THE HIGH COURT

[2023] IEHC 318

[Record No. 2021/104COS]

IN THE MATTER OF BROCK DELAPPE LIMITED

AND

IN THE MATTER OF AN APPLICATION UNDER SECTION 212

OF THE COMPANIES ACT 2014

BETWEEN

KEVIN DELAPPE

APPLICANT

AND

DAVID BROCK, DECLAN COSGRAVE AND BROCK DELAPPE LIMITED

RESPONDENTS

JUDGMENT of Mr Justice Mark Sanfey delivered on the 18th day of April 2023.

Introduction

1. This judgment relates to an application by the respondents, David Brock, Declan Cosgrave and Brock Delappe Limited (‘**the company**’), in relation to documents which have come into the possession of the applicant, Kevin Delappe, and

have been exhibited by him to an affidavit sworn in the course of the proceedings. While a wide variety of reliefs is sought by the respondents in their notice of motion, the essential relief sought is an injunction restraining the use or dissemination of, or reliance upon, these documents on the basis that they are the subject of litigation and/or legal advice privilege. The respondents maintain that the documents were improperly obtained by the applicant, and should not have been exhibited. The applicant's position is that, for a number of reasons, the court should not regard the documents as privileged.

2. This dispute takes place in the context of proceedings pursuant to s.212 of the Companies Act 2014. The applicant, a director, employee and 33% shareholder of the company, considers, *inter alia*, that the affairs of the company have been conducted by the first and second named respondents in a manner oppressive to him and in disregard of his interests as a member of the company. The role of the company as a respondent to the s.212 application was a matter of some debate at the hearing; the applicant contended that the company was joined as a respondent solely to render it amenable to any orders the court might make, such that there was no hostile litigation between the applicant and the company, a contention relevant to an issue as to whether legal advice sought on behalf of the company on certain issues could be privileged.

3. As we shall see, David Brock swore an affidavit in the substantive proceedings replying to the grounding affidavit of the applicant, to which Mr Delappe replied in turn by an affidavit of 8 July 2021. It was in this latter affidavit that the documents the subject of the respondents' application were exhibited. The respondents immediately took exception to the affidavit, and promptly issued the present application for injunctive relief on 15 July 2021. There followed an extensive exchange of affidavits,

and lengthy written submissions. The hearing was held over three days after which, in circumstances where I shall explain, further affidavits of the parties were necessary.

4. The issues were complicated, and require close examination of the facts and documents at the heart of the dispute. I have considered all of the voluminous papers and written submissions for the purpose of this judgment, and had access to the digital audio recording of the hearing where necessary.

The company

5. The company is an estate, letting and property management agency which trades and operates from a number of locations in Dublin. The company was incorporated on 17 November 2004 and is a private company limited by shares. Mr Delappe, the applicant in the proceedings, and Mr Brock and Mr Cosgrave, the first and second respondents respectively, each own 33.3% of the company's shares, and each is a director of the company (I propose in this judgment to refer to Mr Delappe as 'the applicant', and to Mr Brock and Mr Cosgrave as 'the first respondent' and 'the second respondent' respectively, notwithstanding that the application the subject of this judgment is that of the respondents rather than the applicant in the substantive proceedings, Mr Delappe).

6. On the company's incorporation, Mr Delappe and Mr Brock took up employment positions with the company, and between them have been responsible for different aspects of its operations. Mr Cosgrave is a non-executive director who, following the incorporation of the company, invested €150,000 into the company in order to support its establishment. Mr Delappe avers at para. 17 of his grounding affidavit that Mr Cosgrave "had no operational or day-to-day involvement in the Company's business, and instead simply took dividends and had some limited

participation in the strategic direction of the Company…Mr Brock and Mr Cosgrave are well-acquainted with one another and have overlapping social circles".

7. It appears that, particularly given the crash in the Irish property market which occurred shortly after the establishment of the company, the applicant and first respondent concentrated on providing letting and property management services on behalf of landlords, and notwithstanding the crash were able to grow the company's business considerably. The company is profitable, and has never made a loss. The company does offer residential sales, particularly in respect of the letting properties managed by the company when the landlord decides to sell, but letting and property management remains the core business of the company.

8. The company acquired a retail office in Inchicore, and ultimately a second sales office in Kilmainham. The company opened a third office in Cabra, Dublin 7 in early 2020. The opening and maintenance of the Cabra office has been a source of disagreement between the parties, and I will refer to this issue below. It appears that the company employs sixteen staff, including Mr Delappe and Mr Brock, across the three offices. Mr Delappe, at paras. 26 and 27 of his grounding affidavit in the substantive proceedings, sets out some of the financial details in relation to the company, and exhibits management accounts from December 2019 and December 2020 in relation to the financial state of the company. Mr Delappe avers that the company is "very healthy financially", with very significant cash reserves, substantial recurring monthly income, and "…an active sales pipeline from both Kilmainham and Cabra [para. 26]…".

9. Mr Delappe, Mr Brock and Mr Cosgrave executed a shareholders' agreement on 21 December 2004. This agreement is exhibited to Mr Delappe's affidavit. He contends that "…as a matter of law, the company is and always has been a *quasi-*

partnership between the three of us, and has operated as such" [para. 4]. Mr Delappe relies on certain clauses of the shareholder's agreement, and in particular clause 13 thereof, which provides that, if the employment of either Mr Delappe or Mr Brock with the company ceases, the two remaining shareholders must be given an option to purchase the entire shareholding of that employee. He contends that the first and second respondents intend to terminate his employment on the grounds of redundancy, and proceed to exercise their option to acquire his shares pursuant to clause 13 of the shareholders' agreement and remove him as a director of the company: see para. 15 of the grounding affidavit.

10. In his replying affidavit, Mr Brock denies that the company was in reality a *quasi*-partnership, "…an assertion that I believe is plainly incompatible with the dealing of the parties, the existence of the shareholders agreement and, indeed, the contents of that document, in which the parties expressly ruled out the possibility of the company being construed as a partnership" [para. 14 replying affidavit].

Dispute in the substantive proceedings

11. In order to understand the application presently before the court, it is necessary to have a grasp of the issues in the substantive proceedings. While there are many issues ventilated in the respective affidavits, the resolution of them is solely a matter ultimately for the trial judge. I shall attempt therefore to summarise the issues in the substantive proceedings as concisely as possible.

12. The originating notice of motion, issued on 24 May 2021, seeks a declaration that the affairs of the company are being conducted by the first and second respondents in a manner oppressive to the applicant and/or in disregard of his interests in his capacity as a member of the company. At para. 2 of the notice of motion, the following relief is sought:

"2. An order (pursuant to s.212(3) of the Act of 2014) restraining the Respondents, and each or either of them from conducting the affairs of the Company and/or exercising their powers as directors in a manner oppressive to the applicant and/or in disregard of his interests and in particular, restraining them from:

(i) Taking any steps to remove the plaintiff from his employment with the Company;

(ii) if necessary, proceeding with the purported directors' meeting scheduled to take place on 25 May, 2021;

(iii) excluding the applicant from the day to day management of and or participation in the affairs of the company;

(iv) taking any steps to oust the Applicant as a member and shareholder of the company;

(v) utilising the resources of the company against the interests of the applicant".

13. At para. 5 of his grounding affidavit of 24 May 2021, Mr Delappe sets out the essence of his case as follows:

"5. In recent weeks, it has become clear to me that Mr Brock and Mr Cosgrave are engaged in a scheme, the object of which is to oust me from the Company. In outline, this scheme will involve the termination of my employment with the company on the purported and entirely false basis of redundancy, following which Mr Brock and Mr Cosgrave will exercise an option available to them under a Shareholders' Agreement to acquire my shares. The option in question allows the remaining shareholders of the Company to acquire the shareholding of any member of the Company whose employment with the

Company ceases (for any reason). My purported redundancy is a sham, designed to make the said option exercisable by Mr Brock and Mr Cosgrave as against me and my shareholding…".

14. Mr Delappe avers that he generally has a "front of house" role, with Mr Brock's focus tending to be "more on the management of the office and of the business" [para. 28]. He avers that he is "responsible for most of the sales and revenue-generation in the company. I am the lead contact with new and existing clients. I brought the majority of our customers to the company, and continue to do so" [para. 29]. Mr Delappe states that, in the history of the company, the directors have never had a formal board meeting, nor has the company ever convened an annual general meeting. He states that all decisions concerning day-to-day management are taken by himself and Mr Brock "through simple consultation and without any formality" [para. 32].

15. In his affidavit, Mr Delappe acknowledges that his relationship with Mr Brock has "cooled considerably" over the years. He describes their contact as "minimal and functional, rather than amicable" [para. 41]. He acknowledges that "a particular source of tension has been the company's third office in Cabra" [para. 43]. In his affidavit, Mr Delappe sets out some of the difficulties which arose in relation to the Cabra office, and in particular the resignation of a sales agent hired for that office, the fault for which is attributed by Mr Delappe to Mr Brock. According to Mr Delappe, in the course of a "clear the air" meeting between him and Mr Brock, he was asked by Mr Brock how much he would require in order to sell his shares in the company to him. Mr Delappe avers that he said he would want €2.5m for his shares, and that while Mr Brock did not refuse this offer, the matter was "…left unresolved. I have not spoken to Mr Brock since that day" [para. 43].

16. Mr Delappe avers that, on 11 May 2021 at 6.10pm, he received an email from Mr Brock convening a meeting of the company's directors for 6pm on 13 May 2021 at the Inchicore office. Mr Delappe avers that he was shocked by the notice – the company had never before had a formal meeting of the directors – and also by the agenda, which proposed three items: (i) the financial status of the company; (ii) the financial viability and financial projections of the Cabra office; and (iii) the potential redundancy of Mr Delappe, his wife Gráinne and Mr Brock's wife Annette, Ms Delappe and Ms Brock also being employees of the company drawing a salary.

17. Mr Delappe avers that this notice came as a complete surprise to him, and that "[i]t was immediately apparent to me that Mr Brock and Mr Cosgrave intended to use their voting majority to make me redundant and oust me from the Company" [para. 46]. After correspondence between Mr Delappe's solicitors and Mr Brock in his capacity as company secretary, it was agreed by Mr Brock that the meeting would not take place. In an email of 20 May 2021, Mr Brock stated that the meeting would now take place on 25 May 2021 at 6pm. The agenda for this rearranged meeting was slightly different; the third agenda item now read: "Consider whether the positions held by Kevin Delappe, Annette Brock and/or Gráinne Delappe should be placed at risk of redundancy thereby requiring the commencement of a formal consultation process in respect of those positions".

18. In his email of 20 May 2021 to Mr Delappe's solicitor, Mr Brock stated that no steps would be taken to seek the sale of Mr Delappe's shares. At para. 56 of his grounding affidavit, Mr Delappe set out the reasons why he did not take comfort from this statement. In particular, he stated "…there is no reality to the idea that I would remain as a one-third shareholder of the company without any active role in it…there is similarly no reality to the idea that Mr Brock would be satisfied with the situation

where he is responsible for the entire running of the business despite only being a one-third shareholder, while his two fellow shareholders (*i.e.*, me and Mr Cosgrave) take one-third of the profits without expending any effort on the company's behalf. The only rational inference available to me is that my shares will be bought under clause 13, either by each of the respondents or by Mr Brock alone".

Mr Brock's reply

19. By an affidavit of 21 June 2021, Mr Brock replied comprehensively to Mr Delappe's grounding affidavit. At para. 5 of his affidavit, Mr Brock summarised in general terms his view of Mr Delappe's proceedings:

> "…[i]t is apparent that the within application has been brought by Mr Delappe for the sole purpose of bringing about his desired exit from the business and to force a buyout of his shareholding. This application has been brought by Mr Delappe against the backdrop of a number of discussions between he and I in April of this year, during which Mr Delappe informed me that he no longer enjoyed working within the company, that he had been unhappy in the business for quite some time and during which we both discussed openly the possibility of him departing from the company and selling his shareholding. I believe that a significant driving factor in those discussions was the common understanding amongst he and I that, for a number of reasons, Mr Delappe's role in the management and operations of the company has, over time, greatly diminished. I engaged in *bona fide* discussions with Mr Delappe with a view to exploring the possibility of arranging a buyout of his shares but it quickly became clear that he expected to be paid an inordinate sum of money which bore no resemblance to the market value of his shareholding in the company. I firmly believe that the sole purpose of these proceedings is to manufacture

leverage against your deponent and Mr Cosgrave with a view [to] extracting a higher sum in respect of any share buyout".

20. Mr Brock acknowledges that he adopted the role of managing director "…taking broad responsibility for the running of most aspects of the business on a day-to-day basis, with Mr Delappe focussing primarily on his work as an estate agent" [para. 17]. However, he avers that "…virtually all of the major decisions regarding the direction of the company are ones which have been initiated and implemented by me…" [para. 18]. Mr Brock sets out at length the circumstances in which a branch had been opened by the company in Cabra, Dublin 7, and the strategic partnership with a local solicitor which was envisaged at that time. Mr Brock portrays the Cabra venture as a failure, with only 4% of the company's property sales in Inchicore, Kilmainham and Cabra for the year 2020 generated by the Cabra office. At para. 35 of his affidavit, Mr Brock attributes the resignation of the sales agent in the Cabra office to her inability to work with Mr Delappe.

21. Mr Brock accepts that he had a discussion with Mr Delappe in which the possibility of Mr Delappe selling his shares was discussed, and agrees that a sum of €2.5m was mentioned by Mr Delappe. Mr Brock avers that he told Mr Delappe that this sum "was very significantly higher than the market value of the shares. This was met by outright hostility on the part of Mr Delappe" [para. 39].

22. In relation to the intended directors' meeting of 13 May 2021, Mr Brock avers that "…the purpose of the meeting was to initiate a discussion about those financial matters which I believed required to be addressed by the directors. At no stage was it envisaged or indicated to Mr Delappe that he was going to be terminated at this meeting…" [para. 42]. Mr Brock refers to the correspondence between him and Fieldfisher LLP (**"Fieldfisher"**), the solicitors for the applicant, and particularly his

email of 20 May 2021, which he contends "…made perfectly clear that the intended meeting would not under any circumstances result in an immediate decision to terminate Mr Delappe…" [para. 47]. Mr Brock refers to further correspondence between Fieldfisher and the respondents' solicitor Anne O'Connell Solicitors in advance of the proposed meeting on 25 May 2021. Ultimately, the parties agreed to enter into mediation, and the meeting did not take place. Unfortunately, the mediation process proved unsuccessful.

23. Mr Brock concluded his affidavit as follows:

> "54. I say and firmly believe that the position adopted by Mr Delappe amounts, in truth, to an attempt to obstruct the internal affairs of the Company and the decision-making powers which rest with its directors. The directors of the Company are entitled and, indeed obliged, to given [sic] consideration to the Company's finances, as well as the ongoing viability/sustainability of its various branches. Similarly, the directors are entitled to carry out any reorganisation we consider might be in the interests of the Company. I say and believe that Mr Delappe has no entitlement to obstruct such decisions being taken and he certainly has no entitlement to prevent a discussion about those issues taking place at a meeting of the directors".

Mr Delappe's second affidavit of 8 July 2021

24. In his second affidavit, Mr Delappe firmly rejected any suggestion that he was attempting to engineer a buyout, and stated his "firm desire to remain as part of the company and grow it into the future…" [para. 3].

