the terms of the Disclosure Order.

76. In their written submissions to this Court on the appeal, counsel for Mr. Delaney annexed to the submissions a schedule containing ten sample documents which they submit demonstrate that the High Court had ample information available to it upon which to reach conclusions as to whether the documents in question were privileged or not. The CEA in its submissions has likewise responded in the case of each of the 10 sample documents which I will now consider. The CEA also makes the point that this submission was not made to the High Court nor were the 10 documents drawn specifically to its attention. It should also be remembered that each of these 1,123 documents were found to benefit from LPP by the Assessors.

77. For illustration purposes, in the case of the first of the ten documents, I will set out the entries in each column in full:

(a) NX-JD-0013

(b) Re: *[Address of a property given]*

(c) Microsoft Outlook note

(d) John Delaney – jdelaney@fai.ie

(e) --

(f) Marion McGee – marion.mcgee@sheridanquinn.ie

(g) Re: *[Same address as at (b) above]*

(h) Friday 14 December 2018 at 15:21:42 GMT

(i) Nolan N. dataset 1 – Yes (LPP) (NN)

(j) Legal advice – LPP applies

(l) NX-JD-0013

(m) Yes

(n) Yes

(o) Family

(p) Not concluded

(o) --

(r) N/A

(s) Prepared in context of family law proceedings

(t) JD personal

(u) Possible redaction

(v) Property transaction and valuation for *[address of same property at (b) and (g) above]* and also litigation privilege - family law matter, 05 separate emails Banking info - BOI statements

Counsel for Mr. Delaney submit that this document is designated as being subject to both litigation and legal advice privilege. It relates to Mr. Delaney's ongoing family law issues resulting from the dissolution of his marriage and says that it relates to proceedings that have not been concluded. It relates to the status of a property that forms part of the subject matter of his family dispute and it represents communication for the purpose of obtaining legal advice and assistance. Counsel for the CEA on the other hand submit that Mr. Delaney fails to identify the litigation concerned or even each of the relevant documents. The documents do not appear to have been prepared by lawyers yet Mr. Delaney does not explain how they should benefit from legal advice privilege. He does not explain how documents which appear to include a property valuation, bank *"info"* and bank statements are privileged. It emerged during the course of the hearing of this appeal that Mr. Delaney's marriage was dissolved a number of years ago, but there is no explanation as to how these documents continue to enjoy litigation privilege.

78. The terms of the Disclosure Order required Mr. Delaney to identify the litigation in respect of each claim of litigation privilege. One would reasonably have thought that at a minimum, this involved identifying the parties to the litigation and the record number of that litigation. Beyond attaching the description *"family"* to this document, Mr. Delaney gives no further information which might assist in identifying the litigation and thus whether litigation privilege might attach.

79. Indeed, it is not even clear whether there are one or more pieces of litigation involved. In the comments section, Mr. Delaney does not identify how many individual communications are comprised in this document beyond stating that there are five separate emails. He refers to Bank of Ireland statements as being documents benefitting from litigation privilege. There could be one or a hundred statements involved, but in any event, such bank statements could not conceivably have been prepared in the context of family law proceedings as he appears to suggest.

80. In exchanges with the court during the hearing of the appeal, counsel for Mr. Delaney conceded that bank statements would not attract LPP and yet this is clearly and unambiguously claimed as a privileged document by Mr. Delaney. Even were that not the case, one of Mr. Delaney's core complaints about the approach of the trial judge is that she failed to examine the individual documents in order to determine whether privilege attached to them or not. It is entirely unclear to me how examining a bank statement could possibly be of assistance in determining whether LPP attached to it. The same goes for other items including a property valuation.

