

**THE HIGH COURT**

[2021] IEHC 141  
[2020 No. 66 COS]

**IN THE MATTER OF THE COMPANIES ACT 2014**

**BETWEEN**

**DIRECTOR OF CORPORATE ENFORCEMENT**

**APPLICANT**

**AND**

**CUMANN PEILE NA H-ÉIREANN  
"FOOTBALL ASSOCIATION OF IRELAND"**

**RESPONDENT**

**AND**

**JOHN DELANEY**

**NOTICE PARTY**

**JUDGMENT of Ms. Justice Reynolds delivered on the 2nd day of March, 2021.**

**Introduction**

1. This is an application brought on behalf of the Office of the Director of Corporate Enforcement ("ODCE") seeking directions pursuant to s.795(6) of the Companies Act 2014 varying the previous Order of this Court dated 10th November, 2020 and providing for, *inter alia*, the appointment of up to five additional people with suitable legal qualifications to carry out the functions of examining the information and preparing a report for the court in the manner prescribed by the section, together with other ancillary relief.

**Background**

2. Further to the Director's application on 11th November, 2020, this Court directed, *inter alia*, the appointment of Mr. Niall Nolan BL pursuant to s.795(6) of the Act of 2014 for the purposes of: -
  - (i) Examining the reviewed material ("the LPP Material") over which an assertion of privilege has been claimed by the notice party ('Mr. Delaney') and the respondent ('the FAI'), and
  - (ii) preparing a report ('the Report') for the court with a view to assisting or facilitating the court in the making of a determination as to whether or not the LPP Material constitutes privileged legal material pursuant to s.795 of the Act of 2014.
3. In addition, the Court made an Order, with the consent of all parties, providing for the preparatory process of the Report by Mr. Nolan as follows: -
  - (i) The ODCE to automatically generate schedules of the material over which an assertion of privilege has been made by the respondent and notice party ('the Schedules') for provision to each of the parties. If required by the parties, the subject line is to be omitted from the Schedules so as to avoid revealing any potentially privileged material and/or to ensure the redaction of the Schedules is not necessitated.

- (ii) Mr. Nolan to be provided with copies of the said Schedules and access to all of the substantive material underpinning the Schedules by way of the Nuix System.
  - (iii) Mr. Nolan to engage in a review of the material itemised within the Schedules for the purpose of preparing a report to assist or facilitate the court in making its determination as to whether the material is in fact privileged legal material.
  - (iv) The Report to include a recommendation by Mr. Nolan to the court with respect to each piece of material itemised within the Schedules as to whether each item does or does not constitute privileged legal material ('the Recommendations').
  - (v) The Report to be submitted to the court to assist or facilitate the court in its determination as to whether the material is privileged legal material.
  - (vi) A copy of the Recommendations to be provided to each of the parties to assist them in consideration of whether or not they wish to make legal submissions to the court with respect to any of the material itemised within the Schedules in advance of the court making any final determination as to whether each such item does or does not constitute privileged legal material.
4. Since the making of the Orders, Mr. Nolan has commenced his examination of the LPP Material.
5. Due to the complexity and volume of the material, Mr. Nolan advised the parties in correspondence that he would require the appointment of a further independent person pursuant to s.795(6)(b) of the Act of 2014 to assist in examining the reviewed material and to expedite the Report for the court. Mr. Nolan has further advised that even with the appointment of a second person to assist, his indicative timeline for the completion of the exercise is May or June 2021. He emphasised that the appointment of such a person would do little to affect cost as the total number of hours to complete the exercise would remain substantially the same but rather facilitate a much reduced timeframe.

**Appointment of Additional Persons Pursuant to s.795(6)(b) of the Act of 2014**

6. Section 795(6) of the Act provides: -

*"Pending the making of a final determination of an application under subsection (4) or (5), the court may give such interim or interlocutory directions as the court considers appropriate including, without prejudice to the generality of the foregoing, directions as to -*

- (a) *the preservation of the information, in whole or in part, in a safe and secure place in any manner specified by the court,*
- (b) *the appointment of a person with suitable legal qualifications possessing the level of experience, and the independence from any interest falling to be determined between the parties concerned, that the court considers to be appropriate for the purpose of -*

- (i) *examining the information, and*
  - (ii) *preparing a report for the court with a view to assisting or facilitating the court in the making by the court of its determination as to whether the information is privileged legal material". [Emphasis added].*
7. These provisions are found in part 13 of the Act, primarily dealing with investigations by court appointed inspectors and investigations initiated by the Director.
8. Section 795(6) gives the court broad, general powers to take such measures as the court thinks are necessary to assist in performing its functions under this section.
9. The applicant asserts that the powers set out in paras. 795(6)(a) and (b) are enumerated powers which exist without prejudice to the unenumerated powers specified in general terms at the beginning of the subsection. In other words, the applicant contends that just because the provision explicitly allows for the appointment of one person does not mean that it does not implicitly allow for the appointment of more.
10. On the other hand, the notice party contends that the contents of sub. (b) make it clear that only one person can be appointed and that the appointment of further persons is simply not permitted by the Act.
11. The respondent in the proceedings supports the view expressed by the applicant in respect of the provisions and submits that the list set out under s. 795 (6) is not an exclusive list and allows for the appointment of additional persons.

