Neutral Citation Number: [2018] EWHC 2284 (Ch)

Case No: BL-2017-000368

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
BUSINESS LIST (CHANCERY DIVISION)

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 September 2018

Before :

MR JUSTICE ARNOLD

- -

Between :

THE FINANCIAL REPORTING COUNCIL LIMITED	**Applicant**
- and -	
SPORTS DIRECT INTERNATIONAL PLC	**Respondent**

- -
- -

Mark Simpson QC and **Rebecca Loveridge** (instructed by **David Salcedo**) for the **Applicant**
Richard Lissack QC and **Adam Sher** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Respondent**

Hearing dates: 24-25 July 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MR JUSTICE ARNOLD

MR JUSTICE ARNOLD :

Introduction

1. This is an application by the Applicant ("the FRC") pursuant to Regulation 10 and Schedule 2, paragraph 2 of the Statutory Auditors and Third Country Auditors Regulations 2016, SI 2016/649 ("SATCAR") and paragraph 10(b) of the FRC's Audit Enforcement Procedure ("AEP") for an order requiring the Respondent ("SDI") to provide the FRC with certain documents, as detailed below. This is believed to be the first application of its type to have reached the courts.

2. The FRC is a regulatory body with certain responsibilities for, among other things, the regulation of statutory auditors and audit work. Its functions include carrying out investigations into statutory auditors and audit work and imposing and enforcing sanctions. Its powers in this regard are derived from SATCAR and AEP. Schedule 2 to SATCAR provides the FRC with statutory powers of investigation, obstruction of, or failure to comply with, which may be remedied in the civil courts and/or constitute a criminal offence.

3. The FRC is presently conducting an investigation ("the Investigation") into the conduct of Grant Thornton UK LLP ("GT") and an individual at GT ("Subject A") in relation to the audit of the financial statements of SDI for the year ending 24 April 2016 ("the 2016 Financial Statements"). The Investigation arose out of reports about SDI's subsidiary Sportsdirect.com Retail Ltd ("SDR") engaging Barlin Delivery Ltd ("Barlin") to provide delivery services to SDR's customers. The owner and a director of Barlin during the relevant period was John Ashley, the brother of Mike Ashley. Mike Ashley is the founder of SDI and a director and majority shareholder of SDI during the relevant period. It appears that Barlin was engaged as part of a structure adopted by SDR on the advice of Deloitte LLP in an effort to ensure that SDR paid VAT on its sales to EU customers in the UK rather than in the country of each relevant EU customer ("the Enhanced Structure"). The FRC is considering, among other things, the conduct of GT and Subject A in relation to the non-disclosure of the relationship between SDR and Barlin as one between related parties in the 2016 Financial Statements.

4. To this end, the FRC has exercised its power pursuant to paragraph 1(3) of Schedule 2 to SATCAR and rule 10(b) of the AEP to issue notices ("Rule 10 Notices") to SDI requiring the provision of certain documents because they are likely to shed light on what GT understood SDI to have been advised in relation to the introduction of Barlin as part of the Enhanced Structure. The FRC contends that SDI has failed to comply with the Rule 10 Notices in certain respects, and therefore seeks an order of the court compelling compliance by SDI. SDI disputes that it has failed to comply with the Rule 10 Notices.

5. The documents which are the subject of the application are as follows:

   i) A fax which was sent by SDI's Head of Finance (Herbert Monteith) to a representative of GT (David Cox) on 15 July 2015 ("the Fax"). The Fax was requested in a Rule 10 Notice issued by the FRC to SDI on 6 November 2017, but SDI refused to provide it on grounds that it was subject to both legal advice privilege and litigation privilege. The FRC did not accept the claim to privilege. On 16 July 2018 SDI provided the FRC with a redacted copy of the Fax, reduced