81. In short, it seems to me that in relation to the claim of privilege made for this document, there is a total failure on the part of Mr. Delaney to comply in any meaningful way with the requirements of the Disclosure Order. Where explanation is clearly called for, none is

forthcoming. It seems somewhat extraordinary that even after months of analysis of documents by his lawyers and IT experts, Mr. Delaney appears quite unable to accurately identify even his own family law litigation. Accordingly, despite having been given every opportunity to advance his claim for privilege, and having been specifically directed as to what was required to sustain that claim, it seems to me that Mr. Delaney entirely failed to advance any evidence either on affidavit or otherwise which might have enabled the court to conclude in his favour. I now turn to consider the remaining nine documents.

Document X-JD-0165 - This document is stated to have been sent to Mr. Delaney by Ms. Rea Walshe. The court was informed that Ms. Walshe was then a solicitor in the employment of the FAI. Litigation privilege is said to attach to this document and under column (o) it is stated *"Family law/defamation proceedings/settlement agreements/MAXIMUM Media Network Limited T/A Sports Joe/Irish Daily Mail/IMN"*. The litigation is said not to be concluded and under columns (r) and (s) appears *"Rea Walshe acted as legal advisor."* Under column (v), the document is described as *"case summary"*.

In the course of his evidence on affidavit in this application, Mr. Delaney stated that two firms of solicitors represented him, namely A&L Goodbody and Patrick M. Goodwin & Company, the latter in relation to his family law proceedings. Yet he entirely fails to explain in relation to this document how Ms. Walshe, an FAI employee, could have been acting as his legal advisor in relation to, inter alia, *"family law"*. He refers to multiple sets of proceedings which are evidently unrelated to each other without identifying any record numbers, how many different sets of proceedings are concerned, or who the parties were to any of those proceedings.

He does not explain how a settlement agreement could attract litigation privilege or how, in the light of such settlement agreement, the litigation concerned could still be described as *"not concluded."* The description of the document as *"case summary"* is entirely uninformative, gives no indication of whether one or multiple communications are involved and fails to explain why Ms. Walshe, acting as Mr. Delaney's legal advisor, was summarising cases in which she presumably did not appear as a lawyer and thus explaining how litigation privilege could possibly attach to this document. Here again, there is a total failure on the part of Mr. Delaney to comply with the order of the court or establish any basis upon which the court could come to the conclusion that this document was privileged.

NX-JD-0320 - This document is described in the Assessors' Report as *"Draft Will 2018.pdf"* It is claimed by Mr. Delaney to be subject to both legal advice privilege and litigation privilege. The columns dealing with the date of the document, by whom and to whom it was sent are all left blank. Under column (o), the litigation is described as *"family law - advice re. Will"*. The relevant litigation is described as being *"not concluded"*. It is difficult to understand how a draft will, without more, can constitute legal advice, particularly when the provider of that advice is unknown.

It is equally difficult to understand how a draft will could be created in contemplation of litigation and if it was, how that could be its dominant purpose. None of these matters are explained by Mr. Delaney when an explanation is clearly called for and there is no obvious reason why Mr. Delaney should not be able to provide such explanation. Finally, it is difficult to see how a perusal of a draft will by the court without the benefit of any context could enable the court to come to a conclusion

about privilege. There is clear non-compliance with the order and no basis established for the privilege claim.

NX-JD-0713 - This is said to be a draft letter, incorrectly described in Mr. Delaney's submissions as a settlement agreement. Although described as a letter, the date of the document is not given nor are the parties by whom and to whom it was sent identified. Column (o) again refers to merely *"family"* and (p) *"not concluded"*. Although litigation privilege only is claimed, the Assessors appear to have concluded that legal advice privilege applied. In column (b), the comment appears "1 doc - letter to FAI re. discovery". The FAI is clearly not a party to Mr. Delaney's family law proceedings. Column (s) requires Mr. Delaney to explain how a communication that does not include a lawyer or legal advice as either the sender or recipient retains LPP. That column is left blank by Mr. Delaney. This does not comply with the order and no basis is established for a claim of privilege.