### **Statutory Interpretation**

12. It is well settled law that the first recourse that a court must have in interpreting a statutory provision is to look to its literal meaning.
13. As Denham J. stated in *Lawlor v. Flood* [1999] 3 I.R. 107 the use of the literal approach is part and parcel of the appropriate judicial respect for the separation of powers and the prerogatives of the legislature:

*"In applying the ordinary meaning of the words the court is enforcing the clear intention of the legislature. This aspect of statutory construction is an essential part of the separation of powers. Further, it is an illustration of appropriate respect by one organ of government to another."*

14. Departure from the plain, ordinary or literal meaning of the statutory text must be a last resort, generally where an ambiguity has arisen on the text. As Brandon J. put it in *Pawys v. Pawys* (as cited with approval by Barron J in *O'H. v. O'H.* 1990 2IR 588):

*"The true principles to apply are in my view, these; that the first and most important consideration in construing a Statute is the ordinary and natural meaning of the words used; that, if such meaning is plain, effect should be given to it; and that it is only if such meaning is not plain, but obscure or equivocal that resort should be had to presumptions or other means of explaining it."*

15. Accordingly, where the literal meaning of the words used is clear, it should be applied. However, where an ambiguity arises or where the literal meaning would lead to an absurdity or inconsistency, the court must look to alternative interpretations.

16. The Interpretation Act, 2005 ("the Interpretation Act") provides general rules for the interpretation of legislation.

17. Section 5 of the Interpretation Act states as follows: -

*"(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) -*

*(a) that is obscure or ambiguous, or*

*(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of -*

*(i) in the case of an Act to which paragraph (a) of the definition of Act" in section 2(1) relates, the Oireachtas, or*

*(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned, the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the act as a whole.*

*(2) In construing a provision of a statutory instrument (other than a provision that relates to the imposition of a penal or other sanction) -*

*(a) that is obscure or ambiguous, or*

*(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of the instrument as a whole in the context of the enactment (including the Act) under which it was made,*

*The provision shall be given a construction that reflects the plain intention of the maker of the instrument where that intention can be ascertained from the instrument as a whole in the context of that enactment".*

18. The section, therefore, provides that where an ambiguity arises or where a literal interpretation would be absurd, the provision must be given a construction that reflects *"the plain intention of the Oireachtas"*.

19. Further, where a literal meaning may appear to be inconsistent with or undermine the purpose of the legislation, the court may take a purposive approach which allows the court to interpret the provisions within the context of the Statute's purpose.

20. In the Supreme Court decision of the *DPP (Ivers) v. Murphy* [1999] 1 IR 98 at p. 110 Denham J discussed the approach in the following terms: -

*"Such an approach enables the court to consider the entirety of the Act or section when the literal interpretation produces an absurdity....*

*.....The rules of construction are part of the tools of the court. The literal rule should not be applied if it obtains an absurd result which is pointless and*

*which negates the intention of the legislature. If the purpose of the legislature is clear and may be read in the section without rewriting the section, then that is the appropriate interpretation for the court to take."*

### **Objection**

21. Counsel for the notice party contends that in applying the ordinary meaning of the Statute, an ambiguity arises because of the use of singular rather than the plural in the provision, insofar as: -
- (a) Section 795(6) states that one person may be appointed and one report prepared;
  - (b) it omits to state that any more than *one* can be appointed; and
  - (c) it stipulates that the power to appoint this one person is additional to the power to make orders of an interim or interlocutory nature; but
  - (d) it does not state what these orders are or whether they include the appointment of more than one person or not.

### **Discussion**

22. Undoubtedly, the starting point of the court's considerations must be to look at the literal meaning of the provisions of the section.

23. In considering the entirety of s. 795 (6), it is clear that the court "may give such interim or interlocutory directions as the court considers appropriate including, without prejudice to the generality of the foregoing, directions..." [Emphasis added]

Subsection (b) further provides that these powers include the appointment of a person for the purpose of examining the information and preparing a report. Such powers are specifically stated to be inclusive rather than exhaustive or limiting.

24. Accordingly, in applying the ordinary meaning to the words in the section, I am satisfied that the section facilitates the making of such directions as the court considers appropriate to assist it in reaching a determination in relation to these matters, including the appointment of additional persons, if necessary, pursuant to the section. In my view, to interpret it any other way would lead to an absurdity.

25. However, even if it was necessary to look beyond the literal meaning of the provisions as asserted by the notice party on the basis of some ambiguity, the matter is put beyond all doubt by reason of the provisions of s. 18 of the Interpretation Act which states as follows:

*"18.- The following provisions apply to the construction of an enactment:*

*(a) Singular and plural. A word importing the singular shall be read as also importing the plural, and a word importing the plural shall be read as also importing the singular;"*

26. Accordingly, there is no issue with the use of the singular in this section and it must be construed as also importing the plural.
27. In all the circumstances, I am satisfied that the court has jurisdiction to appoint further additional independent persons pursuant to s. 795 (6) (b) of the Act.
28. However, in exercising such jurisdiction, I am mindful that Mr. Nolan, who has already been appointed under the provisions, has sought the appointment of a second person to assist in examining the material due to the volume and complexity of same and to assist with the preparation of the Report.
29. The Director, however, has sought to vary the Order of the Court providing for the appointment of up to five additional people with a view to expediting the process.
30. Whilst I accept the need for expedition in these matters, I am mindful that Mr. Nolan who has commenced his examination of the relevant material is the person best placed to assess what additional resources are required to assist him in carrying out his functions pursuant to the relevant legislative provisions. He has already indicated that such additional resources, as he has requested, would facilitate a much reduced timeline for the provision of the Report. I am further conscious that the material concerned is potentially of a sensitive nature and that a targeted and focused approach by two individuals working closely together would in my view yield a more efficient and coherent Report within the timeline envisaged by Mr. Nolan. In all the circumstances, I propose to direct the appointment of one additional person pursuant to s.795(6) of the Act.

**Conclusion**

31. Accordingly, I will vary the Order of the 11th November, 2020 to provide for the appointment of an additional independent person pursuant to s. 795 (6) of the Act and will hear further from the parties in that regard.