its claim to privilege to only the second page of the Fax and restricted the basis of the claim to legal advice privilege. The dispute in relation to the second page of the Fax turned out to be academic, however. SDI's evidence explained that the basis of the claim to privilege was that the second page of the Fax reproduced part of a draft letter to Her Majesty's Revenue and Customs ("HMRC") which had been drafted by Deloitte, sent by Deloitte to SDI's solicitors Reynolds Porter Chamberlain ("RPC"), sent by RPC to Justin Barnes (a consultant who provides business consultant services to companies in SDI's group) and then sent (it would appear) by Mr Barnes to Mr Monteith. SDI's evidence also revealed that on 28 September 2015 a letter had been sent to HMRC in the same terms as the draft letter part of which was reproduced in the second page of the Fax. SDI has not claimed privilege in respect of the 28 September 2015 letter. Indeed, the contents of the 28 September 2015 letter have been summarised in a decision of the Upper Tribunal (Tax and Chancery Chamber) dated 11 August 2017 concerning a dispute between HMRC and two subsidiaries of SDI ([2017] UKUT 327 (TCC) at [17]-[19]). Although the FRC had requested production of the 28 September 2015 letter on 16 August 2017 and SDI had refused to produce it on 13 September 2017, at the outset of the hearing I enquired whether SDI was prepared to produce it and SDI agreed to do so. In those circumstances the FRC agreed not to pursue its application for production of the second page of the Fax. Although it is therefore not necessary for me to consider whether SDI's claim to privilege in respect of the second page of the Fax was well founded, I shall have to consider some of the same issues in the context of SDI's claim to privilege in respect of some of the Additional Documents referred to below.

ii) Any documents which SDI disclosed to Grant Thornton in 2015 which record the advice Deloitte provided to SDI in or around 2015 regarding the distance and/or internet selling arrangements of SDI and/or its affiliates, the VAT implications of those arrangements and/or one or more of Etail Services Ltd, SDI (Brook EU) Ltd, SDI (Brook ROW) Ltd, SDI (Brook UK) Ltd and Barlin ("the Deloitte Material"). The Deloitte Material was the subject of a Rule 10 Notice dated 5 May 2017. The FRC contends that SDI has not complied with this Rule 10 Notice. SDI disputes this. The resolution of this dispute depends on whether or not the Rule 10 Notice required SDI to produce a group of "potentially responsive" documents which it has collated.

iii) Emails and email attachments in the possession and control of SDI which (i) relate to the audit; (ii) are held by one or more of five identified custodians; (iii) are dated within certain specified date ranges; and (iv) are responsive to certain specified search terms ("the Additional Documents"). The Additional Documents were the subject of a Rule 10 Notice dated 20 April 2017. On 16 July 2018 SDI agreed to provide these documents to the FRC and they were provided on 17 July 2018. On 17 July 2018 the FRC asked SDI whether it had withheld any documents responsive to the relevant Rule 10 Notice on the ground of legal professional privilege. Remarkably, it was only in response to this letter on 18 July 2018 that SDI revealed that it had withheld the production of 36 documents on the ground of legal professional privilege. Moreover, it was only by letter dated 23 July 2018 that SDI corrected the figure to 40 documents, consisting of 19 emails and 21 attachments, and outlined the basis of its claim to legal advice privilege in respect of "certain of" the 21 attachments. Moreover,

it was only when I asked counsel for SDI about the basis of the claim to privilege in respect of the attachments stated in the letter dated 23 July 2018 that he informed me that what was said in the letter about that was incomplete and provided certain further information on instructions.

6. Counsel for the FRC characterised SDI's approach in responding to the Rule 10 Notices as one of obfuscation and delay verging on obstruction. In my view this criticism is entirely justified. As counsel for SDI pointed out, however, the remaining issues between the parties on this application depend upon the extent of the FRC's powers and upon the law of legal advice privilege.

SATCAR

7. Regulation 10 of SATCAR provides for Schedule 2 to have effect. Paragraph 1(3) of Schedule 2 provides that the competent authority (i.e. the FRC) may give notice to any person mentioned in sub-paragraph (4) "requiring that person to provide information relating to the statutory audit of the annual accounts or the consolidated accounts of any public interest entity". SDI is a public interest entity for the purposes of Schedule 2.

8. Paragraph 1(6) of Schedule 2 provides that such a notice may:

> "(a) specify the time within which and the manner in which the person to whom it is given must comply with it,
>
> (b) require the creation of documents, or documents of a description, specified in the notice, and
>
> (c) require the provision of those documents to the competent authority."