NX-JD-0958 - Although this document is described as *"Re: Call - without prejudice"* it is said in column (b) to comprise four emails. These were sent by Niall McGarry - niall.mcgarry@maximummedia.ie to John Delaney - jdelaney@fai.ie. They are said to be litigation privileged and the litigation is identified in column (o) as *"Defamation/Reputation Maxim Media"*. Column (p) is populated with the initials "tbd" presumably meaning "to be determined." Mr. Delaney explains that he is not in a position to state whether the proceedings are definitively concluded in the absence of access to the files of his former solicitors. As before, column (s) requires Mr. Delaney to explain how such documents retain LPP where the communication does not include a lawyer or legal advice. This is left blank. While Mr. Delaney may well not have access to the files of his former solicitors, it is difficult to

understand how he is not in a position to explain how emails passing between non-lawyers could come into being for the dominant purpose of litigation. This again amounts to a failure to comply with the order. Further, it is difficult to see how an examination of these emails could assist in circumstances where nothing is known of the litigation. Even the commencement date of the litigation, for example, may have relevance as against the date of the communication. Further, as the communication ostensibly appears to be between the parties to the litigation, it is difficult to see how it could benefit from litigation privilege. None of these matters are explained or commented upon in any way by Mr. Delaney and thus no basis for privilege has been established.

NX-JD-1498 - This document is said to be an email from Paddy Goodwin to Karl Heffernan, an employee of the FAI . Mr. Delaney is copied on the email. Mr. Delaney claims that this email is subject to legal advice privilege with regard to litigation which he identifies as *"shareholder dispute"*. The parties to the litigation are not identified. No attempt is made to explain how an email sent to a primary recipient other than Mr. Delaney himself could benefit from legal advice privilege. The court order requires Mr. Delaney to explain how LPP attaches to documents copied to third parties and in this instance, he has left column (r) entirely blank. Thus, the claim of privilege to this document is not made out.

NX-JD-1573 - This document comprises four emails from Marion McGee of Sheridan Quinn Solicitors to Mr. Delaney. They are dated the 3rd May, 2016. Mr. Delaney claims that litigation privilege attaches to these emails and they relate to *"family"* litigation, again not identified. Mr. Delaney claims that this litigation is *"not concluded"*. It seems to me that in circumstances where the communication

dates from some seven years prior to Mr. Delaney's report JD4, and Mr. Delaney's family proceedings resulted in dissolution of his marriage some years ago, how these documents continue to enjoy the benefit of litigation privilege is at the very least questionable. No explanation for this is forthcoming beyond that originally advanced on behalf of Mr. Delaney to the effect that family law proceedings can never be said to be concluded, a patently untenable proposition. In the absence of knowing anything about the litigation in question, it would be impossible for the court to conclude that privilege had been established in this instance.

NX-JD-1593 - This document is described as *"Re: Accounts"* and apparently consists of four emails sent by Mr. Goodwin to Mr. Delaney on the 28th April, 2016. The documents are claimed to benefit from both legal advice and litigation privilege. Litigation is identified as *"family/shareholder dispute/defamation"* which appears on its face to refer to at least three different sets and types of proceedings. However, as in every other case, none of the proceedings are identified, even by reference to the parties. It is not obvious how emails concerning accounts apparently prepared in the context of three quite disparate forms of proceedings, even assuming that to be the case, could benefit from either legal advice or litigation privilege. At a minimum, this calls for an explanation by Mr. Delaney but as in all other cases, none is forthcoming. As before, the examination of emails is likely to be of little assistance in the absence of any knowledge of the proceedings to which they are said to relate.

NX-JD-1963 - This document is said to comprise three emails and is described as *"Re: Bank details"*. The emails were sent by Mr. Goodwin to Mr. Delaney on the 15th April, 2015. Mr. Delaney claims that these emails benefit from both legal advice and litigation privilege. The litigation is identified as *"related to advice on litigation*

and property matters - family law?". Whether this is intended to be a reference to more than one piece of litigation is unclear and the question mark suggests that Mr. Delaney does not himself appear to know the answer. How then it could be said that this establishes that the dominant purpose for which the documents were created was litigation is a mystery. As in previous cases, the litigation, whatever it may be, is stated to be *"not concluded"* which, given the antiquity of the communications, raises obvious questions that are not answered. Nor is it explained how *"bank details"* could ever be the subject of either legal advice or litigation privilege. The privilege claim fails.