25. In the affidavit, Mr Delappe takes issue with a number of the averments of Mr Brock in respect of the respective roles of Mr Brock and Mr Delappe in the company: Mr Delappe asserts that "Mr Brock's characterisation of my role within the

company…seeks to minimise my influence and importance…my strength lies in sales, whereas Mr Brock's talents are primarily administrative and organisational" [para. 11]. Mr Delappe also deals at length with circumstances in relation to the Cabra office, and takes issue in particular with Mr Brock's version of events in relation to the resignation of the sales agent in that office.

26. In dealing with the intended directors' meeting, Mr Delappe avers that, on or about 1 June 2021, his solicitors "wrote to AOC Solicitors [*i.e.*, Anne O'Connell Solicitors] seeking access to advice sought by the Company and given by them in relation to my status as a shareholder under the Shareholder's Agreement. I have been advised and so believe that, in circumstances where the company is Ms O'Connell's client and I am a director and shareholder of the company, I am entitled to see that advice under the so called disclosure rule…" [para. 21]. In response to a further letter to Anne O'Connell Solicitors of 4 June 2021 in this regard, that firm replied by a letter of the same date, *inter alia*, that "…our clients are of the view that your client is not entitled to a copy of the legal advice that has been sought". The heading to the letter identified "our client" as "Brock Delappe Ltd".

27. In a further letter of 29 June 2021 Fieldfisher, the applicant's solicitors, continued to insist on provision of the advices from Anne O'Connell Solicitors to the company. The letter stated that "[y]our continued refusal to provide same only serves to reinforce our client's view that your clients have set out to oppress and continue to oppress his interests with your continued assistance". The letter indicated that the applicant had instructed Fieldfisher "to issue further proceedings against your clients for deceit. If we do not receive confirmation from you by return that you will make disclosure of the information sought, we are instructed to join your firm in those proceedings in respect of your knowing participation in their fraudulent enterprise".

28. Anne O'Connell Solicitors ["**AOC Solicitors**"] replied to this letter on 02 July 2021. As regards Mr Delappe's entitlement to the advices, the firm stated that "…whilst it is acknowledged that your client may ordinarily be entitled to sight of advices provided to the company in relation to the general management of its affairs, it is certainly not the case that your client would be entitled to copies of any advices provided specifically on matters in relation to which a dispute might likely arise between the company and your client…".

29. The heading to this letter stated "Our client: Brock Delappe Ltd; David Brock and Declan Cosgrave…". In the letter itself, the firm stated that "…our firm was engaged by the Company for the purposes of advising on its legal obligations in respect of the meeting originally scheduled to take place on 13 May 2021. We have since been engaged by the majority shareholders, Mr Brock and Mr Cosgrave, for the purposes of defending the proceedings which your client has now instituted against Mr Brock, Mr Cosgrave and the Company. It is not accepted that any conflict arises and it is noteworthy that your letter is silent when it comes to substantiating this assertion".

30. The letter denied that Mr Delappe had any legal entitlement to disclosure of advices, and stated that the firm regarded "as completely extraordinary your threat to join this firm in any such proceedings…".

31. Mr Delappe went on in his affidavit to state that, since the swearing of his first affidavit, "…I have had access to the company's shared email server to emails sent by Mr Brock from his company email account (davidbrock@brockdelappe.ie) which confirmed that at all times, the Respondents' primary objective has been my removal from the company". Mr Delappe then proceeds to address a number of emails, primarily in which Mr Brock sought advice in relation to matters concerning the

proposed meeting from Ms O'Connell. It is the production of these documents that has given rise to the present application.

The injunction application

32. The present application issued by notice of motion of 15 July 2021, a particularly prompt response to Mr Delappe's second affidavit of 08 July 2021 in the substantive proceedings. The application was on behalf of "the respondents", *i.e.*, the company in addition to Mr Brock and Mr Cosgrave. The notice of motion sought numerous reliefs, which may be summarised as follows:

> (1) An injunction restraining the applicant from accessing the private email account or any workplace computer or electronic device normally used by Mr Brock;
>
> (2) an interlocutory injunction restraining the applicant from using, disseminating or otherwise relying upon documentation or material between the respondents and their legal advisers concerning the issues in the proceedings;
>
> (3) an order requiring the applicant to provide full details of his access or attempts to access the private email and documentation of the first respondent;
>
> (4) an order requiring delivery up of copies of documentation accessed by the applicant to the first named respondent's email account;
>
> (5) an order striking out or expunging the contents of paragraph 6, 28 to 50 and exhibits KD6 to KD14 of the applicant's second affidavit "on the grounds that same are scandalous, frivolous, vexatious and/or that same purported to disclose privileged and/or confidential material unlawfully or improperly obtained by the Applicant…";

(6) an order pursuant to Order 19, rule 27 of the Rules of the Superior Courts striking out those paragraphs and exhibits;

(7) an order pursuant to Order 19, rule 28 of the Rules of the Superior Courts striking out or amending those paragraphs and exhibits "on the grounds that same are frivolous and/or vexatious";

(8) an order pursuant to Order 19, rule 27 of the Rules of the Superior Courts directing that the costs of this application be discharged as between solicitor and client".

33. The application is grounded on the affidavit of the first respondent Mr Brock of 15 July 2021. He avers that "…it now appears that the Applicant in these proceedings has accessed, without any lawful authority or excuse, private email correspondence, related documents and advices exchanged between your deponent and the legal representatives of the Respondents. In his second affidavit sworn on 08 July 2021, the Applicant has quoted extensively from those documents which I believe and am advised are manifestly confidential and legally privileged in nature [para. 3]…I believe and am advised that those steps amount to an utterly unwarranted and unlawful attempt to introduce privileged material into these proceedings – and that this was done solely in an attempt to prejudice the Respondent's position in these proceedings [para. 5]…".

34. Mr Brock refers particularly to the exhibits KD6 to KD14 of Mr Delappe's affidavit and the fact that Mr Delappe quotes at length "the contents of the confidential and privileged documents" [para. 6]. At para. 10 Mr Brock avers that "…if, indeed, Mr Delappe legitimately believed that he had a lawful entitlement to the documents in question, I am advised that there is a well-established mechanism for compelling production of those documents in the context of these proceedings – that

being the discovery/inspection process – which would have permitted this Honourable Court to consider fully the issues of relevance, necessity and most fundamentally, the privileged nature of those documents, before such documents could be produced and/or relied upon in these proceedings". Mr Brock contends that Mr Delappe deliberately chose to circumvent the discovery process and ignore this Court's powers to determine such issues "…because he knew that, in truth, he would not be entitled to production of those documents through any legitimate or official process as it is patently clear that those communications are and were at all times privileged and confidential in nature" [para. 10].

35. At para. 11 of his affidavit, Mr Brock points out that the steps taken by Mr Delappe to access "my private work email account" "…were taken at a time when he was being advised by his solicitors, Fieldfisher LLP. I believe that, in the circumstances, very serious questions arise regarding the level of knowledge and involvement on the part of Mr Delappe's solicitors in Mr Delappe's actions [para. 11]." It is notable that Mr Brock raises the issue of the role of Mr Delappe's solicitors because, as we shall see, Mr Delappe in turn raises issues in relation to the role in the matter played by AOC Solicitors.

36. Mr Brock refers at para. 12 of his affidavit to the ventilation between the solicitors of the issue of Mr Delappe's entitlement to copies of the legal advice provided to the company, in particular articulated by Fieldfisher LLP [**"Fieldfisher"**] in its letter of 29 June 2021, to which I have referred at para. 27 above. He also refers to correspondence from AOC Solicitors of 02 July 2021, to which I have referred at paras. 28 to 30 above.

37. At para. 15 of his affidavit, Mr Brock notes that Mr Delappe quotes extensively from communications between "your deponent and the respondents' legal

advisers dated between 28 April 2021 and 4 June 2021. As is patently clear from the contents of those communications, they contained legal advice provided to your deponent and the Company concerning matters relating to Mr Delappe. Those advices were not, as appears to be suggested by Mr Delappe and his legal advisers, provided in relation to the general management of the Company's affairs – they were provided in circumstances where there was a strong possibility of a dispute arising between the Applicant and the Company. I say and believe that it simply cannot be asserted by the Applicant that those advices were sought in the joint interest of the company's shareholders, they were sought and provided in circumstances where it was manifestly clear that the interests of the Respondents, including the Company, and Mr Delappe were divergent, or were likely to be so".

38. Mr Brock goes on to refer to an exchange of correspondence between AOC Solicitors and Fieldfisher of 9 July 2021, in which AOC Solicitors required an explanation as to how Mr Delappe and/or Fieldfisher came to be in possession of the documentation exhibited "…as well as a detailed list of every such document accessed and/or retained by your client and your firm". Fieldfisher's reply refuted the claim of privilege in respect of the documents disclosed in Mr Delappe's affidavit.

39. Mr Brock avers at para. 21 of his affidavit "…that having regard to the unlawful and improper actions of Mr Delappe in accessing those documents through my private work email account and, indeed, having regard to the confidential and privileged nature and contents of the documents themselves, Mr Delappe is not entitled to rely on those documents in the context of these proceedings".

The documents in dispute

40. Given the nature of the allegations and counter-allegations between the parties, it is not possible to ventilate the issues without referring to the contents of exhibits

KD6 to KD14 to Mr Delappe's affidavit of 08 July 2021. Counsel for the respondent remarked on more than one occasion at the hearing that the documents in question have been seen and are known to the applicant – in circumstances in which the respondents argue that he should not have such knowledge – and that they cannot be "unseen". The court, in its judgment, has to deal with that reality. Accordingly, I propose to summarise the contents of the documents, as they are directly relevant to the issues before the court, and the submissions made by the parties.

Document KD6

41. This document appears to be a reproduction of an email from Mr Brock to Tony Kilcoyne, the company's accountant, of 22 April 2021 at 13.55. In it, Mr Brock raises various queries under the headings "redundancy" and "minority shareholder oppression". In relation to "redundancy", Mr Brock states that "[t]o make someone redundant involves an onerous process, which isn't feasible in the circumstances…", followed by a number of specific queries, including one as to "the legal risks".... Under the "minority shareholder oppression" heading, various queries are raised in relation to costs, the legal process and "the expected outcome".

Document KD7

42. This document reproduces an email from Mr Brock to Mr Kilcoyne of 22 April 2021 at 16.53 which supplies certain information in relation to a figure in the 2020 accounts. It provides a breakdown which sets out certain monies paid to Mr Brock, Mr Delappe and Mr Cosgrave.

Document KD8

43. This document reproduces an email from Mr Brock to Mr Kilcoyne of 23 April 2021 at 14.37. It refers to a meeting set up by Mr Kilcoyne, although it is not apparent from the email who attended the meeting. It also refers to a "valuation

provided", and Mr Brock comments that "if a valuation can be agreed all the other problems will go away…[t]his forms the basis of our initial approach…".

Document KD9

44. This exhibit comprises a number of emails, commencing with an email of 28 April 2021 from a third party to Anne O'Connell of AOC Solicitors, in which that person states that she has recommended Ms O'Connell to Mr Brock, and asking Ms O'Connell to contact him. Ms O'Connell and Mr Brock then establish contact, with Mr Brock requesting "30 minutes for a chat today" on 29 April 2021. Ms O'Connell replies by stating that "it would be much more productive if you would email with the background before the call". Mr Brock duly sets out the background in an email to Ms O'Connell at 15.05 on 29 April 2021. Mr Delappe sets out the text of this email in full at para. 33 of his affidavit, and places considerable reliance upon it.

45. In the first part of the email, Mr Brock sets out the structure of the business, stating that "I am an equal partner in Brock Delappe Estate Agents…Kevin Delappe and Declan Cosgrave are the other partners…Kevin and myself work in the business and Declan is a silent partner…". He refers to "a strained working relationship" between himself and Mr Delappe, and goes on to make some comments which are critical of Mr Delappe. He then states as follows:

> "He [sic] behaviour has been upsetting other members of staff and I am unable to communicate with him
>
> I have explained all of this to him and suggested he sell his shares in the business
>
> He is unwilling to do this and I am aware that is his right
>
> At this point I just want him away from the business and I am exploring the possibly [sic] of redundancy

I am willing to pay him the maximum award offered by the WRC and some sort of tax-free golden handshake

I may be able to get an exit interview from the departed member of staff in the Cabra office and statements from some existing staff

If I am honest I think my redundancy case could be easily challenged

I should mention, he is suffering from personal problems

The reality is that he is unlikely to accept this offer in mediation

My main questions are below:

- What is the process for making a director and shareholder of a company redundant
- If it went to the WRC, what is the process and costs involved
- Can the WRC award his reinstatement

Let me know a good time to call, the call will probably last 30 mins…"

Document KD10

46. By an email of 6 May 2021 at 11.16, Ms O'Connell replied to Mr Brock. In view of the seriousness of the allegations which arise from this email, I propose to set it out in full below:

"David

I have gone through your documents extensively and discussed the matter with your accountant. I was waiting for him to call me back yesterday as we have a difference in approaches but I think I have figured out the best way forward.

First, I double checked the point about the minority oppression and as Kevin holds less than the majority of shares he can claim minority oppression. However, he signed up to the Shareholders' Agreement which provides for this and therefore he would find it very hard for a court to agree with him on

that basis. Furthermore, any potential remedy of minority oppression would be as already set out in the Shareholders' Agreement.

There is a difficulty in that Tony informed me that you cannot afford to buy Kevin's shares and that he was looking at using a mechanism whereby the company can buy back its shares. This mechanism is very limited and would be contrary to terminating Kevin's employment on the ground of redundancy. However, as the Shareholders' Agreement does not provide for what happens if neither of the remaining shareholders exercises the option to purchase his shares at the time of him ceasing employment, I suggest that you leave Kevin with the shares at the time of termination of employment. This may also mean that he will continue to be a non-executive director but without a salary.

The next step will be that either Kevin wishes to transfer his shares and he will then have to follow the Shareholders' Agreement mechanism or alternatively Kevin does something that permits the company to buy back his shares. I must warn you that the Revenue have become very strict recently in allowing a company to buy back its own shares and your accountant should double check the recent decisions that issued in this regard before you do this.

The above plan, subject to your tax advice in relation to the buyback, should avoid any High Court proceedings and give us time to carry out some form of redundancy process. I think you should talk to your accountant and Dermot and we can then arrange a meeting for later today or tomorrow.

Kind regards".

Document KD11

47. This document is an email from Mr Brock to Ms O'Connell of 13 May 2021. Mr Brock asks Ms O'Connell to let him know "the next steps", and then states as follows:

> "As an aside, we have 3 properties for sale on the Northside to put on the market before the weekend
>
> Typically these would have been handled by the Cabra office
>
> What is the best way to handle them, I have been holding 2 of them back for almost two 2 weeks now".

Document KD12

48. This document is an email from Mr Kilcoyne to Mr Brock of 14 May 2021. In the email, Mr Kilcoyne sets out information generally in relation to oppression of a minority shareholder, and the circumstances in which a *quasi*-partnership might be deemed to come into existence. The email goes on to deal with the worth of minority shares in a *quasi*-partnership, and the impact of a finding of the existence of a *quasi*-partnership. The advice is primarily in relation to the legal position, notwithstanding that Mr Kilcoyne is an accountant.