9. Paragraph 1(8)(a) of Schedule 2 provides that a notice does not require a person to provide any information or create any documents which that person "would be entitled to refuse to provide or produce in proceedings in the High Court on the grounds of legal professional privilege".

10. Paragraph 2(1) of Schedule 2 provides that, if a person fails to comply with a notice under paragraph 1, the competent authority may apply to the court (which is defined so as to include the High Court).

11. Paragraph 2(2) of Schedule 2 provides that:

> "If it appears to the court that the person has failed to comply with the notice, it may make an order requiring the person to do anything that the court thinks it is reasonable for the person to do, for any of the purposes for which the notice was given, to ensure that the notice is complied with."

AEP

12. The provisions of SATCAR are supplemented by AEP. Rule 10(b) of AEP effectively summarises the FRC's power to issue a notice pursuant to Schedule 2 paragraph 1(3) of SATCAR, as set out above.

The Deloitte Material

13. The relevant Rule 10 Notice required the production of:

> "any document(s) SDI disclosed to [GT] in 2015, which record the advice Deloitte provided to SDI in or around 2015 regarding any of the following:
>
> a. the distance selling arrangements of SDI and/or its affiliates;
>
> b. the internet selling arrangements of SDI and/or its affiliates;
>
> c. the VAT implications of the arrangements referred to in paragraphs (a) and (b) above; and/or
>
> d. one or more of the following entities:
>
> i. Etail Services Limited;
>
> ii. SDI (Brook EU) Limited;
>
> iii. SDI (Brook ROW) Limited;
>
> iv. SDI (Brook UK) Limited; and/or
>
> v. [Barlin]."

14. The issue with respect to the Deloitte Material is a narrow one. It concerns the words "disclosed to [GT]" in the Rule 10 Notice. It is common ground that these words cover both documents which were provided to GT and documents which were merely shown to GT.

15. The FRC has been informed by solicitors acting for William McMullan of GT in response to a Rule 10 Notice served on Mr McMullan that Mr McMullan recollects being shown by Mr Monteith in or around June 2015 a Deloitte document which recorded Deloitte's advice regarding the distance selling and internet selling arrangements of SDI. Mr McMullan and Mr Cox were allowed to review this document, but not to take a copy. Mr McMullan's recollection is that the document took the form of a report and had a number of pages.

16. Mr Monteith's evidence is that he does not recall whether or not he showed any such document to Mr McMullan.

17. On 8 June 2018 SDI informed the FRC that it had identified and collated "a pool of potentially responsive documents", but that it was unable to identify any of these documents as having been shown by Mr Monteith to Mr McMullan. SDI has not stated how many documents are contained within this pool. On 16 July 2018 the FRC asked SDI to produce any documents in the pool which fitted the description given by Mr McMullan. On 17 July 2018 SDI declined to produce these documents.

18. The FRC contends that SDI has failed to comply with the Rule 10 Notice, and accordingly the Court should order it to produce any documents in the pool which fit the description given by Mr McMullan. SDI disputes that it has failed to comply with

the Rule 10 Notice, and accordingly contends that the Court has no jurisdiction to make the order sought. Counsel for SDI submitted that the FRC's proper course was to serve a fresh Rule 10 Notice seeking production of the "pool" of documents.

19. In my judgment SDI has failed to comply with the Rule 10 Notice, because it has not produced any documents in response to the request. SDI's reason is that, although it has identified a pool of potentially responsive documents, it cannot identify any particular document within the pool as having been "disclosed to [GT]" by being shown to Mr McMullan. In my view that goes not to whether SDI has complied with the Rule 10 Notice, but to what it is reasonable for SDI to do to ensure that it is complied with. I consider that it is reasonable for SDI to produce any of the documents in the pool which are capable of fitting Mr McMullan's description (bearing in mind that the word "report" is not necessarily a precise one in this context).