NX-JD-2119 - This document bears the description *"L2C - Blank letter to client - 215577.doc"*. The date and the identity of the sender and receiver are all left blank. Mr. Delaney claims that legal advice privilege attaches to this document and in column (o) appears the word *"property"*. In column (v) he has inserted *"Ballyglass - 1 doc"*. One is therefore left to speculate that this is some form of advice concerning a property at Ballyglass. However, it is cryptically referred to as a blank letter that is undated and has no sender or recipient. In particular, there is nothing to suggest that it emanates from a lawyer. How then it can be said to benefit from legal advice privilege is left quite unexplained. As in all other cases, the onus rests upon Mr. Delaney to establish his claim of privilege which in this case would require him to show that the document emanates from a lawyer, comprises legal advice as opposed to legal assistance, and is confidential. As none of these things are established, the privilege claim cannot succeed.

Conclusions

82. The procedure under s. 795 for determining questions of legal professional privilege is, as previously explained, bespoke. It requires the court to adjudicate on the privilege status of documents seized under the section in pursuit of a criminal investigation where, as here, the nature of the investigation or the party the subject of it may not be known.

83. This distinguishes it to a significant degree from the facts in the cases cited by the parties here which all concerned inter partes litigation in the public and private law spheres. In such cases, the issues between the parties are defined by pleadings to which the court can look when determining questions of privilege. The court does not have that advantage in a s. 795 application and it becomes all the more important that it should have the benefit of sufficient contextual evidence to adjudicate on the status of any particular document. The onus of providing that evidence rests on the party asserting the privilege.

84. As has been seen, the issues in *Keating* and *McGuinness* concerned public interest privilege said to attach to one document. It was clearly open to the court to examine the document in order to determine which public interest privilege should prevail as between the protection of confidential communications for security and other reasons and the availability of evidence to further the proper administration of justice.

85. *Artisan Glass* concerned two documents both created as a result of the fire the subject matter of proceedings where the pleadings were closed and discovery had been ordered. In that case, the High Court examined the two documents in order to reach a conclusion as to whether, in the light of the extant proceedings, it could be said that they had been created for the dominant purpose of litigation. In reaching its conclusion, the court relied on both the affidavit evidence and the contents of the documents themselves to base the conclusion that one was privileged and the other was not.

86. These cases are clearly far removed on their facts from the situation pertaining here where hundreds of thousands of documents were the subject of seizure pursuant to an undefined criminal investigation. For the reasons I have already explained when dealing with the sample documents identified above, it is not in any way clear to me that the court's task would have been advanced by examining the documents themselves, in the light of the clear failure by Mr. Delaney to provide any meaningful context for virtually all of the documents in respect of which he claims privilege.

87. I therefore reject the suggestion that the court had an obligation to consider each document individually before adjudicating on the privilege question. The authorities make clear that the court has a discretion to examine documents if the court considers it necessary or advantageous to do so to enable it to reach a conclusion. No authority was opened to the court to the effect that this was mandatory, as, in essence Mr Delaney asserted. The authorities indicate otherwise.

88. In the present case, Mr. Delaney complains that the judge did in fact examine a random selection of documents but did not identify them and this, it was said, is an impermissible approach. I disagree. The judge could in my view have legitimately elected not to examine any of the documents but chose to do so in a number of cases with a view to ascertaining whether it might be possible to reach conclusions on privilege based on what the documents themselves contained. She evidently concluded that this was not possible and there was therefore nothing to be gained by looking at them all.