Document KD13

49. This document gave rise to considerable controversy at the hearing. The heading of the document exhibited is "email from David Brock to Anne O'Connell Solicitors" and is dated 19 May 2021. The document exhibited is short, commencing with the heading "Preferred Outcome" under which Mr Brock states "Understanding the risks, we would like to proceed with the redundancy process and the closure of the Cabra office by notifying Kevin of a directors' meeting…If the agenda can be sent to Kevin today suggesting a directors' meeting for next Tuesday evening, that would be ideal…We can deal with the potential sale of the shares separately, but the tax

treatment should force the issue…Our preference would be for mediation but we would prefer to hold back on this until the situation becomes clearer for Kevin…".

50. That is the entire of the text included in exhibit KD13. However, at the end of the second day of the hearing, counsel for the respondents raised the fact that the document exhibited was an extract from a much lengthier email which had not been exhibited by Mr Delappe. Counsel stated that this had only just come to his notice; counsel for Mr Delappe stated that he had been unaware of the fact that the exhibit was in fact not the entire email, but only an extract.

51. As it happened, the third day of the hearing was not the following day, but the day after that. Accordingly, I suggested that the parties ventilate the issues in relation to this email between each other so that it could be addressed when the hearing resumed for the third day. On that day, the court was presented with correspondence between the parties in relation to the issue: a letter from AOC Solicitors to Fieldfisher of 16 February 2022, a reply of 17 February 2022 from Fieldfisher, and a further letter from AOC Solicitors to Fieldfisher of that date. The first letter from AOC Solicitors required "immediate confirmation" as to the knowledge that Fieldfisher had that the material comprised only an extract of the email of 19 May 2021, and whether Fieldfisher was at any time aware of the full content of the email. Fieldfisher was also asked to specify its involvement in the decision to exhibit only a partial extract of the email of 19 May 2021, and whether or not the documents exhibited to the affidavits "comprised the entirety of the material accessed and retrieved by your client from the email account of Mr Brock". AOC Solicitors pointedly remarked that the decision to exhibit a partial extract of the email and "maintaining before the High Court that same constituted the entire email exchange between our client and this firm on 19 May 2021" was "particularly significant in light of the emphasis placed by your Senior

Counsel on that portion of the email to make the case that this firm was involved in a fraudulent and dishonest plan contrary to the interest of your client".

52. In its reply of 17 February 2022, Fieldfisher took exception to "the implicit reference [in the AOC Solicitors' email] of an intention to mislead the court", describing it as "outrageous". Fieldfisher confirmed "…that what our client has exhibited in his affidavit is precisely the text that he copied from the email and that is precisely what he provided to this firm". Fieldfisher queried why AOC Solicitors "chose not to bring this matter to our attention at any stage prior to the hearing and that only when particular emphasis was placed on the document during the course of the hearing".

53. In its replying letter of 17 February 2022, AOC Solicitors suggested that the issue "…arises from one of only two possible scenarios. The first possibility is that your client copied the entirety of the email from Mr Brock's email account and he chose to present a selective extract of same in the affidavit evidence presented by him to this Honourable Court. The second possibility is that your client acted in the manner outlined in your letter; namely, that he chose (for reasons which remain unexplained) to only copy a selected portion of that email. In either instance, there can be no doubt but that your client had accessed the full email on Mr Brock's email account and that he elected to exhibit an extract of that email in full knowledge that a substantial portion of same was being omitted".

54. The letter went on to state that "…it was never envisaged by our client or this firm that your client would instruct his representatives to present such a wholly distorted, damaging and utterly speculative interpretation of the documents forming the subject of our client's injunction application. The actions of your client in seeking to advance, on Wednesday afternoon, what was an extraordinarily false and damaging

narrative in respect of those documents left our clients and this firm with simply no alternative but to bring the Court's attention to this issue". The letter concluded by stating that "…in light of your client's record of abusing such privileged material to date, there is absolutely no question of our client agreeing to furnish your client or your firm with such material".

55. The issue of whether the entire email should now be furnished by the respondents to the applicant was canvassed at the hearing. Counsel for Mr Brock accepted that his solicitor was aware that the exhibited document was only an excerpt of the full email, but did not advert to the significance of this fact until she had heard the submissions of counsel for Mr Delappe and the allegation to the effect that he was party to a "plot" to remove Mr Delappe from the company. Up to that point, she had regarded the portion of the email exhibited at KD13 as, in the words of counsel, "reasonably innocuous". Counsel for the respondents confirmed that, of the various exhibits KD6 to KD14, KD13 was the only one in which the text was truncated, although he submitted that the emails were selective, in that there were conversations and other emails to which reference was not made by Mr Delappe.

56. Ultimately, counsel for the respondents reiterated his position that the full text of the email should not be furnished to the applicant. Counsel for Mr Delappe did not oppose this course of action, although he indicated a preference to see the document. Accordingly, I was furnished with a copy of the full email, although the applicant was not.

57. It is apparent from the full text of the email that it was sent at 3.11pm on May 19th 2021. The recipients are Ms O'Connell, Ethna Dillon who is a colleague of Ms O'Connell in AOC Solicitors, Mr Cosgrave and Mr Kilcoyne. That these are the recipients is not apparent from KD13, which refers only to Ms O'Connell. The email,

prior to the "Preferred Outcome" section of the email set out in KD13, includes a discussion of the "Case for redundancy", which sets out certain circumstances which Mr Brock considers could be called in aid of the position that the redundancy of Mr Delappe was justified. This section of the email provides context for the "Preferred Outcome" section reproduced at KD13, which is effectively a conclusion to the email. In my view, it is a significant deficiency in exhibit KD13 that it omits the entire text of the email.

58. In view of Mr Delappe's failure to exhibit the full text of the email, I directed that he make an affidavit, notwithstanding the conclusion of the hearing, which would explain the circumstances in which his exhibit was incomplete. Accordingly, Mr Delappe swore an affidavit on 24 February 2022. He pointed out that he had previously explained in an affidavit that he did make a copy of the email itself, but instead copied the text of the email using his mobile phone. He avers that he was not aware, until the matter was brought to his attention after it had been raised by counsel for the respondents at the end of the second day of the hearing, that the text of exhibit KD13 was incomplete. He averred that the text he exhibited at KD13 was "precisely the text that I copied and furnished to my solicitors. I confirm that although I intended to copy the entire email, through inadvertence it seems that I did not succeed in doing so. It was never my intention to selectively extract a portion of the text from the email. As I was accessing the email using my mobile phone I can only assume that I was not successful in capturing the entire email text [para. 5]." Mr Delappe went on to aver, that while he "may well have read the entire email at the time that I copied it", he could not recall the contents of the entire email, and that it was not apparent to him, having read what he copied, that it was incomplete. He confirmed that he does not have the entire email in his possession.

59. Two affidavits were sworn in response to Mr Delappe's affidavit. Mr TJ Kelly, an information technology specialist, who swore affidavits in the course of the present application, swore a further affidavit on 4 March 2022. He concludes at para. 9 of his affidavit that he did not believe "…that the extract in question has the hallmarks of a document that was simply copied and pasted from an email. It has formatting attributes (including a heading and summary details of the author, recipient and date of email) which does not in my view correspond with the format of an email, even one that has been copied and pasted into a Word document".

60. Mr Brock also swore an affidavit on 4 March 2022, at para. 5 of which he avers that "…it is apparent that the fourth affidavit of Mr Delappe raises more questions than it answers…". He avers that "…there can be no doubt but that Mr Delappe did in fact view the entire email and he must therefore have been fully aware of the full content thereof…[i]f, as Mr Delappe suggests, he copied the extract 'through inadvertence' then it naturally follows that he did not copy any other part of that email. This begs the question – how was he able to identify the author, recipient and date of the email for the purposes of swearing his affidavit of 8 July 2021?" [Paragraph 8-9].

Document KD14

61. This document is an email from Mr Brock to AOC Solicitors of 04 June 2021 at 14.15. That was a Friday; the email commences by stating that "…hopefully we get a good outcome on Tuesday…", undoubtedly a reference to the mediation between the parties scheduled for Tuesday 08 June 2021.

62. The remainder of the email relates to a discussion between Mr Brock and Mr Kilcoyne in relation to "a company share buyback and the tax treatment regarding a share purchase…", and provides "some info on entrepreneurial relief…". The email

appears to relate to issues which Mr Brock anticipated might arise during the mediation as to the tax treatment of the sale of Mr Delappe's shares, if that were agreed. He refers towards the end of that email to the need for an opinion from an expert in the area.

Replying affidavit of Mr Delappe 22 July 2021

63. In his replying affidavit, Mr Delappe does not accept the assertions in Mr Brock's grounding affidavit of confidentiality and privilege over the documents exhibited to Mr Delappe's affidavit, or his allegation that those documents were accessed unlawfully. He avers that it is his position "that Ms O'Connell is the company's solicitor, and that I am therefore entitled to access the legal advice given by her to the company [para. 5]."

64. Mr Delappe develops this theme at para. 6 of his affidavit. He avers that it is clear from the chain of emails exhibited at KD9 to his second affidavit that it was the company, rather than Mr Brock, that was engaging Ms O'Connell's services, particularly as Mr Brock was seeking advice in relation to making Mr Delappe redundant, a course of action which could only be adopted by the company. He refers to an exchange of correspondence between his solicitors and Mr Brock calling for a cancellation or postponement of the directors' meeting due to take place on Thursday 13 May 2021, and the response of that date from Mr Brock which stated, *inter alia*, that "…the company has instructed Anne O'Connell Solicitors and the advice given to date is to hold a directors' meeting to discuss this matter…". Mr Delappe notes that a letter of 24 May 2021 from AOC Solicitors to Fieldfisher was "…the first occasion on which there was any suggestion that Ms O'Connell acted for anyone other than the company; it stated: "We confirm that we act on behalf of Brock Delappe Limited ['the company'] and the shareholders David Brock and Declan Cosgrave". Mr Delappe

points out that the letter of 4 June 2021 from AOC Solicitors to Fieldfisher asserts that Mr Delappe had no entitlement to legal advice sought by the company, and that the heading to that letter stated "our client: Brock Delappe Limited". In a further letter of 2 July 2021, AOC Solicitors refused to provide a copy of the advices sought on the basis that the advices related to a potential dispute between Mr Delappe and 'the company'".

65. At para. 8 of his affidavit, Mr Delappe avers that, even if an arguable claim for privilege had been made out, that privilege "does not apply to communications made in order to get advice for the purpose of carrying out a fraud". In this regard, he cites what he characterises as "the sham contrivance of a redundancy which Mr Brock outlined in his email to Ms O'Connell of 29 April 2021, the true purpose of which was to exclude me from the business; and secondly, Mr Brock's email to Ms O'Connell of 13 May 2021 (exhibit KD11 to my second affidavit) in which he sought advice in relation to deliberately holding back properties from the market in order to fraudulently depress the financial outlook for the Cabra office and thereby justifying my purported redundancy". At para. 10 of his affidavit, Mr Delappe extends these comments to the communications between Mr Brock and Mr Kilcoyne.

66. At para. 12 of his affidavit, Mr Delappe maintains that "…the true position is that various employees of the company have habitually had access to one another's emails especially to facilitate the smooth operations of the business when staff are on leave. It was part of the company's culture that employees would access each other's emails. Mr Brock was in possession of various employees' email passwords and regularly used to send those passwords to other employees…". He asserts that Mr Brock was in possession of his own email password. He asserts at para. 14 of his

affidavit that "…the only reason that I copied the emails to a Word document was because I was not capable of saving them as .eml files on my device".

67. At paras. 15 *et seq* of his affidavit, Mr Delappe develops the theme that the legal advice sought by Mr Brock was sought on behalf of the company, and that as such, Mr Delappe, as a director and shareholder of the company, was entitled to access the documents containing such advice. He denies Mr Brock's assertion at para. 12 of his affidavit that he had accessed the documents at a time when Mr Delappe was aware that the question of his entitlement to the advices was the subject of a clear dispute "which had been ventilated in correspondence between 12 May 2021 and 02 July 2021". In that regard, he states that "…my solicitors had repeatedly asked for the legal advice. At first, Mr Brock and Ms O'Connell simply ignored these requests. Then, they began to assert that I was not entitled to access to the legal advice, but without any reasoning, rationale or basis for that assertion. At no stage prior to her letter of 02 July 2021 did Ms O'Connell's correspondence ever explain why I was not entitled to the advice. She failed to meaningfully engage with the requests at all. No claim of privilege or confidentiality was asserted…[w]hat in fact occurred was a bare dismissal of my reasonable requests for access to documents to which I had a legal entitlement".

Mr Brock's second affidavit 05 August 2021

68. In his second affidavit, Mr Brock draws attention to what he characterises as Mr Delappe's refusal to provide the details of his access to Mr Brock's email account, and contends that this refusal "…simply underscores the covert and secretive nature of his actions in accessing my private work email account without my knowledge [para. 6]". He denies that it was the case that he and Mr Delappe "habitually had access" to one another's emails.

69. At para. 8 *et seq*, Mr Brock sets out the basis for his contention that Mr Delappe is incorrect in contending that he and Mr Brock habitually had access to each other's emails. He avers at para. 11 of his affidavit that "…[s]ince its creation in 2004, I have never accessed Mr Delappe's email account or viewed his emails, nor would I have ever considered it appropriate to do so as they are private in nature". Mr Brock then deals with emails to which Mr Delappe referred in his affidavit in which passwords had been disclosed "in very particular circumstances". He avers at para. 19 of his affidavit that "…[i]t is not in dispute that your deponent and Mr Delappe had cause to access the email accounts of other more junior employees (or permit such access to other employees) in order to ensure continuity of service in the case of an employee being absent. This in no way supports Mr Delappe's false contention that he and I had habitual access to one another's email accounts". At para. 21 of his affidavit, Mr Brock avers "[i]f, indeed, as Mr Delappe now contends, he was perfectly entitled to copy access the material in question, it begs the question – why did he not simply forward a copy of those emails to his own email address or make a copy of same? I say and believe that the true reason why Mr Delappe took this course of action is because he was at all times fully aware that his conduct in accessing my emails without my consent was both unlawful and underhanded".

70. At para. 23 *et seq* of his affidavit, Mr Brock addresses "the nature of the communications accessed by Mr Delappe". He avers at para. 25 of his affidavit that the advices "fall into two distinct categories – firstly, advices which were provided to the Company for its benefit and, secondly, advices provided to your deponent and Mr Cosgrave on matters relating to our rights and obligations as shareholders". Mr Brock's position was that Mr Delappe did not have any entitlement to disclosure of either category.

71. In relation to the first category of advice, Mr Brock avers at para. 27 of his affidavit that "…whilst it is not in doubt that Mr Delappe may have an entitlement to sight of legal advice provided to the Company in relation to the normal conduct of its management or affairs, the same most certainly cannot be said in respect of advice provided to the Company in circumstances where an actual or potential dispute existed between Mr Delappe and the company, of the kind which arose in this case".

72. In relation to the second category of advice, Mr Brock averred that he did not accept "that there is an inherent conflict in the Company and its majority shareholders (being Mr Cosgrave and I) taking advice from the same solicitors [para. 29]". He avers at para. 30 that "…I believe it is manifestly clear from the communications exhibited in Mr Delappe's affidavit sworn on 01 July 2021 that, with the exception of those initial advices provided for the benefit of the company, the communications contained advices provided to your deponent and Mr Cosgrave in our capacity as shareholders of the Company and, as such, are patently privileged in nature".

73. At para. 33 of his affidavit, Mr Brock trenchantly rejects the assertion that communications relied upon by him "were made in order to get advice 'for the purposes of carrying out a fraud'". He avers that the position expressed by Mr Delappe "…is truly illustrative of the lengths to which he appears willing to go to excuse his unlawful actions in covertly accessing my emails with the sole intention of gaining access to confidential legal advice, include [sic] legal advice provided during the course of these very proceedings". [Paragraph 33].