The Additional Documents

20. As explained above, SDI has belatedly complied with the Rule 10 Notice requiring production of the Additional Documents save for 40 documents in respect of which it claims legal advice privilege. It is common ground that, if the documents are subject to privilege which would be infringed by being produced to the FRC, then SDI is not required to produce them by virtue of Schedule 2 paragraph 1(8) of SATCAR. The FRC does not accept the claim to privilege. Notwithstanding the late and unsatisfactory way in which the claim to privilege was made, and the absence of any evidence specifically in support of it, the parties were agreed that the Court was in a position to resolve three issues of principle regarding the claim to privilege:

   i) whether legal advice privilege applies to documents purely by virtue of those documents having been attached to emails passing between SDI or its subsidiaries and RPC ("the Communication Issue");

   ii) whether SDI's waiver of privilege by sending copies of documents to GT for the purposes of audit extends to the FRC ("the Waiver Issue"); and

   iii) whether production of the documents to the FRC would infringe any privilege of SDI ("the Infringement Issue").

The background to SDI's claim to legal advice privilege

21. Before turning to consider those issues, I think it will be helpful if I explain the background to SDI's claim to legal advice privilege. Although, as I have said, SDI had not adduced any evidence specifically in support of its claim to privilege in respect of the 40 Additional Documents, the evidence served by SDI in support of its claim to privilege in respect of the Fax explains the background.

22. In mid-2009 SDR sought advice from Deloitte on the treatment of its international sales for VAT purposes. Following advice from Deloitte, a structure was devised for SDR's VAT arrangements ("the Structure"). In March 2010 SDR obtained confirmation from HMRC that, under the Structure, the place of supply for VAT purposes of sales made to customers in other EU countries was the United Kingdom, so VAT would accrue in the UK.

23. On 30 June 2014 SDR received a request from the French tax authority for information in relation to SDR's VAT arrangements. Mr Monteith's evidence is that he believed that this request for information would inevitably be followed by a full enquiry.

24. The evidence of SDI's witnesses is that, shortly afterwards, SDR instructed Deloitte and RPC to advise it on defending the anticipated challenge from the French tax authority, and any challenges from other EU tax authorities, regarding its VAT arrangements. Robert Waterson, a legal director at RPC specialising in contentious tax matters, was instructed to work on the matter under the supervision of Jeremy Drew, a partner of RPC. Mr Waterson's evidence is that he considered that RPC's communications with Deloitte and SDR were privileged due to the anticipated litigation to which they related. In order to formalise the position, he drafted a protocol to alert those involved to the importance of privilege and to explain to them the procedures for sharing information and work product. The protocol was put in place on 10 November 2014. The protocol included a requirement that all communications should pass to RPC so that RPC could advise and/or comment on any proposals or advice that Deloitte sought to provide to SDR and in order to ensure the dissemination of relevant information to those involved.

25. On 26 January 2015 SDR received an enquiry from the Irish tax authority about its VAT arrangements. Again, Mr Monteith's evidence is that he considered it likely that a challenge would follow shortly.

26. Following advice from Deloitte and RPC, with effect from 20 February 2015 SDR altered its online sales structure with the introduction of new companies to form the Enhanced Structure. The Enhanced Structure was described in the draft letter to HMRC part of which was reproduced in the second page of the Fax and in the 28 September 2015 letter to HMRC referred to in sub-paragraph 5(i) above.

27. Subsequently, enquiries into SDR's VAT arrangements have been launched by the French, Irish and Finnish tax authorities which have led to ongoing litigation in those countries.

28. SDI has previously claimed litigation privilege in respect of communications relating to the challenges by EU tax authorities to SDR's VAT arrangements under the Structure which it says were anticipated, but this claim was not pursued in relation to the communications in issue on the present application. SDI still claims legal advice privilege in respect of the obtaining and giving of the advice which led to the adoption of the Enhanced Structure.

29. I do not understand it to be in dispute that communications between SDI and/or SDR on the one hand and Deloitte on the other hand concerning the giving and obtaining of tax advice by Deloitte would not attract legal advice privilege: see *R (Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1, [2013] 2 AC 185.

The Communication Issue

30. As noted above, on 23 July 2018 SDI stated that it was claiming legal advice privilege in respect of 19 emails and 21 attachments to those emails. RPC's letter of that date stated that "certain of the 21 attachments … are not privileged in and of themselves, but are withheld on the grounds that they form part of a lawyer-client communication".