89. In my view, the judge was entitled to arrive at this conclusion. Sight should not be lost of the fact that the judge had been closely involved in the management of these proceedings for a lengthy period and had already delivered several judgments relating to various issues that had arisen along the way. It seems to me that the judge's decision to

refrain from examining all 1,123 documents, many of which comprise multiple communications and items, was one that was well within the range of judgment calls available to the judge (especially in light of her long familiarity with the case and the issues arising) and thus one to which this court should afford a significant margin of appreciation, in line with many recent authorities of this Court and the Supreme Court. This appeal is of course not a rehearing of the matter and the onus rests upon Mr. Delaney to establish an error of principle by the High Court or an injustice arising in the manner in which the High Court exercised its discretion.

90. I think it fair to say that the primary error said by the appellant to arise here is the total failure of the High Court to offer any reasons for rejecting the Assessors' Report in its entirety. I think there is some validity in this criticism. Section 795(6)(b) provides for the appointment of an assessor for the purpose of examining the information in issue and preparing a report for the court with a view to assisting or facilitating the court in making a determination as to whether the information is privileged. The report of an assessor prepared under the section does not enjoy any particular status and the court must remain free to accept or reject its conclusions.

91. As the trial judge pointed out, the determination of the privilege question is one for the court and the court alone. While the judge characterised the report as *"simply a tool to be utilised by the court to aid its considerations"*, I do not think the court by this meant to suggest that the court was entirely free to disregard the report without giving any reasons for doing so. Whether one describes the report as a tool, an aid or some sort of preliminary advice, it must in my view enjoy some status as a report commissioned on foot of a statutory power expressly conferred by the Act. It cannot simply be dismissed with a wave of the hand.

92. The task undertaken here by the two professional Assessors was a significant one in that it involved an examination of almost 3,000 items, many of which, as already observed, comprised multiple documents and communications. The Assessors devoted some six months to the task which clearly involved significant public expense. Their ultimate conclusion was that approximately one third of the documents enjoyed the benefit of LPP. Given the volume of documentation involved and what were undoubtedly time and cost constraints, it was not feasible for the Assessors to do more than express a conclusion in respect of each particular document, without giving reasons for arriving at that conclusion. That in itself proved to be problematic in the light of subsequent events. Had the report been presented to the court in May 2021 and at that stage rejected by the court without further ado or explanation, clearly a difficulty would arise.

93. However, as I have been at some pains to point out, that is not in fact what happened. It is clear that from an early juncture, significant controversy arose concerning the context letter. The, then sole, Assessor quite properly sought information from Mr. Delaney to assist in the task of putting into context the documents he was being asked to assess from a privilege perspective. Indeed, that was what Mr. Delaney was subsequently directed to do, albeit in considerably more detail, on foot of the October 2021 Disclosure Order. The difficulty with which the Assessor was presented was that Mr. Delaney's solicitors refused to provide the context letter save under guarantee of confidentiality from the Assessor on the stated premise that if the letter were disclosed to the CEA, it would undermine Mr. Delaney's claims of privilege.

94. Whether that be so or not, it left the Assessor with little option in order to fulfil his mandate. The obvious difficulty with that however was, and subsequently transpired to be, that the Assessors' Report was prepared on the basis not just of contextual information, but

legal submissions made on behalf of Mr. Delaney to which the CEA was not privy and in respect of which it was afforded no opportunity to respond. It is self-evident that this had the potential to fundamentally undermine the conclusions of the Assessors and with the benefit of hindsight, it may have been preferable to seek the guidance of the court on this issue before the report was finalised.

95. It is somewhat extraordinary that it was only several months after the report was presented to the court that the CEA had sight for the first time of the context letter which clearly immediately gave rise to the concerns that are set out in the affidavits and correspondence to which I have already referred. It is obvious that those concerns were shared by the court as they formed the basis of the Disclosure Order. It is clearly evident from the terms of the order itself that the judge was not prepared to accept the conclusions of the Assessors at face value for the reasons highlighted by the CEA. Were it otherwise, there would have been no need for the Disclosure Order.