Second affidavit of Mr Delappe 19 August 2021

74. Mr Delappe in turn replied to Mr Brock's second affidavit. He asserts at para. 4 of his affidavit that "there was no practice or culture of secrecy in the Company regarding access to Company emails nor could there be for the smooth running of the

business". He does not accept Mr Brock's characterisation of his email account as a "private work email".

75. As regards further access to Mr Brock's email account, he averred that he did "…not intend to further access Mr Brock's email account pending the determination of the proceedings. In the event that I require access to his Company email account going forward I shall put him on notice of same" [para. 7].

76. At para. 16 of his affidavit, Mr Delappe avers that "I reject Mr Brock's assertion that there is no or no proper evidence of fraud. The disputed communications establish that Mr Brock sought advice and assistance from Mr Kilcoyne and Ms O'Connell to contrive a sham redundancy which was to be based upon a false appraisal of the business of the Cabra office. The documents confirm that Mr Brock fraudulently withheld the sale of properties that would ordinarily have gone through the Cabra office in order to suppress sales figures. Mr Brock requested the advice of Ms O'Connell on how he should achieve this. At the same time, Mr Kilcoyne produced a financial account for the Cabra office that falsely represented that the Cabra office was loss making when it was not".

77. Much of the remainder of the affidavit consists of a commentary on the documentation in dispute with a view to refuting the points made by Mr Brock in his affidavit. While I have taken all of the said averments into account, I do not propose to discuss them further here, as the points made in the affidavit were advanced by counsel in submissions, to which I refer below.

Third affidavit of Mr Brock 31 August 2021

78. Similarly, as Mr Brock acknowledges at para. 4 of his third affidavit, "…a large proportion of the matters ventilated on affidavit are more appropriately matters for legal submission". Once again, I do not consider it necessary to summarise most

of that affidavit, as much of it overlaps with the submissions subsequently made by counsel. There are however one or two matters to which it is appropriate to refer.

79. At para. 6 of his affidavit, Mr Brock avers that it would appear that Mr Delappe had attended the company's Inchicore branch "out of hours for the purposes of getting a copy of my new password from my own desktop computer. I was in Donegal on the evening of 10 June 2021, when my email account and password were accessed from the Inchicore branch…it would now appear that Mr Delappe had access to my emails from his mobile telephone device until 28 July 2021…" [emphasis in original].

80. Mr Brock took issue with Mr Delappe's averment that email accounts in the company "are left logged on", suggesting that the fact that his email account was accessible from his desktop computer in the Inchicore branch "most certainly does not equate to providing other persons permission to review my emails without my consent" [para. 7].

81. Mr Brock notes Mr Delappe's averment in his second affidavit that he does not "intend to further access [my] email account pending the determination of the proceedings". Mr Brock notes at para. 13 of his affidavit that this commitment "…has come over a month after the issuance of this injunction application and approximately three weeks after it was expressly indicated to this Honourable Court by Mr Delappe's counsel that he was not providing any undertaking in respect of access".

82. At para. 15 of his affidavit, Mr Brock continued to strongly reject the suggestion that there was any question of fraud, a term which Mr Brock states is "highly offensive". He argues that the various issues in relation to Mr Delappe's involvement in the company, and in particular what he terms "the poor performance of the Company's Cabra branch", were significant matters which required to be

discussed at the directors' meeting. He also avers at para. 16 that, irrespective of any decision taken in relation to redundancy, "…there was no question of any step being taken to force the sale of [Mr Delappe's] shares or otherwise interfere with his rights as a shareholder of the Company". I repeat that I have no intention or desire whatsoever to force Mr Delappe into the sale of his shareholding in the company…". He states that he is "at a loss to understand" the suggestion that he and Mr Cosgrave intended to force the sale of Mr Delappe's shares, or that the respondents' solicitor's advice was to make Mr Delappe redundant without a salary or sterilise his shareholding.

83. At para. 17 of his affidavit, Mr Brock deals with the Cabra properties which Mr Delappe maintains were to be excluded from the accounts relating to the Cabra office. He avers that, in relation to two of these properties, neither of the sales could be credited to the work of the Cabra branch; if Mr Delappe took a different view, he could "express those views at the directors' meeting" [para. 17]. At para. 19 of his affidavit, Mr Brock sets out a number of matters which he says support his contention that he has "worked hard to support and advise the Cabra office in its marketing, strategy and recruitment efforts".

Affidavit of TJ Kelly, 31 August 2021

84. Mr TJ Kelly describes himself as an information technology specialist, and he provides external services to the company in respect of their IT and computer systems. The purpose of Mr Kelly's affidavit was to address the issues of access to Mr Brock's desktop computer.

85. At para. 7 of his affidavit, Mr Kelly states that he has not himself "experienced any practice within the Company which might suggest that each user has open access to the other's work email account". He states that he was asked by Mr Brock to look

into the activity logs for Mr Brock's email account and to identify attempts to access his email account by persons other than himself.

86. At para. 11 of his affidavit, Mr Kelly states that he is advised that "…in order for a new device to access Mr Brock's email account, it would be necessary to input the correct password. The only exception to this would have been with the use of Mr Brock's desktop computer, located in the company's Inchicore office". Prior to installing a security log-in on Mr Brock's desktop computer in July 2021, it would "…in theory have been quite possible for a third party to gain access to his emails through Mr Brock's own desktop computer in the Inchicore office. It would also have been possible to gain access to the private password for his private email account, which is save [sic] and readily accessible on his desktop computer".

87. Thereafter, Mr Kelly's affidavit relates mainly to his investigation of the audit logs for Mr Brock's email account, and he sets out technical details in this regard. At para. 14 of his affidavit, he avers that "…it is evident that someone in the Cabra office logged into Mr Brock's email account on numerous occasions. I understand and have been advised by Mr Brock that he never worked from the Cabra office". Mr Kelly exhibits details from the audit logs. These details show that there was a failed login to Mr Brock's email from the Cabra office at 19.11 and 19.12 on 10 June 2021. Approximately twenty-five minutes later, at 7.39pm, Mr Brock's email account was accessed from the company's Inchicore office, and the audit details show that, over the course of the next eleven minutes, there is a number of logins from the same location. Mr Kelly avers that "this…likely reflects activity on the account such as email searches, which would require additional interaction with the Google server". He points out that the Inchicore office closes at 5.30pm, and that he is advised that Mr Brock was in County Donegal at the time when this activity took place.

88. Mr Kelly further avers at para. 16 of his affidavit that, at 7.54pm, a new mobile device successfully logged into Mr Brock's email account, and sets out his reasons for believing this mobile device to belong to Mr Delappe. He avers that such access "would have been made possible if Mr Delappe accessed and took note of Mr Brock's password through the settings on his desktop computer in the Inchicore office".

89. The inference drawn by the respondents is that, on 10 June 2021, Mr Delappe attempted to access Mr Brock's email from the Cabra office, and when he was not successful in this regard, drove to the Inchicore office out of hours, at a time when Mr Brock was in Donegal, in order to obtain access to Mr Brock's email. Mr Kelly also sets out his reasons for believing that Mr Delappe's telephone was used to access Mr Brock's email account during the period 10 June to 28 July 2021.

Third affidavit of Mr Delappe, 20 September 2021

90. This short affidavit from Mr Delappe relates to work done on Mr Delappe's behalf by an information technology expert in reviewing data provided by the company consisting of all logins and logouts on the company's network and email accounts for a period of six months. Spreadsheets of analysis are exhibited to Mr Delappe's affidavit.

91. Mr Delappe avers that "there was an unsuccessful attempt to access my email address from [an IP address identified by him] on 20 July 2021. I therefore believe that Mr Brock attempted to access my email account on at least one occasion, on 20 July 2021…I say and believe that there are other instances of attempts to log in to my email which I am unable to identify on the basis of the data that I have been provided access to" [paras 11 to 12].

Second affidavit TJ Kelly, 23 September 2021

92. However, Mr Kelly, in a further affidavit, avers at para. 6 of that affidavit that the IP address referred to by Mr Delappe "is not that of David Brock but is in fact my IP address". Mr Kelly avers that "…the log-in record relates to an attempt by me to log-in to his account on that date. I did so in direct response to a request for support, sent to me by Mr Delappe on 19 July 2021" [para. 7].

Submissions generally

93. Both sides proffered lengthy written submissions in advance of the hearing, and senior counsel for both sides made oral submissions to the court. In the course of those submissions, counsel addressed the facts as set out in the affidavits at length, each seeking to persuade the court to draw the inferences for which they respectively contended.

94. As the facts are essential to the exercise of applying legal principles to arrive at an appropriate and just result, I have summarised the parties' respective positions as set out in the affidavits at length. Accordingly, I propose, for the purpose of considering the submissions of the parties, not to dwell further on their factual positions, but to refer to them only in as far as they are relevant to the arguments as to the legal principles. As regards the many points made by both in submissions both written and oral, I have considered and taken all of them into account in this judgment.

The respondents' submissions

95. The essence of the respondents' position is expressed as follows at para. 6 of their written submissions:

> "…It is apparent that the applicant obtained copies of [exhibits KD6 to KD14] through the covert and unauthorised access of the First Named Defendant's private work email account, at a time when these proceeding [sic] were in

being and, furthermore, at a time when it was abundantly clear that the Applicant's stated entitlement to be furnished with the copies of those documents was the subject of a dispute ventilated in correspondence exchanged between the Applicant's solicitors (Fieldfisher) and the Respondents' solicitors (Anne O'Connell Solicitors). It is a remarkable feature of this case that in spite of Fieldfisher being aware of the opposition to these documents and the basis on which objection was made, they proceeded to exhibit these documents in a replying affidavit without seeking the leave of the court to use these documents (as would be the correct manner to proceed – as the case law suggests) thus making it necessary to bring the within application".

96. In relation to the communications between Mr Brock and AOC Solicitors between 28 April 2021 and 4 May 2021, the respondents submit that this category of documents "…relate specifically to legal advice provided, in the first instance to the Company, in respect of a potential redundancy process which was to be considered in respect of the Applicant's position and, laterally [sic], also to the First and Second Named Respondents as shareholders of the Company. The Applicant's contention that there was anything improper in the decision to consider embarking upon a redundancy consultation process in respect of his position is completely unfounded. The Respondents had (and continue to have) legitimate concerns in relation to the financial position of the Company and, in particular, the ongoing viability of the Cabra office (where the applicant is primarily based). Those advices accessed and disclosed by him in his second affidavit addressed various matters which would likely fall to be considered in the event of the Company deciding to embark upon a redundancy consultation process in respect of the Applicant's position, including a

consideration of the Applicant's rights as a shareholder of the Company and the issues which would likely required [sic] to be addressed in the settlement of the litigation which, it was envisaged, the Applicant would initiate" [para. 8 written submissions].

97. The respondents' submissions distinguish between the communications involving Mr Brock and AOC Solicitors on the one hand, and communications between Mr Brock and Mr Kilcoyne on the other. In relation to the former category, it is submitted that such documents are communications between lawyer and client for the purpose of seeking or giving legal advice. As such, it is submitted that the documents are confidential and clearly covered by legal advice privilege.

98. It is also stated that both categories of communications are covered by litigation privilege. It is submitted that it is "manifestly the case that at the time when the very first documents were exchanged between the First Named Respondent and both Anne O'Connell Solicitors and Mr Kilcoyne, it was reasonably apprehended that litigation would be commenced by the Applicant. This is apparent from the face of the communications themselves, in which advice is being sought in relation to the potential matters which fell to be considered in the event of litigation being commenced, including, *inter alia*, the terms upon which such litigation might be compromised between the parties…" [para. 24].

99. A further issue arises as to whether Mr Delappe, as a director and shareholder of the company, was entitled to access to advice given to the company. Such an entitlement was asserted by Fieldfisher on behalf of Mr Delappe in its letter of 13 May 2021. This request was reiterated in a letter by Fieldfisher to Mr Brock of 24 May 2021, and again in a letter of 4 June 2021. In a letter of reply of that date, AOC Solicitors stated bluntly that "…our clients are of the view that your client is not entitled to a copy of the legal advice that is being sought". By a letter of 29 June 2021

to AOC Solicitors, by which time the mediation process had concluded, Fieldfisher stated *inter alia* as follows:

> "It is our firm view that in representing both the company and the oppressing majority, you have placed yourself in an impossible position of conflict which is now highlighted by your refusal to provide disclosure of your advices. It has been confirmed by your client that legal advice was sought and received from your firm in relation to the proposed redundancy of our client. As a shareholder and a director of the Company, our client is clearly entitled to those advices. Your continued refusal to provide same only serves to reinforce our client's view that your clients have set out to oppress and continue to oppress his interests with your continued assistance.
>
> We ask you to carefully reflect on your obligations to our client as a shareholder and director of the Company. We also ask you to carefully consider your obligations under the disclosure rule. In this regard we would refer you to the decision in Re Hydrosan Ltd. [1991] BCLC 418."

100. AOC Solicitors replied in detail to this letter on 02 July 2021. The letter stated *inter alia* as follows:

> "In your letter, you appear to suggest that your client, Mr Delappe, ought to be entitled to copies of any legal advice provided to the Company by our firm regarding the directors' meeting which was due to take place on 13 May 2021 and the issues to be discussed at that meeting. As previously stated, whilst it is acknowledged that your client may ordinarily be entitled to sight of advices provided to the Company in relation to the general management of its affairs, it is certainly not the case that your client would be entitled to copies of any

advices provided specifically on matters in relation to which a dispute might likely arise between the Company and your client.

The Company was perfectly entitled to seek legal advice in respect of the obligations it owes to your client in convening the meeting of 13 May 2021 which, as you are well aware, was intended to include a discussion regarding the possibility of your client's employment with the company being placed at risk of redundancy.

The likely existence of a dispute between your client and the company in respect of that proposed meeting is beyond doubt. In fact, this was acknowledged in your initial letter dated 12 May 2021, in which you wrote to Mr David Brock, demanding confirmation that the proposed meeting would not go ahead and requesting certain categories of documentation relating to the Company's affairs. It is noteworthy that this letter was directed to Mr Brock, specifically in his *'capacity as Company Secretary of the Company'* [italics in original].

There can be no doubt whatsoever that any advice provided by our firm to the Company in respect of that meeting, or the matters to be discussed at that meeting, were provided in circumstances where there was a strong possibility of a dispute arising between your client and the Company (of the kind referred to in Arrow Trading & Investments Est. 1920 v Edwardian Group Limited [2004] BCC 955).

In the circumstances, your client has no legal entitlement to disclosure of any such advice".

101. This remains the respondents' position. It is submitted that, where advice concerns actual, threatened or contemplated litigation between the company and

shareholder, that shareholder has no entitlement to access the advices in question, and the respondent relies in particular on the decision in *Arrow Trading & Investments est. 1920 v Edwardian Group Limited* [2004] BCC 955, in which Blackburne J stated as follows:

> "…The essential distinction as between the advice to the company in connection with the administration of its affairs on behalf of all its shareholders, and advice to the company in defence of an action, actual, threatened or in contemplation, by a shareholder against the company…" [para. 24].

