



LITIGATION AND DISPUTE RESOLUTION

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# Regulatory Privilege

by **Muireann Granville**

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29th June 2021 | by Muireann Granville

Legal professional privilege (LPP) is a rule of evidence which gives a party the right to refuse to disclose a document on the grounds of a special interest recognised by law.

In essence this means that the document is protected from review or inspection by others. LPP encompasses two distinct forms of privilege: legal advice privilege (LAP) and litigation privilege (LP).

LAP protects confidential communications between lawyers and their clients which concern the seeking, giving and receiving of legal advice.

LP covers confidential communications created with the dominant purpose of being used in aid of or obtaining legal advice from a lawyer about actual or anticipated litigation.

In the context of regulatory investigations, there are a number of provisions in Irish legislation which enable regulators to request documentation from regulated entities and individuals. The Irish courts recognise that communications which are privileged – whether because of LAP or LP – do not have to be disclosed in the course of a regulatory investigation.

The Law Society of Ireland has confirmed that ‘regulatory’ or ‘investigatory’ privilege may be validly asserted in respect of communications that take place in response to a regulatory investigation undertaken by the Central Bank of Ireland (CBI) or a law enforcement agency, for example, the Office of the Director of Corporate Enforcement (ODCE).

## The courts and case law of interest

In *Ciara Quinn v IBRC and Kieran Wallace*<sup>[1]</sup>, which involved investigations by the CBI and the ODCE, the High Court accepted that the first defendant was entitled to assert regulatory privilege in respect of any documents brought into being for the dominant purpose of engaging with those regulatory and investigative processes.

The judgment in *Re Independent News and Media and Director of Corporate Enforcement v Leslie Buckley*<sup>[2]</sup> affirmed the position that clients can consult their lawyers in confidence and that LP can apply in the context of statutory or regulatory investigations.

In a decision of the UK Court of Appeal last year in *Sports Direct International plc v The Financial Reporting Council*<sup>[3]</sup>, the Financial Reporting Council (FRC) was investigating the auditors of Sports Direct, who had shared certain privileged documents with its auditors on a limited basis. The FRC sought to carve out an exception to LPP on the basis of a “no infringement” argument, i.e. that the documents sought by the regulator were not being used in a regulatory investigation against Sports Direct and therefore should be disclosed. The Court of Appeal rejected the arguments of the FRC and held that any incursions into the law of privilege must be principled and clear so as not to undermine the confidence of the client in non-disclosure. In addition, the Court clarified that there are only two exceptions to LPP – the iniquity exception (i.e. where the document was generated for the purposes of crime or fraud) or where there is a statutorily prescribed exception. As neither exception applied, the Court held that the trial judge had made an error in ordering the disclosure of privileged documents to the regulator.

We believe that the Irish courts would take a similar stance as the Court in *Sports Direct* in light of the Irish

court's affirmation that LPP, once it is established, is absolute by reason of important principles of public policy, including in a regulatory context. This will be of comfort to any client under regulatory investigation.

However, caution should be exercised in terms of refusing disclosure of documents to the CBI even where a claim to privilege can be validly made. The CBI's Guidance on Administrative Sanctions Procedures published in 2019 advises that "regulated entities" (a definition which includes both present and former regulated financial service providers, as well as persons presently or formerly concerned in their management) must be open and cooperative with the CBI and notes that where there has been exemplary self-reporting, this will ordinarily be treated as a mitigating factor. In certain situations, therefore, it may be advisable for a regulated entity to disclose privileged documentation to the CBI.

It has been established that privileged documents can be shared for a limited purpose, pursuant to the principles in *Fyffes v DCC*<sup>[4]</sup>, which held that disclosure of documents covered by LPP to a third party will not destroy the privilege, even where such disclosure is made to obtain an advantage, where there is not sufficient nexus between the matter for which the documents were disclosed and the action in which it is claimed that the privilege was destroyed.

Therefore, in certain circumstances, a regulated entity/individual may decide to share privileged documents on a limited basis with the CBI, in order to cooperate with information requests, without being deemed to have waived its privilege.

### **Comment**

Careful consideration must be given to claims of LPP in any regulatory investigation. The importance of instructing lawyers at the earliest opportunity cannot be overstated. Correspondence exchanged in the context of a lawyer-client relationship can provide the client with the valuable protection of LPP. In addition, it is crucial that legal advice is obtained on the disclosure of potentially privileged documents during the course of an investigation.

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<sup>[1]</sup> [2015] IEHC [IEHC 315](#)

<sup>[2]</sup> [2018] IEHC 51

<sup>[3]</sup> [2020] EWCA Civ 177

<sup>[4]</sup> [2005] 1 IR 59

## About the Author



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Muireann advises on a wide variety of general and commercial litigation disputes including contract disputes, construction disputes and property litigation, disputes in relation to complex financial structures, professional negligence claims and intellectual property disputes.

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