96. It seems to me that that order was made with a view to addressing the imbalance between the parties that had been created by the insistence of Mr. Delaney's lawyers that the Assessors not disclose the context letter to the CEA, thereby depriving the CEA of making any responding submissions to the Assessors. In substance and effect, it represented a clear conclusion by the court that the report of the Assessors could not be relied upon. Indeed, had the court proposed to simply accept the Assessors' Report and findings without further ado, it would undoubtedly have been open to the CEA to challenge the report and any findings of the court based on it.

97. It is unsatisfactory that the High Court did not give specific reasons for rejecting the conclusions of the Assessors. It is an undesirable state of affairs that this Court should be left in the position of having to speculate about the reasons for this outcome. However, in

the unusual circumstances of this case, it is in my judgment possible to infer those reasons with a sufficiently high degree of confidence. The reasons are manifest from the making of the Disclosure Order, itself clearly based on the objections of the CEA to the Assessors' Report.

98. In effect, the order reset the parameters within which Mr. Delaney's claims of privilege would fall to be determined.

99. It seems to me that many of Mr. Delaney's complaints in this appeal are in reality complaints about that order and his ability to comply with it. Thus, he says that he needed more time, better access, copies of documents and so forth before he could be expected to meaningfully assess his own documents and provide the relevant evidence to the court.

100. The difficulty with that proposition is that Mr. Delaney chose not to appeal the Disclosure Order and cannot now be heard to complain of what it required of him. Further, the process for examining the documents had long since been agreed and the subject of an order of the court concerning the examination strategy. It is far too late for Mr. Delaney to now suggest that he has been unfairly disadvantaged by that strategy or, in particular, that fairness required that he be provided with copies of the documents. The High Court concluded that there had been no unfairness to Mr. Delaney in relation to the process for examining the documents. He was afforded unfettered access for six months by his lawyers and forensic IT experts to the documents in addition to being provided with extensive IT facilities at the offices of the CEA together with two further periods of access, the latter of which led to the production of report JD4.

101. I think one must not lose sight of the fact that although there were a very large number of documents involved initially, the sole purpose of Mr. Delaney's lawyers spending six months examining them was to identify LPP documents. This ought to have involved a

consideration of the very issues that were the subject of the court's Disclosure Order, whether at that stage they had been spelled out or not. These were not new requirements that emerged out of the blue and took Mr. Delaney by surprise. They were no more than what the law required of him from the outset. Consequently, I agree with the comment of the High Court that Mr. Delaney's complaints about subsequently being only afforded a few days to attend at the offices of the CEA to comply with the order have a somewhat hollow ring.

102. While Mr. Delaney's lawyers were not permitted to take copies of the documents for reasons that have already been considered, his lawyers and IT consultants were free to make whatever notations or memos they considered appropriate in relation to relevant material. When it came to seeing the same material for a second or even third time, one assumes that the task of complying with the order ought to have been significantly easier. It is perhaps not without significance that throughout all of this process, Mr. Delaney did not personally attend at any of the inspections. Had he done so, one might reasonably have thought that he might have been in a position to give considerable assistance to his lawyers in identifying privileged material and the basis upon which he claimed such privilege.

103. Bearing in mind that, for example, more than half of the material over which LPP is claimed by Mr. Delaney relates to what are described as *"family"* proceedings, it is remarkable that Mr. Delaney has entirely failed in any instance to give details of those proceedings or how they could be regarded as still extant. Even if he does not have access to the files maintained by his original solicitors, it is surely not beyond the ken of Mr. Delaney or his current lawyers to conduct a search in the Central Office to identify the record number of the relevant proceedings, the parties and their current status. None of this was done nor was any explanation offered as to why not.

104. The manner in which Mr. Delaney has chosen to assert privilege over certain of the documents has, perhaps by design, rendered it virtually impossible for the CEA to meaningfully interrogate the claim of privilege. It is very difficult to my mind to avoid the conclusion that Mr. Delaney's manifest failure to comply with the order of the court is not due to circumstances beyond his control but is rather a deliberate attempt to shield documents from disclosure which he does not wish to disclose.