102. Particular reliance is placed by the respondents on the judgment of Haughton J in *Carlo Tassara Assets Management SA v Éire Composites Limited & Ors.* [2016] IEHC 103, in which the court was requested to consider the entitlement of a shareholder to discovery of legal advice provided to the company in anticipation of a dispute between the company and its shareholder. The court held that, at a certain point, litigation involving the shareholder had become "probable", so that legal advice sought and obtained by the company or other likely parties to the litigation attracted legal professional privilege. Haughton J refers to a situation where the parties are "sundered by litigation", in which case legal advice obtained by one of them must be regarded as privileged. In such a case, the "joint interest" of shareholders and the company in accessing legal advice given to the company ceases to exist.

103. In their written submissions, the respondents address the contention that any privilege attaching to the controversial documents should be set aside on the basis that they constitute a fraud or deceit upon the applicant – the so called "iniquity exception". The written submissions repeat Mr Brock's trenchant rejection of this contention as set out at para. 15 of his third affidavit, summarised at para. 82 above.

The respondents accept that legal professional privilege is not available to parties who – in the words of Finlay CJ in *Murphy v Kirwan* [1993] 3 IR 501 – "…falsely and maliciously bring an action and…abuse for an ulterior or improper purpose, the processes of the court". However, they rely in particular on the decision in *Curless v Shell International Limited* [2019] EWCA Civ 1710. In that case, the claimant Mr Curless suffered from certain disabilities. There were ongoing concerns on the part of the respondent ('Shell') with regard to his ability to meet deadlines and his general standard of work. Mr Curless contended that the rejection by Shell of various applications by him for internal roles and the requirement of him to provide written reports as to work carried out gave rise to unlawful disability discrimination and/or failure to make reasonable adjustments on the part of Shell. He submitted a claim to the Employment Tribunal, and subsequently raised an internal grievance, both of which complaints raised the issue of disability discrimination. Subsequently, Shell implemented a group-wide redundancy programme, and after participating in a redundancy consultation process, the employment of Mr Curless was terminated with three months notice, allegedly by reason of redundancy. Mr Curless then commenced a second Employment Tribunal claim alleging disability discrimination, victimisation and unfair dismissal, contending that Shell was using the redundancy as a pretext to terminate his employment.

104. In the "details of claim" which accompanied the claim form in Mr Curless' second claim to the Employment Tribunal, he included the following paragraph:

> "10(ii) In October 2016, the claimant learnt that, in April 2016, Ms Alex Ward (the respondent's 'Managing Counsel', UK Employment and Employee Benefits) had told David Brinley (who was the line manager of the claimant's line manager) that the respondent could use a planned re-organisation of the

> respondent's in-house legal department in order to terminate the claimant's employment. Ms Ward told Mr Brinley that it was worth considering this in order to avoid the risk of 'impasse and proceedings with ongoing employment with no obvious resolution'. She did so while the claimant's disability discrimination grievance process (see below) and existing claims for disability discrimination were in train, and three months before the claimant was put on notice of risk of redundancy. This indicates that the claimant's 'redundancy' process was a sham designed to end his employment, and that the respondent wanted to end his employment because he had done protected acts, namely raising his disability discrimination grievance and bringing his employment tribunal claims of disability discrimination".

105. Mr Curless became aware of the matters in the foregoing paragraph as a result of seeing an email of 29 April 2016 between other Shell lawyers. This email had been sent to him anonymously in October 2016. The email was from a lawyer – the 'Ms Ward', to whom reference is made – who had at the time "high-level responsibility for giving legal advice in relation to Mr Curless". The recipient was a member of a legal firm who had effectively been seconded to Shell, and had conduct of Shell's defence in Mr Curless' first claim. The email was headed "legally privileged and confidential". It contained the following paragraph:

> "I told him [*i.e.*, Mr Brinley, in-house general counsel with Shell] this is their best opportunity to consider carefully how such processes could be applies [sic] across the board to the UK legal population including the individual [it was not disputed that this is a reference to Mr Curless]. If done with appropriate safeguards and in the right circumstances, while there is always the risk he would argue unfairness/discrimination, there is at least a wider

> reorganisation and process at play that we could put this into the context of. I felt in the circumstances this is definitely worth considering even if there is the inevitable degree of legal risk which we would try to mitigate. Otherwise we risk impasse and proceedings with ongoing employment with no obvious resolution. Happy to discuss next week".

106. The Employment Tribunal held that this email attracted legal advice privilege and that para. 10(ii) of the details of claim, along with another paragraph, should be struck out. That decision was set aside on appeal by the Employment Appeal Tribunal. Shell in turn appealed to the Court of Appeal, which required to determine whether the Employment Appeals Tribunal was correct in holding that the "crime-fraud-iniquity" principle was applicable in respect of, *inter alia*, the email in question. The court stated as follows:

> "49. Legal advice was being given on how such processes could be applied to Mr Curless 'with appropriate safeguards and in the right circumstances': the email leaves open what such safeguards or circumstances might be, but there is nothing in the email to suggest that if further elucidation was sought and given, it would have consisted of anything other than entirely conventional advice. The writer was considering two alternative risks. If the processes led to Mr Curless being selected for redundancy, there was a risk that he would argue that the dismissal was unfair and discriminatory. On the other hand, if Mr Curless was not considered for redundancy and remained in employment, the first claim would continue anyway and there was a risk of an impasse.
>
> 50. We agree with the ET that this was the sort of advice which employment lawyers give 'day in, day out' in cases where an employer wishes to consider for redundancy an employee who (rightly or wrongly) is regarded by the

employer as underperforming. We do not agree that this was advice to act in an underhand or iniquitous way".

107. The respondents submit that the present case is on all fours with the decision in *Curless*. They contend that the email of 29 April 2021 from Mr Brock to Ms O'Connell was "absolutely typical of a request by a company for legal advice on an employment issue". In oral submissions, counsel referred to the dicta of Mann J in *Various Claimants v Newsgroup Newspapers Limited* [2021] EWHC 680 (CH), and in particular the summary of the applicable principles by the court at paras. 2 to 5 of that judgment. The court accepted that the iniquity principle applied where the conduct could be characterised as dishonest and fraudulent; the court referred at para. 4(iii) to the dicta of Norris J in *BBGP Managing General Partner Limited v Babcock and Browne Global Partners* [2011] CH 296, in which the court stated "…in each of these cases [*i.e.,* concerning the principle] the wrongdoer has gone beyond conduct which really amounts to a civil wrong; he has indulged in sharp practice, something of an underhand nature where the circumstances required good faith, something which commercial men would say was a fraud or which the law treats as entirely contrary to public policy". The court adopted the test set out in the *BBGP* decision of whether there is a "strong prima facie case" of iniquity: see para. 4(v).

108. It was submitted by counsel that none of the documents in controversy showed dishonesty or fraud, or established a *prima facie* case of iniquity, strong or otherwise. Counsel emphasised the strong support shown by courts in the jurisprudence for the principle of privilege, and the reluctance of courts to set aside privilege in other than compelling circumstances. Counsel also emphasised the serious and far-reaching consequences for the respondents and AOC Solicitors if the court were to find that there was an iniquity which warranted the setting aside of privilege.

Applicant's submissions

109. Both the written and oral submissions made on behalf of the applicant commenced with a preliminary objection. The applicant argues that the respondent has no standing to seek injunctive relief: it is contended that "there is an overriding requirement that the applicant for an injunction must have a cause of action in law entitling him to substantive relief" [para. 11 written submissions]. The applicant submits that "…[t]he only possible cause of action discernible from the papers filed in support of the injunction appears to be a claim for an alleged breach of confidence. However, no proceedings have been issued by the Respondents for breach of confidence or any claim that might lay the ground for seeking injunctive relief nor has any counterclaim been intimated which in any event would be confined to the relief available under s.212 of the Companies Act 2014. It follows that the Respondents do not have standing in these proceedings to seek the injunctive relief they claim" [para. 12 written submissions].

110. The applicant also submits that there is no resolution of the company authorising the institution of legal proceedings, and cites *Re Aston Colour Print Limited* [1997] IEHC 33 as authority for the proposition that, where a meeting of directors is not properly held, any decision to commence proceedings – in that case a petition to have an examiner appointed to the company – can be invalidated. It is not suggested by either the applicant or the respondents that any such resolution has been passed authorising the company to participate in seeking an injunction against the applicant.

111. Counsel for the applicant went on to state that the applicant relied on two points in particular: firstly, the applicant contends that the "iniquity exception" applies, and that he has shown a strong *prima facie* case that the respondents were

guilty of the sort of iniquity envisaged in the case law, and that they received advice with a view to carrying out that iniquity. Secondly, it was argued that Mr Delappe, as a director and shareholder of the company, was in any event entitled to the documentation, and that privilege cannot be asserted against him.

112. Counsel referred to the originating notice of motion in the proceedings, and pointed out that, although para. 2 of the originating notice of motion refers to "the respondents, and each or either of them", it is very clear that the reliefs are sought, not against the company, but against the first and second respondents. It is they who are accused of exercising their powers in a manner oppressive to the applicant or in disregard of his interests as a member of the company, and the reliefs are solely directed towards Mr Brock and Mr Cosgrave. While the company is a respondent, it is submitted that the company is named as such to render it amenable to any order the court would see fit to make. In this regard, the applicant relies on the decision of Harman J in *Re Hydrosan Limited* [1991] BCLC 418. That case involved a petition pursuant to s.459 of the Companies Act 1985, pursuant to which a member of a company may apply to the court by petition on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of some part of the members, or that any actual or proposed act or omission of the company is or would be so prejudicial. The petitioner sought orders for further discovery of certain documents in respect of which the company claimed legal professional privilege. The court referred to "the general rule that all documents obtained by the company in the course of the administration of the company…are producible to the shareholders…but where there is hostile litigation proceeding between them that rule does not apply" [p.421 b to c]. Harman J went on to find that the documents which were sought

> "…were not documents which were protected from disclosure by legal professional privilege. They were documents which were created or which were added to by lawyers or others for the purpose of procuring the company to take certain actions, albeit it was anticipated that those actions might give rise to litigation in which a challenge would be mounted to their propriety by the present petitioner. In the present case a company has procured the issue of a substantial number of the shares of its subsidiary to Mr Doughty and giving him an option to acquire further shares which would render the company a minority shareholder in that subsidiary. It is alleged amongst other matters that the issue of those shares in the granting of the option were at a discount on the true value of the shares at the relevant time is demonstrated by their market price. It is also alleged that the shareholders of the company in general meeting were induced to vote in favour of this transaction as a result of a misleading circular. I say nothing as to whether any of these allegations are justified. I can see powerful contrary arguments. However, I can see no reason why the objecting shareholders should not be entitled to see the advice and guidance being given to the company's board at the time these transactions were embarked upon in proceedings in which the company itself only appears as a defendant in a nominal capacity so as to be bound by any order which the court makes".

113. This passage was quoted with approval by Haughton J in *Carlo Tassara Assets Management SA v Éire Composites Teoranta & Ors.* [2016] IEHC 103. Haughton J distinguished the decision in *Hydrosan*, as *Caro Tessara* involved plenary proceedings in which damages for various causes of action were sought against each of the defendants, including the company: see para. 27 of the judgment. Haughton J

did however go on to state at para. 28 that "…it seems to me that legal advice obtained by a company for the purpose of procuring that company to take certain actions – even if it is anticipated that those actions might give rise to litigation – is advice which in principle a shareholder who claims that such actions are unlawful as constituting oppression should be entitled to discover".

114. It was submitted that, from the outset, the respondents' position was that it was the company that was seeking legal advice. In his email of May 13 2021 to Fieldfisher in response to that firm's letter of 12 May 2021, Mr Brock states "…[p]lease note that the company has instructed Anne O'Connell Solicitors on the advice given to date as to hold a directors meeting to discuss this matter and to circulate an agenda to all directors of the directors meeting so that everyone is aware of what is to be discussed". In her letter of 24 May 2021 to Fieldfisher, Ms O'Connell describes "our clients" as "Brock Delappe Limited, David Brock and Declan Cosgrove [sic]". All subsequent letters from Ms O'Connell contain this heading (albeit with the correct spelling of the second respondent's name).

115. AOC Solicitors addresses the issue of whom it was advising in its letter to Fieldfisher of 02 July 2021. Mr Brock quotes the entire text of this letter at para. 12 of his grounding affidavit in the present application, and I have referred to it at paras. 28 to 30 and para. 100 above. As is clear from the text quoted at para. 29 above, the letter seems to suggest that AOC Solicitors regarded itself as having been engaged initially by the company "for the purposes of advising on its legal obligations in respect of the meeting originally scheduled to take place on 13 May 2021…", and that it had "…since been engaged by the majority shareholders, Mr Brock and Mr Cosgrave, for the purposes of defending the proceedings which your client has now instituted against Mr Brock, Mr Cosgrave and the company".

116. This letter would suggest that, at the time that the email from Mr Brock to Ms O'Connell of 29 April 2021 setting out the initial instructions which Ms O'Connell had requested, she regarded herself as advising the company rather than Mr Brock or Mr Cosgrave personally. It would also appear that, when she sent her email of 6 May 2021 (KD10) to Mr Brock, she regarded herself at that time also as advising the company.

117. The position therefore of the applicant is that there was not and never has been hostile litigation involving him and the company. His grievances and the reliefs sought by him are against Mr Brock and Mr Cosgrave alone. He and the company are not "sundered by litigation", the phrase adopted by Haughton J. in *Carlo Tassara.* As a shareholder, he is entitled to see documentation which contains legal advice rendered to the company, and neither legal advice privilege nor litigation privilege can be deployed to prevent his access to such documentation.

118. As regards the applicability of the iniquity exception, detailed submissions were made on behalf of the applicant in this regard. Reference was made to the decision of the House of Lords in *O'Rourke v Darbishire* [1920] AC581, in which Viscount Finlay addressed the nature of the allegation by the party seeking to set aside privilege as follows:

> "The statement must be made in clear and definite terms, and there must further be some *prima facie* evidence that it has some foundation in fact…it is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud. The Court will exercise its discretion, not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the purpose of seeing whether the charge is

made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications…" [p.604].

119. The applicant referred to a number of authorities in which the "iniquity exception" is discussed. In *Barrowfen Properties v Patel & Ors.* [2020] EWHC 2536 (CH), Tom Leech QC (sitting as a judge of the Chancery Division) stated as follows:

> "33. It is well-established that the exception is not confined to crime or fraudulent misrepresentation but extends to fraud 'in a relatively wide sense': see *Barclays Bank plc v Eustice* (above) at 1249D (Schiemann LJ). In that case the Court of Appeal held that advice given in the course of transactions at an undervalue for the purpose of prejudicing the interests of a creditor fell within the exception. In [BBGP Managing General Partner Limited v Babcock & Browne Global Partners [2011] CH296] …Norris J stated that the iniquity exception applied in cases where:
>
> > '…the wrongdoer has gone beyond conduct which merely amounts to a civil wrong; he has indulged in sharp practice, something of an underhand nature where the circumstances required good faith, something which commercial men would say was a fraud or which the law treats as entirely contrary to public policy".

