



## Keeping privileged legal material under lock and key

Investigatory privilege confirmed by the High Court

February 2018

The President of the High Court, Mr Justice Peter Kelly, delivered judgment in the case of *The Director of Corporate Enforcement –v- Leslie Buckley*<sup>1</sup> on 6 February 2018. The case concerned a determination sought by the Director of Corporate Enforcement (the “**ODCE**”) as to whether information produced by Leslie Buckley in response to a request from the ODCE contained privileged legal material.

The request was made by the ODCE pursuant to section 780 of the Companies Act 2014 (the “**Act**”) which sets out the power of the ODCE to require a third party to produce books or documents.

The documents sought formed part of an investigation by the ODCE into a whistleblower complaint in Irish News and Media where Leslie Buckley was formerly Chairman. In summary, it was argued by Mr Buckley that the documents over which privilege was claimed were documents produced during the course of an investigation by the ODCE for the purpose of obtaining instructions and giving legal advice and in contemplation/ furtherance of litigation and an investigation by the ODCE.

The ODCE received the documents from Mr Buckley on 17 November 2017 which included 11 documents in respect of which privilege was claimed. 10 of the 11 documents were held by President Kelly to attract privilege. The only document found by Mr Justice Kelly not to be privileged was a letter from the ODCE which was attached to an email that was held to be privileged.

The documents over which privilege was claimed related to a separate request from the ODCE from 11 August 2017 concerning a cost reduction exercise, in particular the engagement of a specialist IT company. One of the documents in particular was described as an email from Mr Buckley’s solicitor to an IT expert, attaching Mr Buckley’s draft response to the ODCE’s request dated 11 August 2017. The email was also described as being sent for the purposes of advancing Mr Buckley’s draft response to the ODCE and was sent on a confidential basis and without any waiver of privilege. Mr Justice Kelly held that the email is privileged as it was sent to the IT expert for his input into the draft response to the ODCE.

The judgment of Mr Justice Kelly provides further clarity on the scope of documents that will attract privilege in the context of inquiries and investigations, and clearly further establishes the principle of investigatory/regulatory privilege and how privilege is not waived when communicating with experts.

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1 [2018] IEHC 51

2 [2015] IEHC 315

3 [2008] IEHC 119

Investigatory privilege was previously confirmed by the Commercial Court in the 2015 case of *Quinn v Irish Bank Resolution Corporation Limited and Kieran Wallace*<sup>2</sup> which held that the scope of litigation privilege extends not only to documents created for the dominant purpose of anticipated litigation, but also to documents created in contemplation of a criminal or regulatory investigation. Similarly in the case of *Ahern v Mahon*<sup>3</sup>, the plaintiff was held to be entitled to claim litigation privilege in respect of communications between him and his legal advisers and experts retained by him for the purposes of the inquiry proceedings.

The logic behind the application of privilege is the principle that a person must be able to consult his lawyer in confidence and be sure that what he tells his lawyer in confidence will never be revealed without his consent. The recent decision of Kelly P highlights the fact that an individual involved in a regulatory investigation is entitled to take expert advice (ie IT, accountancy) and demonstrates the importance of maintaining a claim of privilege over any such communications.

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