105. I share the trial judge's view that the failure to comply with her order is near total.

106. For all these reasons, I would therefore dismiss this appeal.

The Costs Judgment

107. Following delivering judgment in the substantive issue, Reynolds J. ruled on the disposition of costs in an *ex tempore* written judgment delivered on the 24th November, 2022. The CEA sought the costs of the entire proceedings. Mr. Delaney conceded the issue of costs in relation to the final hearing concerning the privilege issue only and sought his costs in what he described as the separate modules prior to the final hearing. The judge referred to the relevant principles as now set out in s. 169(1) of the Legal Services Regulation Act, 2015 with particular reference to the conduct of the parties. In this regard, the judge observed (at para. 15):

> *"15. Notwithstanding the length of the proceedings, the volume of affidavit evidence, and the time afforded to the notice party to assess and consider the documents, the notice party failed to discharge the burden of proof in respect of any of the impugned documents for privilege."*

108. She referred to the judgment of this Court in *Chubb v The Health Insurance Authority* [2020] IECA 183 and the judgment of the High Court in *Veolia Water UK Plc v Fingal County Council (No. 2)* [2007] 2 I.R. 81.

109. The judge observed that the CEA was required to bring the application pursuant to its statutory obligations under s. 795(4). She said that the notice party sought to be joined to the proceedings and engaged legal representation throughout. Notwithstanding the lengthy process, Mr. Delaney failed to establish privilege in relation to a single document. The judge commented that the applications to appoint the Assessors were precipitated by the length of time taken by Mr. Delaney to conduct the review process and were entirely warranted.

110. Mr. Delaney consented to the First Assessor being appointed but objected to the second which prolonged matters and incurred unnecessary costs. With regard to the crime/fraud application hearing, although the CEA was unsuccessful on the basis of there being insufficient information before the court, and Mr. Delaney might in the normal way have had a good argument for obtaining his costs, she concluded that having regard to the overall manner in which the proceedings were conducted on his instructions, she was of the view that the appropriate order in respect of that aspect was no order as to costs.

111. Accordingly, the court made an award of costs in favour of the CEA in respect of the entire proceedings, including any reserved costs, save and except for the costs incurred in relation to the crime/fraud application in respect of which no order as to costs would be made. She directed that the costs would include all costs associated with the appointment of both assessors.

112. In his appeal, Mr. Delaney advocates for a module based approach to the costs as follows.

113. Module 1 is said to relate to the joinder of Mr. Delaney whom the CEO failed to put on notice from the outset. He suggests that this failure should entitle him to the costs of this module.

114. Module 2 relates to a number of applications before the court which led up to the devising and approval of the examination strategy. Mr. Delaney complains that the CEA initially put forward an entirely unrealistic time frame for carrying out the inspection which he resisted successfully. He further says that the CEA unsuccessfully opposed his application to have a forensic IT expert involved in the examination. He claims to have substantially succeeded in this module.

115. Module 3 according to Mr. Delaney relates to the appointment of the Assessors which he claims not to have opposed and consequently at a minimum, there should be no order as to costs.

116. Module 4 related to the crime/fraud exception in which he says he was fully successful and should get his costs.

117. Finally, Module 5 relates to the substantive determination of the privilege claims in which Mr. Delaney accepts that he was unsuccessful and accordingly costs should follow the event.

118. The CEA in response also relies on both sections 168 and 169 of the 2015 Act and *Chubb European Group* in support of its contention that the trial judge was entitled to take an overall view of the matter and made a discretionary order with which this court should not interfere.