120. The applicant also referred to the judgment of Popplewell J of the High Court of Justice in *JSC PTA Bank v Ablyazov* [2014] EWHC 2788 (COMM), who, after a lengthy exposition of the principles relating to the principle, concluded as follows:

> "93. I would conclude, therefore, that the touchstone is whether the communication is made for the purposes of giving or receiving legal advice, or for the purposes of the conduct of actual or contemplated litigation, which is advice or conduct in which the solicitor is acting in the ordinary course of the

> professional engagement of a solicitor. If the iniquity puts the advice or conduct outside the normal scope of such professional engagement, or renders it an abuse of the relationship which properly falls within the ordinary course of such an engagement, a communication for such purpose cannot attract legal professional privilege. In cases where a lawyer is engaged to put forward a false case supported by false evidence, it will be a question of fact and degree whether it involves an abuse of the ordinary professional engagement of a solicitor in the circumstances in question…where in civil proceedings there is deception of the solicitors in order to use them as an instrument to perpetrate a substantial fraud on the other party and the court, that may well be indicative of a lack of confidentiality which is the essential prerequisite for the attachment of legal professional privilege. The deception of the solicitors, and therefore the abuse of the normal solicitor/client relationship, will often be the hallmark of iniquity which negates the privilege".

121. Counsel engaged at length with the documents KD6 to KD14, submitting that they satisfied the requirement of iniquity so as to lift the privilege. Counsel concentrated his submissions on the email from Mr Delappe to Ms O'Connell of 29 April 2021 (KD9); Ms O'Connell's email to Mr Brock of 6 May 2021 (KD10) and Mr Brock's email to Ms O'Connell of 13 May 2021 (KD11) in relation to the Cabra properties, two of which Mr Brock stated that he was "holding…back".

122. Counsel also placed particular reliance on the excerpt from the email from Mr Brock to AOC Solicitors of 19 May 2021 (KD13), and in particular the statement that "…we can deal with the potential sale of the shares separately, but the tax treatment should force the issue…". It was submitted that this was an allusion to "entrepreneurial relief", a tax break in which a person who sells shares may qualify

for relief from capital gains tax. Mr Brock's email to AOC Solicitors of 4 June 2021 (KD14) sets out details in relation to this relief, and states "…so Kevin qualifies and doesn't have to sell his shares immediately…". Counsel submitted that these emails indicated that the "plot" was that Mr Delappe would be made redundant, leaving him as a non-executive director, still holding his shares, but with "the clock running against him" in respect of entrepreneurial relief of which he would have to avail within a limited time. Counsel submitted that the plan was effectively to "back Mr Delappe into a corner", notwithstanding Mr Brock's assurance in his email of 20 May 2021 to Mr O'Reilly of Fieldfisher that "…I have already provided your firm with an assurance that, regardless of the outcome of [the directors' meeting] and/or the outcome of any redundancy process which may be commenced at that meeting, no steps will be taken to seek the sale or transfer [of] any of his shares in the company".

123. Counsel submitted that the shareholders' agreement stated at clause 3 that "…Mr Brock and Mr Delappe shall be responsible for conducting and managing the business of the Company on a day-to-day basis", and that Mr Delappe therefore had a contractual right to be involved in the management of the company. It was submitted that Mr Delappe's employment would be terminated in circumstances where false projections in relation to the Cabra office would be put forward so that Mr Delappe would ultimately have to sell his shares at an undervalue. Effectively, his shares would be sterilised, and he would have no option but to sell them. It was submitted that such actions were not part of the "regular cut and thrust" of shareholder oppression actions. Counsel submitted that this was far from being what he suggested counsel for the respondents had characterised as a "bread and butter, run of the mill redundancy case".

124. The applicant helpfully summarised his position in relation to the applicability of the iniquity exception at para. 67 of the written submissions as follows: -

> "(i) Legal professional privilege does not exist in respect of documents which are in themselves part of a criminal or unlawful fraudulent proceeding or, communications made in order to get advice for the purpose of carrying out a fraud.
>
> (ii) The exception applies whether the solicitor was or was not ignorant of the fact that he was being used for that purpose.
>
> (iii) Fraud in the context of the exception is used in a relatively wide sense and is not limited to the tort of deceit and includes all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances.
>
> (iv) The court should consider the purpose for which the advice is sought. Is it sought to explain the legal effect of what has already been done and is now the subject of existing litigation or is it sought in order to structure a transaction which is yet to be carried out? In the former class of case the court will be more hesitant to lift the cloak of privilege than in the latter.
>
> (v) The conduct must go beyond that which merely amounts to a civil wrong – indulging in sharp practice, something of an underhand nature where the circumstances required good faith, something which commercial men would say was a fraud or which the law treats as entirely contrary to public policy.
>
> (vi) The parties seeking to invoke the iniquity exception must establish a very strong *prima facie* case of fraud or some other iniquity."

Analysis

Preliminary objections

125. Preliminary objections were made by the applicant in the present application: I have set out the nature of those objections above at paras. 109 to 110.

126. As regards the first objection, to the effect that the respondents have no standing to seek injunctive relief, this ground is rooted in the contention that the respondents have not issued any proceedings for breach of confidence or any claim that might lay the ground for seeking injunctive relief. While this is so, one must bear in mind the procedure in a s.212 application, which requires the proceedings to be initiated by originating notice of motion (O.75, r.3(1) Rules of the Superior Courts). Order 75, r.3(5) states that the application "shall be heard and determined on affidavit unless the court otherwise authorises". However, the court may, pursuant to O.75, r.4(3) direct a plenary hearing of the matter, and issue "such directions as to the exchange of pleadings and the settling of the issues between the parties as appears proper in the circumstances".

127. No such directions have yet been given by the court. The parties appear to have proceeded on the basis that any directions application should await the outcome of the present application. There has therefore been no formal pleading – as opposed to affidavit – in the proceedings which has set out the respondents' defence to the proceedings or any counterclaim they wish to make. In the event that the court considers pleadings necessary in this regard, it has ample jurisdiction to do so.

128. Accordingly, while it is true that an injunction generally requires to be based upon a pleaded cause of action, there were in fact no pleadings in the matter by which the respondents could have done so. The applicant asserts that proceedings for breach of confidence should have been issued by the respondents, or that a counterclaim should have been intimated "which in any event would be confined to the relief

available under s.212…" [written submissions para. 12]. As they have not done so, it is argued that the respondents have no standing to prosecute the present application.

129. I do not see any merit in this point. The respondents acted with commendable speed in initiating the present application a week after receipt of the affidavit of Mr Delappe of 8 July 2021 in the substantive proceedings. The length of this judgment is testament to the length and complexity of the many affidavits on both sides which followed. Both sides engaged fully and with vigour on the issues; only when the process of exchange of affidavits was almost complete was the pleading point raised in the written submissions of the applicant.

130. A court, in considering whether further steps in the proceedings pursuant to O.75, r.4(3) might be necessary, might in due course consider it prudent to order that the respondents specify a cause of action in pleadings in the proceedings relevant to the present application. That is entirely a matter for the court hearing the directions application, which the parties have informed me is "travelling with" the present application. What I am not prepared to do is to find, after a voluminous exchange of affidavits, written submissions and three days in court, that the respondents never had standing to bring the application in the first place. S.27(7) of the Judicature (Ireland) Act 1877 states:

> "The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act, in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter, so that,

> as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided".

As Hogan J. stated in *Albion Properties Ltd. v. Moonblast Ltd.* [2011] 3 IR 563:

> "This Court enjoys a general jurisdiction to grant an injunction whenever it is just and convenient to do so: see s. 27(7) of the Supreme Court of Judicature (Ireland) Act 1877, as applied to this Court by s. 48 of the Courts (Supplemental Provisions) Act 1961. In this regard, I entirely agree with the submission of counsel for Albion Properties, Mr. Gibbons, that it would be pointless to require his client to issue separate plenary proceedings before an interlocutory injunction of this kind could either be sought or granted. A requirement of this kind would simply represent legal formalism at its worst".

In my view, a similar approach is warranted here. In the event that the Court with seisin of the directions application is of the view that it would be desirable that there be pleadings which reflect a cause of action underpinning the present application, I am quite sure that an appropriate order in this regard can be made.

131. Neither do I see any merit in the argument that, as there is no resolution of the company authorising this application, the respondents cannot prosecute it. While it is quite possibly the case that a resolution of the Board of Directors should be passed authorising the application – the applicant has not exhibited the company's constitutional documents in this regard – the application is brought by directors who represent two-thirds of the company's directors and shareholders. One would have thought that Mr Brock and Mr Cosgrave could readily ratify retrospectively any default in this regard. The applicant's point is a technical one, and not one which would cause me to consider that the respondents' application should be struck out.

Circumstances in which the documents were obtained

132. The respondents in their submissions deprecate the manner in which Mr Delappe obtained access to the documents: for instance, at para. 6 of the written submissions, they refer to "the covert and unauthorised access of the first named defendant's private work email account". At para. 3 of his grounding affidavit, Mr Brock refers to the access by Mr Delappe to the documents as "without any lawful authority or excuse". The manner of that access is the subject of repeated complaint by the respondents, who point out that the applicant could have sought discovery of the relevant and necessary documents held by the respondents, and challenged any claim of legal professional privilege asserted by the respondents.

133. If this had been done by the applicant, the result would have been that he would only have seen documents over which privilege was claimed which the court considered it appropriate for him to see. The respondents contend that, by gaining what they characterise as "covert" access, the applicant has seen and copied documents he was never entitled to see, which have enabled him to argue in turn that the documents indicate an "iniquity" which should deprive the respondents of privilege.

134. The respondents prosecuted the present application on the basis that the documents in controversy are privileged, and that the access of the applicant to the documents was unlawful for that reason. I did not understand them to argue that the conduct of the applicant *per se* in accessing the documents should disentitle him to have the use of them. In any event, whether or not the applicant was entitled to see Mr Brock's work email account was the subject of considerable debate in the exchange of affidavits: see for instance paras. 66 and 69 above, which set out the respective positions. The court cannot resolve any conflict of evidence on affidavit in this regard,

although the court is entitled to take the circumstances in which the documents were accessed into account in exercising its discretion in accordance with the principles appropriate to the grant of injunctive relief.

The issues

135. While the affidavits and submissions give rise to a host of issues both preliminary and otherwise, the parties are agreed that there are two fundamental issues which must be resolved:

(1) Whether the documents in question are protected by privilege; and

(2) if they are, whether the so-called "iniquity exception" applies to remove the privilege which would otherwise apply.

The key documents

136. Before considering these issues, it is necessary to consider the documents KD6 to KD14 carefully, and in particular documents KD9 (the email of Mr Brock to AOC Solicitors of 29 April 2021), KD10 (Ms O'Connell's email to Mr Brock of 06 May 2021), KD11 (Mr Brock's email to Ms O'Connell of 13 May 2021), and KD13 (the portion of the email from Mr Brock to Ms O'Connell of 13 May 2021).The applicant relies particularly on those emails as demonstrating a fraudulent intent on the part of Mr Brock and/or Ms O'Connell.

137. Mr Brock addresses Mr Delappe's role in the company in his replying affidavit in the substantive proceedings, and at paras. 20 to 31 in particular of that affidavit, he addresses what he sees as the failure of the Cabra office and the greatly diminished role of Mr Delappe in the company. At para. 31 of that affidavit, Mr Brock summarised that role as follows:

> "31. Whilst Mr Delappe continues to play a modest role in property lettings and management which are managed out of the Inchicore office, for the past 3

> or so years his primary focus is and has been on the running and growth of the Cabra office. Mr Delappe has little or no involvement in property sales in the Company's Inchicore and Kilmainham branches. In addition to this, since in or around late 2018, Mr Delappe has been based exclusively in the Cabra branch".

138. It is clear from his affidavits in both the substantive proceedings and the present application that Mr Delappe regards the argument that redundancy is justified or even up for discussion in his case as spurious, and indeed a "sham contrivance", the purpose of which is to secure his removal from the company. It is submitted on his behalf that the statements by Mr Brock in the 29 April 2021 email – see para. 45 above – that "…at this point I just want him away from the business and I am exploring the [possibility] of redundancy…", and "…if I am honest I think my redundancy case could be easily challenged…", confirm his views in that regard.

139. Ms O'Connell's email of 06 May 2021 – see para. 46 above – was clearly written after certain documents had been provided to her, and after she had consulted Mr Kilcoyne. There is therefore some context to the email, the exact nature of which is not apparent from the email itself. The email is notable in that it does not address the specific queries regarding the redundancy process raised by Mr Brock at the end of his email of 29 April 2021; redundancy is mentioned only in passing in the final paragraph ("…the above plan…should avoid any High Court proceedings and give us time to carry out some form of redundancy process…").

140. The "plan" set out in Ms O'Connell's email is concerned entirely with issues of "minority oppression" and tactical considerations concerning Mr Delappe's shares. The suggestion is made by Ms O'Connell that Mr Brock "leaves Kevin with the shares at the time of termination of employment". It is clear however that the advice

given addresses the shares issue in the context of Mr Delappe's employment with the company ceasing; in this sense, the advice given is relevant to the issue of redundancy, even though Ms O'Connell seems to envisage that Mr Delappe would be amenable to a sale of his shares to the company. However, while the email does touch upon the issue of Mr Delappe's redundancy, the inescapable conclusion in my view is that the email comprised advice in relation to the issues of minority oppression and the sale of the shares – advice which was directed to Mr Brock's interests rather than those of the company – notwithstanding Ms O'Connell's subsequent clear articulation of her position as advising the company rather than the shareholders at that time.

141. The email of 13 May 2021 from Mr Brock to Ms O'Connell – see para. 47 above – is regarded by Mr Delappe as a clear indication that the sales figures for the Cabra office were to be manipulated to bolster what he considers to be a fraudulent attempt to oust him from the company. For his part, Mr Brock addresses the issue of his "holding back" the two properties to which reference is made in the email at para. 17 of his third affidavit sworn on 31 August 2021 in the present application, in which he expresses the view, *inter alia*, that "neither of these sales can be credited to the work of the Cabra branch", and sets out his reasons for this position, commenting that "Mr Delappe takes the view that those properties should have been credited to Cabra in the accounts…it was open to him to express those views at the directors' meeting".

142. I have referred at paras. 49 to 60 above to the controversy surrounding exhibit KD13. At that stage – 19 May 2021 – Mr Brock was indicating a desire to "proceed with the redundancy process", stating that "we can deal with the potential sale of the shares separately, but the tax treatment should force the issue". Mr Brock rejects any suggestion that this document indicates a desire to pressure Mr Delappe into selling

his shares by reason of the desirability of availing of tax relief, rather than remaining a shareholder but without the benefit of employment with the company.

The privilege issue

143. It is in the context set out above that Mr Brock asserts privilege in respect of exhibits KD6 to KD14. It appears that the privilege asserted by the respondents in respect of the documents is that between the company and AOC Solicitors, or the company and Mr Kilcoyne. Ms O'Connell makes it clear in her letter of 02 July 2021 that, as far as Mr Brock and Mr Cosgrave was concerned, she had been engaged by them "for the purposes of defending the proceedings which your client has now initiated against Mr Brock, Mr Cosgrave, and the company". The proceedings were issued on 24 May 2021, and KD14 is the only one of the disputed documents which comes after that date.

144. I do not propose to increase unnecessarily the length of an already long judgment by embarking on an extensive review of the law relating to discovery. The principles are by and large well settled, and do not require further elaboration from me.

145. The degree of respect and protection afforded by the courts to the concept of legal professional privilege is apparent from the cases on discovery generally and those cited to this Court in the course of argument. This approach is particularly evident in the judgments dealing with the iniquity exception; they emphasise the exceptional nature of that principle, and the need to avoid an erosion of the principles underpinning the privilege. As Lord Taylor CJ stated in *R v Derby Magistrates Court, Ex parte B* [1996] AC 487 (a passage quoted with approval at para. 24 of the judgment of Haughton J in *Carlo Tessara*):

> "The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests".