Counsel for SDI informed me that an example of such an attachment would be a contract between a subsidiary and a third party. He also informed me that privilege was claimed in other attachments on the basis that they were drafts of documents being produced by lawyers (by which I understood him to mean RPC) for their client.

31. The issue of principle is whether, as SDI asserts, legal advice privilege can be claimed in respect of a document which is not privileged in itself merely because it is attached to an email sent by a client to a lawyer seeking advice or by a lawyer to a client giving advice. Counsel for SDI did not shrink from submitting that this would found a valid claim to privilege in respect of a scanned copy of the front page of *The Times* attached to such an email, at least if the contents of the front page were relevant to the advice sought from or given by the lawyer. I must confess to finding this a startling proposition.

32. The orthodox view, as it appears to me, is that stated in Thanki, *The Law of Privilege* (3rd edition) at 2.46 (and see also 4.08):

> "… privilege does not extend to pre-existing documents. The intention to communicate with the lawyer or the client for the purposes of obtaining legal advice must account for the existence of the document. The privilege is not intended to apply to documents which would have been created independently of the relevant lawyer-client communications in any event."

33. It is sufficient to refer to two of the authorities cited by Thanki in support of this. The first is *Ventouris v Mountain* [1991] 1 WLR 607 where Bingham LJ said at 621:

> "I can see no reason in principle why a pre-existing document obtained by a solicitor for the purposes of litigation should be privileged from production and inspection, save perhaps in the *Lyell v Kennedy (No 3)* 27 Ch D situation …"

Although that case was concerned with litigation privilege, there is no reason why the position should be any different with respect to legal advice privilege. The *Lyell v Kennedy* exception is not relied on by SDI.

34. The second is *Imerman v Tchenguiz* [2009] EWHC 2902 (QB), where Eady J said at [14]:

> "It is well settled that pre-existing documents do not become privileged just because they are submitted to lawyers for the purposes of advice or litigation."

35. Although counsel for SDI relied upon *Balabel v Air India* [1988] 1 Ch 317 and *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610 as supporting his proposition, I cannot see that either authority does. All those authorities establish that is relevant to the present issue is that a communication need not explicitly ask for or give legal advice in order to be covered by legal advice privilege: it is sufficient if it forms part of the "continuum of communication" (to adopt the expression used by Taylor LJ in *Balabel* at 330F) between client and lawyer relating to the obtaining and giving of legal advice.

36. The only authority which comes anywhere near to supporting counsel's proposition is *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2015] EWHC 3187 (Ch), [2016] 1 WLR 992. After the commencement of regulatory investigations in a number of jurisdictions in April 2010, RBS instructed a number of external legal advisors in different jurisdictions to advise it and to represent it before the numerous regulators. They included Clifford Chance and SJ Berwin. To oversee these matters RBS established an executive steering group or ESG. From July 2011 onwards the ESG held telephone conference calls with Clifford Chance, SJ Berwin and occasionally other advisors on a regular basis to discuss the various investigations. Two categories of documents were produced in respect of which RBS claimed legal advice privilege. The first consisted of tables prepared by Clifford Chance which informed and updated the ESG on the progress, status and issues arising in the investigations and which formed the basis for discussions during the conference calls, providing the opportunity for the ESG to give further instructions or seek further advice. The second consisted of minutes drafted by Clifford Chance of the discussions during the conference calls. Both categories of documents were prepared by Clifford Chance for the ESG and communicated by Clifford Chance to the ESG. All of them were marked privileged and confidential.

37. Snowden J, having inspected the documents, upheld the claim to privilege. In doing so, he rejected an argument by PAG that, even if legal advice privilege attached to parts of the documents, it did not attach to other parts such as references to information concerning public events or dealings with regulators. Snowden J rejected this argument for the following reasons:

