

THE HIGH COURT

[2019] IEHC 953

[2019 No. 156 COS]

[2019 No. 282 COS]

IN THE MATTER OF THE COMPANIES ACT 2014

AND

IN RE THE MATTER OF CUMMANN PEILE NA hÉIREANN

**"THE FOOTBALL ASSOCIATION OF IRELAND"
AND PART 13 OF THE COMPANIES ACT 2014**

BETWEEN

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND

CUMMANN PEILE NA hÉIREANN

"THE FOOTBALL ASSOCIATION OF IRELAND"

RESPONDENT

AND

BETWEEN

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND

DELOITTE IRELAND LLP

RESPONDENT

JUDGMENT of Ms. Justice Reynolds delivered on the 30th day of July, 2019

Introduction:

1. These are applications by the Director of Corporate Enforcement ("the Director") seeking determinations as to whether information produced by the Football Association of Ireland ("the Association") and Deloitte Ireland LLP ("Deloitte") in response to requests issued by the Director pursuant to s.778 and s.780 of the Companies Act 2014 ("the Act") contain privileged legal material.
2. On the 19th April, 2019, the Director issued a direction pursuant to s.778 of the Act to the Association to produce the minutes of the Association's Board of Directors and Committees of the Board for the period 1st January, 2016 – 21st March, 2019 inclusive.
3. The Association complied with the direction and delivered documents to the Director on the 1st May, 2019, including a small number of documents (10 in total) over which it claimed legal professional privilege. It does not claim privilege over the entirety of each document but rather over limited passages within them.
4. On the 20th May, 2019, the Director issued a further requirement pursuant to s.778 of the Act to produce additional documentation. Again, in delivering documents to the Director, the Association has identified certain documents over which it has claimed legal professional privilege.
5. On the 10th May, 2019, the Director issued a direction to Deloitte pursuant to s.780 of the Act to provide certain documentation. On the 11th June, 2019, following the expiration of the statutory time limit set out in the prior notification, a second direction issued to Deloitte and documentation thereafter was produced on the 18th July. It has

also claimed legal professional privilege on behalf of the Association over certain documents. The documents referred to above (16 in total) are the subject matter of this adjudication. At all material times the confidentiality of the documents has been maintained by the Director pending the Court's determination.

The Statutory Provisions:

6. The statutory provisions relevant to these applications are to be found in part 13 of the Act.

7. Section 795(3) provides that: -

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

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

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

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

(b) who has taken possession of it,

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

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

9. The Director has brought the within applications within s.795(4) seeking a determination of the Court as to whether the documents contain privileged legal material.

Claim as to Privilege:

10. Since the initial application came before the Court there has been what is described as "constructive engagement" between the parties. Further, it was agreed that all applications would be dealt with together. A booklet of papers together with a sealed envelope containing the documents over which privilege is claimed was provided to the Court in advance of hearing submissions from the parties.

11. At the outset, it was conceded by the Director that for the purposes of this application only and on a without prejudice basis that Ms. Walsh, an employee of the Association, was at all material times acting in her capacity as legal adviser to the Association.
12. Thereafter, the Court heard submissions from Mr. Murphy, Senior Counsel for the Association in respect of each of the relevant passages within the documents over which privilege is claimed.
13. By way of summary, the Association's position is that the passages attract legal professional privilege, some by way of legal advice privilege and others by way of litigation privilege.
14. The exercise conducted by the Court was to consider the documents in light of the claims to privilege made by the Association and Deloitte on its behalf. If I am satisfied that the passages within the documents attract legal professional privilege, then they are to be redacted to ensure that they remain unseen by the Director. If, on the other hand I am not so satisfied that the claim of privilege has been made out, then the passages in the documents fall to be disclosed to the Director unredacted.
15. Having considered each of the documents by reference to its description in the schedule, I have made the following determination: -

Document no. 1

These are the Minutes of a Meeting of the Board of Management dated the 16th February, 2016. The two passages within the document requiring the Court's adjudication refer to legal advice furnished to the Association and are therefore privileged.

Document no. 2

These are the Minutes of a Meeting of the Board of Management dated the 1st November, 2016. The first passage refers to advice furnished by Ms. Walsh, the Association's legal adviser in relation to prospective litigation and is privileged. The second and third passages refer to the merits of two ongoing sets of litigation and again are privileged.

Document no. 3

These are the Minutes of a Meeting of the Board of Management dated the 20th June, 2017. The Minutes record legal advice received by the Association from Ms. Walsh with regard to ongoing litigation and is privileged.

Document no. 4

These are the Minutes of a Meeting of the Domestic Committee dated the 5th December, 2017. The sole passage in this document over which privilege is claimed refers to the necessity to seek legal advice over certain issues. However, it cannot be said that it records any specific legal advice or indeed refers to any pending litigation. Therefore, no privilege attaches to it.

Document no. 5

These are the Minutes of a Meeting of the Board of Management dated the 18th January, 2018 and the Court is directed to a single passage on the third page of the Minutes. This records legal advice received by the Association from Ms. Walsh and is privileged.

Document no. 6

These are the Minutes of a Meeting of the Board of Management on the 13th February, 2018. This passage consists of legal advice and a proposed litigation strategy furnished by Ms. Walsh and is privileged.

Document no. 7

These are the Minutes of a Meeting of the Board of Management dated the 20th April, 2018. The passage over which privilege is claimed is a single sentence which records legal advice received by the Association from Ms. Walsh and is therefore privileged.

Document no. 8

These are the Minutes of a Meeting of the Board of Management dated the 4th February, 2019, and again the Court is concerned only with a single sentence on page 5 of the document which records legal advice received by the Association from Ms. Walsh and is therefore privileged.

Document no. 9

These are the Minutes of a Meeting of the Board of Management dated the 4th March, 2019, and the Court is only concerned with two passages contained on page 7. Both passages refer to legal advice furnished by Ms. Walsh to the Association and are privileged.

Document no. 10

These are the Minutes of a Meeting of the Board of Management dated the 21st March, 2019. I have considered the three passages on the first and second pages of the document. Each passage refers to legal advice which has been sought by the Association and are therefore privileged.

Document no. 11

This is an untitled three-page document which appears to refer to undated Minutes of a Meeting of the Board of Management. I have considered the three relevant passages which refer to outside legal advice obtained from A&L Goodbody and are therefore privileged.

Document no. 12

These are the Minutes of the Emergency Meeting of the Board of Management dated the 15th April, 2019. The first passage refers to a meeting with A&L Goodbody on a particular matter but doesn't disclose any legal advice nor does it attract litigation privilege therefore no privilege attaches to it. The following two passages however refer to advice that was furnished at the meeting and are privileged. Further, the last matter for consideration refers to advice to be sought

from A&L Goodbody but does not actually refer to any legal advice received, nor is it covered by litigation privilege so no privilege attaches.

Documents 13-16 inclusive

These are documents produced by Deloitte and are duplicates of documents no. 2, 3, 5 & 6 above in respect of which I have already made a determination.

Conclusion:

All passages of the documents, save for those referred to at numbers 4 & 12, are privileged and are not disclosable to the Director.