146. In relation to legal advice privilege, the respondent relies on the oft-quoted dicta of Finlay CJ in *Smurfit Paribas Bank Limited v AAB Export Finance Limited* [1990] IR 469:

> "Where a person seeks or obtains legal advice there are good reasons to believe that he necessarily enters the area of potential litigation. The necessity to obtain legal advice would in broad terms appear to envisage the possibility of a legal challenge or query as to the correctness or effectiveness of some step which a person is contemplating. Whether such query or challenge develops or not, it is clear that a person is then entering the area of possible litigation. Having regard to those considerations I accept that where it is established that a communication was made between a person and his lawyer acting for him as a lawyer for the purpose of obtaining from such lawyer legal advice, whether at the initiation of the client or the lawyer, that communication made on such an occasion should in general be privileged or exempt from disclosure, except with the consent of the client".

147. In relation to litigation privilege, the respondents fairly comment, at para. 21 of their submissions, that:

> "While there will be no doubt as to the applicability of the privilege where proceedings have formally commenced, the courts have found it difficult to identify precisely the circumstances in which communication will be privileged where litigation has not yet commenced. In *Wheeler v Le Marchant*, both Brett and Cotton LJJ held that litigation must be '*contemplated*' for the privilege to apply." [Italics in original]

148. In *Artisan Glass Studio Limited v The Liffey Trust Limited & Ors.* [2018] IEHC 278, McDonald J recorded the agreement of the parties, based on the caselaw, that

> "… 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. [Paragraph 3]"

149. The court in that case adopted this formulation and deployed it in examining the claim of the second named defendant to litigation privilege in respect of two reports from a firm of loss adjusters. I propose to adopt the same approach to the claim of privilege in the present case, and in doing so, I will concentrate on documents KD9, KD10, KD11 and KD13.

150. As regards document KD9, the email of 29 April 2021 from Mr Brock to Ms O'Connell, Mr Brock made it clear that his relationship with Mr Delappe had broken down ("I just want him away from the business"), but stated that he was "exploring the [possibility] of redundancy". While he frankly concedes in the email that "any redundancy case could be easily challenged", the email concludes with a specific request for advice in relation to the process of redundancy. This request seeks advice as to "if it went to the WRC", and the consequences of that eventuality.

151. It seems to me that Mr Brock wished to consider the possible redundancy of Mr Delappe, and was of the view that it was very likely, if not inevitable, that Mr Delappe would argue that his dismissal was unfair, and apply to the Workplace Relations Commission for relief. Any such proceedings would be against the entity that had made him redundant, *i.e.*, the company. The email therefore clearly contemplated future litigation with Mr Delappe; however, the litigation contemplated relates solely to the proposed redundancy of Mr Delappe. No mention is made in that email of minority oppression, or the sale of Mr Delappe's shares.

152. In KD10 however – the email from Ms O'Connell to Mr Brock of 6 May 2021 – the advice relates almost entirely to these issues. While it appears, from her letter of 02 July 2021 in particular, that Ms O'Connell regarded herself at this time as advising the company, the advice in relation to minority oppression and the sale of the shares were in reality directed to the issues concerning Mr Brock and Mr Cosgrave rather than the company.

153. Section 212(1) and (2) of the Companies Act 2014 are as follows:

> "(1) Any member of a company who complains that the affairs of the company are being conducted or that the powers of the directors of the company are being exercised -

(a) in a manner oppressive to him or her or any of the members (including himself or herself), or

(b) in disregard of his or her or their interests as members,

may apply to the court for an order under this section.

(2) If, on an application under subsection (1), the court is of opinion that the company's affairs are being conducted or the directors' powers are being exercised in a manner that is mentioned in subsection (1)(a) or (b), the court may, with a view to bringing to an end the matters complained of, make such order or orders as it thinks fit."

154. The remainder of the section certainly contemplates that it may be necessary to make an order against the company for the purpose of giving effect to an order the court sees fit to make pursuant to s.212(2), *i.e.*, an order that the company's affairs be regulated "with a view to bringing an end to the matters complained of…". However, the section is essentially directed towards the actions of the directors `who are conducting the affairs of the company in a manner oppressive to a shareholder or in disregard of their interests as members. The company is thus joined to a s.212 application so that it may be amenable to an order which the court considers necessary to bring to an end the oppressive conduct. This principle is recognised in the *Hydrosan* judgment to which I refer at para. 112 above.

155. The position that Ms O'Connell repeatedly asserted as to whom and for what purpose she was advising was that set out in her letter of 02 July 2021 quoted at para. 29 above. On May 06, 2021, therefore, and generally prior to the institution of the present proceedings, AOC Solicitors considered itself to be advising the company "for the purposes of advising on its legal obligations in respect of the meeting originally scheduled to take place on 13 May 2021". At no point does Ms O'Connell contend

that, when she wrote the email of 06 May 2021, she was in fact advising Mr Brock and/or Mr Cosgrave in relation to a possible s.212 application against them personally; such proceedings could have reasonably been contemplated on receipt of the first letter from Fieldfisher to Mr Brock of 12 May 2021, in which specific mention of the actions of Mr Brock and Mr Cosgrave being oppressive and in disregard of Mr Delappe's interests as a shareholder was made. We know from exhibit KD6 – the email of Mr Brock to Mr Kilcoyne of 22 April 2021 – that Mr Brock was conscious at that time of the possibility of s.212 proceedings being initiated by Mr Delappe, but no evidence was adduced before me of any request of Ms O'Connell on behalf of Mr Brock or Mr Cosgrave for advice on this issue in their personal capacities.

156. In *Various Claimants v Newsgroup Newspapers Limited* [2021] EWHC 680 (CH), Mann J addressed the evidence required in relation to a claim for privilege:

> "3. So far as the existence of privilege is concerned, the point in this case turns on the evidence as to the claim to the privilege. It was common ground that the burden is on the person who claims privilege. I do not need to set out authority for that proposition. Next, it was not disputed that it is for the claim of the privilege to be made with sufficient clarity as to the basis on which the privilege is claimed – see WH Holdings Limited v E20 Stadium LLP [2018] EWCA Civ 2652, citing the decision of Beatson J in West London Pipeline and Storage Limited v Total UK [2008] 2CLC 258:
>
> > (1) The burden of proof is on the party claiming privilege to establish it…A claim for privilege is an unusual claim in the sense that the party claiming privilege and the party's legal advisers are, subject to the power of the court to inspect the documents, the judges in their own

> client's cause. Because of this, the court must be particularly careful to consider how the claim for privilege is made out and the affidavit should be as specific as possible without making disclosure of the very matters that the claim for privilege is designed to protect…"

157. In a similar vein, in *Colston v Dunnes Stores* [2019] IECA 59, Irvine J (as she then was) stated as follows:

> "42… litigation in this jurisdiction is adversarial in nature, and that being so, there is nothing improper in a party standing on their right to privilege where it is properly made out. Nonetheless, when a claim of privilege is upheld the consequences are, first, that material which has already been determined as relevant to the issues the court will have to decide, will not be available to the other party. Neither will it be available to the court to enable it to do justice between the parties. For this reason, the court must be diligent to ensure that the party claiming privilege, discharges the requisite burden of proof. Privilege has the potential to interfere with the court's ability to establish the truth. Thus a party claiming privilege must discharge the onus upon them to satisfy the court that privilege is properly claimed."

158. The evidence in the present case emanating from the parties claiming privilege is unequivocally that the email of 6 May 2021 was regarded by AOC Solicitors as advice to the company – the position affirmed by Ms O'Connell in her letter to Fieldfisher of 02 July 2021 – notwithstanding that its contents appear to address the interests of Mr Brock and Mr Cosgrave rather than the company. If the email had been preceded by a specific request from Mr Brock or Mr Cosgrave for such advice, one might be likely to conclude that they, rather than the company, were entitled to regard the email as privileged. However, there is no such evidence, and no claim by

Messrs Brock and Cosgrave, that it is their privilege, rather than that of the company. Accordingly, the privilege, if any, that attaches to the email must be regarded as that of the company in accordance with Ms O'Connell's intimation in her letter of 02 July 2021 that her instructions on behalf of Mr Brock and Mr Delappe had arisen "for the purposes of defending the proceedings which your client has now instituted".

159. In that case, Mr Delappe contends that the position is as set out at para. 117 above. Properly regarded, there is no dispute between him and the company, and this must be so as of May 06 2021, before any proceedings were threatened or instituted. As a shareholder and director, he is entitled to see advice given to the company, as he and the company are not "sundered by litigation".

160. The respondents invite me to hold that the email of 06 May 2021 attracts privilege because litigation had at that stage become "probable". That may be so, and certainly Mr Brock seems to have anticipated possible oppression proceedings at least as early as 22 April 2021, as exhibit KD6 shows. However, the issues with which the email was concerned relate almost exclusively to the interests of Mr Brock and Mr Cosgrave, and not the company. The overwhelmingly "dominant purpose" for which the email was drafted related to matters which did not directly concern the company; the contemplated litigation on which the company required to be advised, as per Mr Brock's email of 29 April 2021, was the anticipated challenge by Mr Delappe to his redundancy, in which the company would have been the appropriate respondent, and not the s.212 proceedings which ultimately transpired.

161. In the circumstances, it seems to me that Mr Brock's email of 29 April 2021 was a request on behalf of the company to a firm of solicitors for advice in respect of anticipated hostile proceedings against the company. As such, the email would attract both legal advice privilege and litigation privilege in the normal way. However, I do

not consider that Mr Brock or Mr Cosgrave can invoke privilege in respect of the email from Ms O'Connell of 06 May 2021, as it contains advice to the company, the dominant purpose of which is not to address the anticipated redundancy litigation or any possible litigation which would have affected the interests of the company as opposed to the interests of its shareholders.

162. In my view, to the extent that the email of 06 May 2021 is covered by privilege, that privilege enures for the benefit of the company, which was the party being advised, and I accept the applicant's position that he and the company were not "sundered by litigation" as regards the issues addressed in the email, in that those issues relating to minority oppression and the shares were issues between the applicant and Mr Brock/Mr Cosgrave. At no time did Mr Delappe contemplate litigation against the company – other than joining it to the proceedings for the purpose of making it amenable to a court order – in relation to those issues. Accordingly, Mr Delappe, as a director and shareholder of the company, was entitled to access the advice given to the company in the email.

163. The email of Mr Brock to Ms O'Connell of 13 May 2021 (KD11), the substantive text of which is at para. 47 above, is prefaced by the statement "…see attached, can you let us know the next steps…". While there is no attachment to the exhibit, it is not unreasonable to infer that the "attached" is the letter to Mr Brock from Fieldfisher of 12 May 2021, in which the possibility of Mr Delappe instituting oppression proceedings was clearly intimated on his behalf. The letter in any event addressed the proposed meeting at which Mr Delappe's possible redundancy was to be discussed. It seems to me therefore that the email to Ms O'Connell sought advice in relation to the meeting of the Board of Directors of the company which was to discuss the financial status of the company, the viability of the Cabra office, the

possible redundancy of Mr Delappe, Ms Delappe and Ms Brock. As such, it addressed similar issues to those in respect of which Mr Brock sought advice from Ms O'Connell on behalf of the company in his email to her of 29 April 2021. Accordingly, it seems to me that the email sought advice in connection with possible proceedings against the company, and is privileged. If the email were to be regarded as emanating from Mr Brock personally rather than *qua* director of the company, Mr Brock would in any event be entitled to invoke privilege on his own behalf, given the intimation of oppression proceedings in the Fieldfisher letter of 12 May 2021.

164. The excerpt of the email of 19 May 2021 (KD13), the text of which is set out at para. 49 above, addresses both the redundancy process and the closure of the Cabra office, and asks Ms O'Connell to arrange the directors' meeting. It also addresses the issue of the sale of the shares. There is an artificiality to the court having to decide what the "dominant purpose" of this excerpt was, in circumstances where the full email was not exhibited, where Mr Delappe accepts that he probably read the full email but does not recall its contents, and where the court has been furnished with the full email but the applicant has not.

165. I am of the view that, in considering the purpose of the excerpt, I should have regard to the full text of the email. As I indicated at para. 57 above, the portion exhibited is preceded by matters concerning the Cabra office and the "case for redundancy" in respect of Mr Delappe. While the excerpt does refer to the issue of the sale of shares and their "tax treatment", the dominant purpose of the excerpt and the email generally relates to the issue of redundancy. In those circumstances, I have no doubt that, subject to considering the iniquity exception, the email is privileged in that it consists of a communication with the company's solicitors in respect of a matter

which Mr Brock considered might well lead to litigation by Mr Delappe against the company.

166. The email of Mr Brock to AOC Solicitors of 04 June 2021 (KD14), to which I refer at paras. 61 to 62 above, relates almost entirely to the issue of the sale of the shares and the question of "entrepreneurial relief". It relates therefore to issues which concern Mr Brock/Mr Cosgrave rather than the company. However, the possibility of oppression proceedings had been expressly intimated and proceedings instituted by Mr Delappe at that time, and Mr Brock was entitled to seek legal advice in relation to this issue. Subject to Mr Delappe's view that the iniquity exception applies – which I discuss below – I am of the view that this email is privileged.

167. The remaining exhibits in respect of which relief is sought are communications between Mr Brock and Mr Kilcoyne: documents KD6, KD7, KD8 and KD12. The respondents submit that they are covered by litigation privilege, and comply with the four criteria set out in *Artisan Glass Studio* set out at para. 148 above [see para. 20 *et seq*, written submissions].

168. Document KD6 of 22 April 2021 was sent at 13.55, and seeks views from Mr Kilcoyne in relation to both "redundancy" and "minority shareholder oppression" in advance of a proposed "chat at 2.30". The email is therefore a "heads-up" note from Mr Brock as to what he wished to discuss half an hour later with Mr Kilcoyne. Document KD7 merely clarifies certain figures in the 2020 accounts without further context. Document KD8 was written in the aftermath of a meeting on 23 April 2021 in which "Declan" – presumably Mr Cosgrave – is mentioned, and an unidentified "Gary", who is reported as having said that "…if a valuation can be agreed all the other problems will go away".

169. It seems to me that the dominant purpose of these documents, and of the email from Mr Kilcoyne to Mr Brock of 14 May 2021 (KD12) which provided general and uncontroversial advice in relation to s.212 proceedings which were anticipated by Mr Brock from at least 22 April 2021 onwards, was to provide advice and assistance in relation to those proceedings. Mr Kilcoyne was the company's accountant; notwithstanding that, it seems to me that the advice and assistance given by him was primarily in respect of what, properly viewed, was contemplated litigation involving personal claims against Mr Brock and Mr Cosgrave rather than the company. Accordingly, the documents appear to me to be covered by litigation privilege which enures in favour of Mr Brock and Mr Cosgrave.

170. While it is entirely a matter for the court dealing with such matters, it does occur to me that, if discovery were ordered, all of the documents which I have held above to be privileged would be listed in any affidavit of discovery which might be ordered to be made by Mr Brock or Mr Cosgrave on behalf of the respondents. Thus, the fact of the involvement of Mr Kilcoyne, if not the content of the privileged documents, would be a matter of record in the case, which might be of some significance to Mr Delappe.

The iniquity exception

171. As we have seen, the applicant submits that the facts of the matter as set out in the affidavits, and the exhibits KD6 to KD14 in particular, warrant a finding that legal professional privilege should not apply to the documents in controversy as they are part of a "criminal or unlawful fraudulent proceeding or [are] made in order to get advice for the purpose of carrying out a fraud" [written submissions para. 67]. Mr Delappe relies in particular on what he considers to be a "sham contrivance" of a redundancy "…the true purpose of which was to exclude me from the business", and

the holding back of properties from the market "in order to fraudulently depress the financial outlook for the Cabra office and thereby justifying my purported redundancy" [see para. 65 above].