119. Many recent judgments of this Court have restated the principle that where costs orders are concerned, this Court will be slow to interfere absent a clear error of principle or evident

injustice. This approach guides the appellate court, while recognising that it retains its own discretion to depart from the order of the High Court in an appropriate case. Thus, in *Heffernan v Hibernia College Unlimited* [2020] IECA 121, Murray J., speaking for this Court, said (at para. 30):

> *"It is also clear that the exercise by the High Court of its discretion in calibrating these various considerations should not be lightly upset by an appellate court: As the Supreme Court has most recently explained in the context of the balancing exercise undertaken by a trial court in making discovery orders 'it should not be overturned on appeal unless the appellate court is satisfied that the determination of the court below is outside the range of judgment calls which were open to the first instance court.' (Waterford Credit Union v J & E Davy [2020] IESC 9 at para. 6.3). The exercise of such restraint by an appellate court has been repeatedly stressed in the context of first instance decisions in respect of costs … However, and at the same time, an appellate court retains jurisdiction to interfere with a costs order where the trial judge has erred in principle, or failed to attach weight to the appropriate factors relative to the particular decision in hand."*

120. The onus accordingly rests squarely on Mr. Delaney to demonstrate that the costs order made by the High Court in this instance was not one which was within the range open to that court. Although he places significant reliance on the *Veolia* judgment, that must now be viewed in the context of the subsequent enactment of the 2015 Act which confers a wide discretion on the court to have regard to the matters in s. 169(1) which provides, insofar as relevant here:

> *"(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court*

orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including -

(a) conduct before and during the proceedings,

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases …"

121. As the trial judge observed, the default position under s. 169 is that an entirely successful party will in the normal way be entitled to recover their costs against the unsuccessful party subject to the court's discretion to be exercised having regard to the factors identified in s. 169 which include (but are not limited to) those identified in the section.

122. The present proceedings arise from a unique statutory procedure under s. 795 where the issue, and the only issue, to be determined by the court is whether any of the seized material enjoys the benefit of LPP. This issue was contested by Mr. Delaney at both great length and expense and the outcome in the High Court and again in this Court is that he has failed to establish LPP in respect of a single document out of some 285,000 files. The default position therefore is that Mr. Delaney should be responsible for all the costs incurred in reaching that end point.

123. It is not clear to me that there is any justification for the modular approach advocated by Mr. Delaney in terms of the costs. Each of the items he seeks to characterise as *"modules"* appear to me to be in reality what was described by Clarke J. (as he then was) in *ACC Bank Plc v Johnston* [2011] IEHC 500 as *"steps on the road"* to the final determination.

In my view therefore, Mr. Delaney has not established that the High Court went outside the range of orders legitimately available to it in the exercise of its discretion on the question of costs by applying a unitary approach to the procedure as a whole.

124. The only exception made by the trial judge was in respect of the crime/fraud hearing on the application of the CEA and as the judge herself recognised, Mr. Delaney might in the normal course of events have had a good argument for seeking those costs. However, she declined to award them in his favour by virtue of the manner in which the proceedings were conducted on his instructions in a clear reference to s. 169(1)(a) and (c). I can see no basis upon which it could be said that this was not an order that was properly within the High Court's discretion to make. Many criticisms of Mr. Delaney's approach to the proceedings are evident from the terms of the judgment of the High Court and most particularly, his failure to comply in any meaningful way with the terms of the court's Disclosure Order.

125. In my judgment, the High Court acted well within its discretion in deciding that this conduct disentitled Mr. Delaney to an order in his favour in respect of the crime/fraud exception and he has established no basis upon which this Court would be justified in interfering with that order. As I have previously mentioned, the High Court heard this application over a very lengthy period of time which involved a huge number of affidavits and multiple court appearances. The trial judge was thus in a far better position than this court to evaluate the manner in which Mr. Delaney had conducted himself in relation to the proceedings.

126. In those circumstances, I would decline to interfere with the costs order in this case.

127. With regard to the costs of the appeal, as the CEA has been entirely successful, it would seem to follow that it should be entitled to its costs. However, if Mr. Delaney wishes to contend for an alternative form of order, he will have a period of 21 days from the date of

this judgment to make a written submission not exceeding 1,000 words and the CEA will have a similar period to respond likewise. In default of such submission being received, an order in the terms proposed will be made.

128. As this judgment is delivered electronically, Costello and Faherty JJ. have authorised me to record their agreement with it.