172. There is no substantive difference between the parties in relation to the principles to be applied by the court. Counsel for the applicant referred to the decision of the Supreme Court in *Murphy v Kirwan* [1993] 3 IR 501, in which the defendant brought a counterclaim against a plaintiff on the grounds that the proceedings were vexatious, frivolous and an abuse of the process of the court as an attempt to prevent the plaintiff from performing another agreement.

173. The defendant sought discovery of legal advice obtained by the plaintiff up to the date of trial. The plaintiff claimed legal professional privilege over the documents. The High Court (Costello J, as he then was) ordered production of the documents for inspection.

174. The Supreme Court dismissed the plaintiff's appeal and specifically endorsed the High Court's view of the legal position, expressed by Costello J – and set out by the Supreme Court at pp. 507 to 508 of the report – as follows: -

> "It is recognised that the rule of professional privilege which prohibits disclosure of communications passing between a client and his legal advisers arises from a requirement of the proper administration of justice, namely that clients wishing to prosecute a claim or defend themselves against a claim should be able to communicate with complete freedom with their legal advisers and in the knowledge that those communications will remain secret. This requirement of the proper administration of justice conflicts with another requirement, namely the need for full disclosure of all relevant documents so that the truth can be ascertained and justice done. By the rule of professional

> privilege priority is given to the need to preserve professional confidentiality (see *Smurfit Paribas Bank Ltd. v. AAB Export Finance Ltd*. [1990] 1 IR 469). The exceptions to the rule to which I have referred reverses this priority. Why is this? Why, in cases of fraud and, speaking broadly, of commercial dishonesty, should the need to obtain all the facts take priority over the need to preserve the confidentiality of professional communications? It seems to me that the basis for the exception must be the conclusion that in exceptional cases which may involve a degree of moral turpitude which is much greater than that which arises in other causes of action it is in the public interest that no restriction be placed on the courts' capacity to ascertain the facts to ensure that a wrongdoer does not escape the consequences of his actions".

175. The Supreme Court cited with approval the dicta of Goff J in *Crescent Farm Sports v Sterling Offices* [1972] Ch 553, in which he stated at p.565:

> "I agree that fraud in this connection is not limited to the tort of deceit, and includes all forms of fraud and dishonesty, such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances".

176. In his judgment, Finlay CJ stated that it was "necessary to decide as to whether the defendant has given sufficient evidence of a plausible or viable case to support his claim to warrant the making of the order for discovery at this stage… [p.511]". In his submissions to the court, counsel accepted that the reference to a "plausible or viable case" was not intended to suggest that something less than a "strong *prima facie* case" of fraud or iniquity required to be established. As Egan J pointed out in his judgment in *Murphy v Kirwan*:

> "I regard this as a somewhat similar exception as that which applies in cases of fraudulent or illegal claims. For this reason I am influenced by the standard of

> proof required in such claims. The rule does not apply merely because fraud is alleged in the action. There must be some *prima facie* evidence that the allegation has a foundation in fact - *O'Rourke v. Darbishire* [1920] A.C. 581, a decision of the House of Lords. In that case their lordships were agreed that the person alleging fraud must show to the satisfaction of the court good grounds for saying that prima facie a state of things exists which, if not displaced at the trial, will support a charge of fraud.
>
> I take the view that the defendant in this case who alleges that the action brought against him by the plaintiff must establish a *prima facie* case that the prosecution of the action was malicious. There must be something beyond the mere making of the charge, however often it is made…"

177. The standard of "strong *prima facie* case" was reiterated in the very helpful summary by Mann J of the principles governing the iniquity exception at para. 4 of his judgment in *News Group Newspapers*. In that summary, he refers to a passage from *Barclays Bank v Eustice* [1995] 1 WLR 1238 in support of the proposition that the exception encompasses matters which may not amount to a criminal purpose, and notes that counsel for the defendant "reserved the right to argue elsewhere that that case took the principle too far and was wrongly decided…". In *Curless*, the Court of Appeal addressed this issue, which it did not have to decide having held that the disputed email in question was not "advice to act in an underhand or iniquitous way" [para. 50] – by setting out the argument of counsel for the appellant at paras. 54 to 60 of its judgment to the effect that the exception was confined to cases of dishonesty, and that the decision in *Eustice*, to the extent that it indicated otherwise, "cannot be considered to be good law" [para. 59]. The court stated that the argument was

"important", and one "which will no doubt have to be decided one day; but not in this case" [para. 60].

178. However, it is tolerably clear from the caselaw that the exception applies to actions in furtherance of a criminal purpose; actions "where the conduct can be characterised as dishonest and fraudulent [*Newsgroup* para. 4]; where "the wrongdoer has gone beyond conduct which really amounts to a civil wrong…he has indulged in sharp practice, something of an underhand nature where the circumstances required good faith…" [Norris J in *BBGP Managing General Partner Limited v Babcock & Browne General Partners* [2011] CH296, quoted at para. 4 of *News Group*]; and "fraud…commercial dishonesty…exceptional cases which may involve a degree of moral turpitude which is much greater than that which arises in other causes of action…" [Costello J in *Murphy v Kirwan*, as approved by the Supreme Court in that case].

179. Applying these principles to the facts, it is clear from Mr Brock's email of 29 April 2021 that his relationship with Mr Delappe had broken down. He had already broached the topic with Mr Delappe of the latter's shares being bought out, an overture which Mr Delappe had rejected. He decided that he should investigate the possibility of making Mr Delappe redundant, and sought general advice from Ms O'Connell as to the redundancy process, while acknowledging to her that the case for redundancy could be "easily challenged".

180. It is not apparent from this email that Mr Brock accepted that there was no case for Mr Delappe's redundancy, so that the very suggestion of redundancy was a dishonest "sham contrivance" to get rid of Mr Delappe. In his affidavits, as we have seen, Mr Brock makes a case that the poor performance – from his perspective – of the Cabra office and what he saw to be Mr Delappe's diminishing role in the company

meant that the possibility of Mr Delappe being made redundant was one which should at least be up for discussion by the directors.

181. Mr Delappe of course interprets the promotion by Messrs Brock and Cosgrave of his redundancy as part of a "plot" to oust him from what he regards as a *quasi*-partnership which guarantees his continued employment by the company. He took this view long before he obtained access through Mr Brock's work email to the controversial documents in question. If the directors' meeting proposed by Messrs Brock and Cosgrave – apparently the first one ever in the history of the company – had taken place, Mr Delappe could have attended the meeting and had a discussion with his fellow directors, from which a number of outcomes were possible. He could have persuaded them that redundancy was not possible or desirable. The directors could have negotiated a commercial resolution of their differences, which might or might not have involved a parting of ways. He might have been unable to reach agreement with Messrs Brock and Cosgrave, in which case they would have to consider whether they should proceed with the redundancy process in respect of Mr Delappe, which they were aware would almost certainly result in Mr Delappe initiating proceedings against them pursuant to s.212 of the Companies Act 2014, alleging that the redundancy was a "sham contrivance" designed to force him out of the company, thus constituting oppression and disregard of his interests as a member.

182. However, it must be borne in mind that acts which are alleged to constitute oppression or disregard of interests as a member are not necessarily coterminous with the sort of fraud or iniquity necessary to warrant the setting aside of legal professional privilege. If that were the case, no director against whom relief pursuant to s.212 was sought could safely seek confidential legal advice in relation to his actions. In my view, for the exception to apply in a s.212 case, a strong *prima facie* case of fraud,

dishonesty or iniquity over and above what would normally be regarded as oppressive conduct or disregard of interests must be established. The onus of proof in this regard is on the party relying on the exception.

183. I accept in the present case that there is a basis for the applicant to allege that redundancy was being promoted by Messrs Brock and Cosgrave as a means of bringing about a situation where Mr Delappe would cease employment with the company and be forced to consider selling his shares, whether for tax reasons or otherwise. Mr Brock's primary motivation in this regard ("at this point I just want him away from the business and I am exploring the [possibility] of redundancy") is clear.

184. It does not necessarily follow that Mr Delappe's proposed redundancy was a "sham contrivance", or that it was not a topic that warranted discussion by the directors. It is evident from the affidavits on both sides that there is friction and discord between Mr Brock and Mr Delappe in relation to the latter's role in the company, particularly in relation to the Cabra office. For his part, Mr Delappe instituted s.212 proceedings on 24 May 2021, and it is evident from para. 2 of the originating notice of motion quoted at para. 12 above that he considers even the prospect of the proposed directors' meeting as an attempt to oust him from the company and thus an instance of oppression.

185. However, even if Mr Delappe is correct about this, that does not establish that the actions of Messrs Brock or Cosgrave are fraudulent or iniquitous. Firstly, they did not commence the redundancy procedure – which itself would require consultation – although the truncated email of 19 May 2021 (KD13) suggests that they would have done so had it not been for the initiation of the present proceedings. Secondly, that email refers to proceeding with "the redundancy process and the closure of the Cabra office" by notifying Mr Delappe of a directors' meeting. The possible closure of the

Cabra office, in circumstances where Mr Brock considered that the office was loss-making, was an operational issue for legitimate consideration by the directors, and given Mr Delappe's commitment to that office, it is not clear to me that the viability of Mr Delappe's continued employment with the company was not something that could at least be discussed by the directors.

186. Mr Delappe places heavy emphasis on the email from Mr Brock to Ms O'Connell of 13 May 2021 (KD11) which suggests that he was "holding back" two properties which "typically would have been handled by the Cabra office…". As we have seen, Mr Brock is of the view that the sales of these properties for various reasons should not be credited to the Cabra branch; he avers that "…I believed consideration needed to be given to whether those properties were to be factor [sic] into any discussion regarding the financial viability of the Cabra branch". He goes on to suggest that this was an issue that could have been discussed at the directors meeting.

187. The essence of the iniquity for which Mr Delappe contends is set out at para. 5 of the grounding affidavit in the proceedings, quoted at para. 13 above. It is worth pointing out that this affidavit was sworn on 24 May 2021, some two and a half weeks before Mr Delappe accessed the controversial documents. Mr Delappe was averring already in that affidavit to Mr Brock and Mr Cosgrave being involved in a "scheme", which would "involve the termination of my employment with the company on the purported and entirely false basis of redundancy, following which Mr Brock and Mr Cosgrave will exercise an option…to acquire my shares…my purported redundancy is a sham…". The documents in controversy do not, from the point of view of Mr Delappe, reveal a hitherto unknown scheme or plot, but in his view provides corroboration of the malign intent for which he contends.

188. While the determination as to whether the reliefs sought in the originating notice of motion are entirely a matter for the trial judge, this Court has to consider whether Mr Delappe has discharged his burden of satisfying the court that the documents are tainted with fraud or iniquity such that legal professional privilege normally attaching to them should be lifted. I am of the view that, for the reasons set out above, the privilege attaching to Ms O'Connell's email of 6 May 2021 to Mr Brock cannot be asserted as against Mr Delappe. However, Mr Delappe has not satisfied me that the privilege in relation to documents KD6 to KD9 and KD11 to KD14 should be set aside. I do not consider that those documents, considered either singly or collectively, are evidence of a "strong *prima facie* case" of iniquity.

189. It may be that Mr Brock and Mr Cosgrave have questions to answer as to their actions or their motivations, and the allegations in relation to oppression or disregard of Mr Delappe's interest as a member are likely to be hotly contested if the proceedings go to trial. However, I think it would be going too far to conclude, on the basis of the evidence before me, that it has been established on a strong *prima facie* basis that there is a level of dishonesty or moral turpitude on the part of Mr Brock or Mr Cosgrave that warrants removal of privilege.

190. Mr Brock was, from the earliest of the disputed communications, aware of the possibility that Mr Delappe would be likely to regard any steps taken to promote his exit from the company as minority oppression warranting proceedings against him and Mr Cosgrave. He was entitled to seek advice from Ms O'Connell and Mr Kilcoyne in contemplation of such proceedings. While redundancy may have been the means by which he would promote or provoke that exit, and while he certainly envisaged that any redundancy proposal would be strongly challenged, I consider that Mr Brock was entitled to seek advice from Ms O'Connell and Mr Kilcoyne on behalf

of the company in relation to or in connection with Mr Delappe's redundancy, given the likelihood of such a challenge. Mr Brock's emails of 19 May 2021 and 04 June 2021 (KD13 and KD14) sought advice at a time when it was clear from the Fieldfisher correspondence of 12 May 2021 that minority oppression proceedings from Mr Delappe were likely. In particular, Mr Brock was entitled to tease out with Ms O'Connell issues which might arise in relation to the sale of the shares, including the issue of entrepreneurial relief.

191. In fairness to Ms O'Connell, although I consider that privilege cannot be asserted against Mr Delappe in respect of her email of 06 May 2021, I should make it clear that I do not consider that email to be in any respect iniquitous or improper. Although, as I have explained, Ms O'Connell considered herself as advising the company at that time, in reality the email is advice to Mr Brock in respect of the minority oppression case in contemplation, and the issue which would inevitably follow in relation to the sale or transfer of Mr Delappe's shares. The email contains a discussion of options in relation to those items, with speculation as to the various outcomes. The email is not a response to Mr Brock's email of 29 April 2021, which specifically requested advice regarding the redundancy process. It therefore responds to queries from Mr Brock to which we are not privy, but which clearly related to minority oppression and the sale of the shares rather than redundancy. I see nothing iniquitous in the advices, although it will be a matter for the trial judge as to whether they contributed to oppression or disregard of Mr Delappe's interests as a shareholder.

Orders

192. The question arises as to what orders should be made in respect of the findings set out above. The notice of motion in the application set out a wide array of requested reliefs. The situation has moved on somewhat, in that there followed a large number

of affidavits, including three from Mr Delappe. The positions adopted in those affidavits may require the parties to reconsider the extent to which those reliefs are necessary.

193. For that reason, and to give the parties an opportunity to consider their respective positions, I shall direct that the parties correspond in relation to the appropriate orders, and agree them as far as possible. I suggest that the respondents' solicitors commence this process, and that the parties have concluded their correspondence within two weeks after delivery of this judgment. If there are issues outstanding by that time, I shall direct that the parties have a further seven days in which to deliver written submissions as to what the appropriate orders should be. Such submissions should not exceed 1500 words, and should address the issue of costs. Under no circumstances will I entertain any attempt to reargue any of the issues addressed in this judgment.

194. On receipt of those written submissions, I will either issue a ruling and/or order within seven days, or will convene a short hearing to elicit oral submissions if I consider that necessary. If so, I shall issue my ruling and/or order within seven days after such hearing.

195. Finally, while I am aware that the parties have already attempted to mediate their disputes unsuccessfully, that attempt took place in early June, after the originating notice of motion and grounding affidavit had been served, but before issue had been joined in relation to the substantive proceedings, much less the present application. I hope that the present dispute will have made it clear to the parties, if it were not clear already, that time consuming and ruinously expensive litigation is a particularly unsatisfactory way of resolving their differences, particularly as it is clear that trust and confidence between them is, if not totally destroyed, at a low ebb to put

it mildly. As experienced and successful men of business, I would urge them to keep in mind the prospect of achieving a resolution of their problems outside the court system, whether by a further mediation or otherwise.