> "32. … As I have indicated above, in *Balabel*'s case, Taylor LJ held that all documents forming part of the continuum of communications between lawyer and client for the purposes of obtaining legal advice would be privileged, even if they did not expressly refer to legal advice, provided that they were part of the "necessary exchange of information of which the object is the giving of legal advice as and when appropriate". It is therefore quite clear that the communication of information between a lawyer and client *can* be privileged, provided that it is information that is communicated in confidence for the purposes of the client seeking, and the lawyer giving, legal advice. The test is one of relevance and purpose: the source of the information makes no difference.
>
> 33. At p 331B–G of *Balabel*'s case, Taylor LJ gave some examples of lawyer/client communications that would *not* be privileged. These were of communications unrelated to the obtaining of legal advice, such as a client simply notifying a solicitor of the sale of a property, or asking him to collect rents from tenants whilst the client was on holiday. These examples are, however, very far removed from the ESG high level documents. The Clifford Chance tabular memoranda were entirely focused on providing the information concerning the regulatory investigations which the ESG needed to know: they did not contain extraneous material. Further, so far as I can detect, the

> summary minutes of the ESG meetings were similarly focused and do not appear to have recorded discussions or decisions taken on matters unrelated to the regulatory investigations with which the lawyers were continuing to deal."

38. As can be seen, Snowden J was not concerned with a claim that legal advice privilege could be claimed for pre-existing documents on the basis that they had been sent by a client to a lawyer in connection with a request for advice or sent by a lawyer to a client in connection with the giving of advice. No doubt for that reason, none of the authorities cited in Thanki are referred to. Accordingly, his decision does not support counsel for SDI's proposition. Nor does his reasoning. True it is that he said that "the source of the information" made no difference, but that statement has to be viewed in context.

39. Indeed, Snowden J went on to say at [41]:

> "I can well see that, depending on the facts, a court might not uphold a claim to privilege in respect of the minutes of a business meeting simply because the minutes were taken by a lawyer who was present and subsequently sent them to his client. The same might also apply if, for example, a law firm was asked to send press cuttings from its own library to its client for the purposes of a board meeting because the client's own public relations department could not find them. But in either case that would be because the court would have taken the view that the lawyer was not "being asked qua lawyer to provide legal advice" (per Lord Rodger of Earlsferry in *Three Rivers District Council v Governor and Co of the Bank of England (No 6)* [2005] 1 AC 610, para 58). The lawyer would simply have been asked to take the minutes or collect the press cuttings and to supply them to his client because it was convenient for him to do so."

40. In my view, there is a more fundamental reason why the press cuttings would not attract legal advice privilege, which is that they are pre-existing non-privileged documents and therefore could not be the subject of legal advice privilege merely because the law firm sent them to its client. Nevertheless, it is clear from what he said in [41] that Snowden J was not intending to suggest that legal advice privilege would apply to such communications.

41. It will be noticed that nowhere in the preceding discussion have I said anything about copies of non-privileged documents. That is because counsel for SDI, rightly in my view, did not argue that the mere fact that the lawyer received or sent a copy of a non-privileged document rather than the original made any difference to the claim for legal advice privilege.

42. Accordingly, I conclude that SDI is not entitled to legal advice privilege in respect of "certain of the 21 attachments".

The Waiver Issue

43. The Fax was a communication from SDI to GT. It can be seen from the third page of the Fax that it was headed "PRIVILEGED AND FOR GRANT THORNTON AUDIT USE ONLY". SDI's evidence is that the second page was headed in the same way.

44. RPC stated in their letter dated 23 July 2018 that five of the 19 emails were copied to GT. In four cases the emails were copied to an individual who was not part of the audit team and in one case to individuals who were part of the French audit team. I will assume, even though RPC do not say so in their letter, that in the latter case the email was marked in a similar way to the second and third pages of the Fax.

45. SDI accepts that, in sending the emails to GT, there was a selective and limited waiver of privilege, but contends that the waiver did not extend beyond GT or beyond use for audit purposes. The FRC contends that any waiver of privilege as against GT, even if only for audit purposes, necessarily entailed a waiver as against the FRC as GT's regulator.

46. I was referred to a number of authorities on this question. It is sufficient to refer to three of them. In *British Coal Corporation v Dennis Rye Ltd (No 2)* [1988] 1 WLR 1113 the plaintiff handed privileged documents to the police in order to assist with a criminal investigation. During the course of the criminal proceedings, the documents were disclosed to the defendants, who were subsequently acquitted. In civil proceedings against the defendant the plaintiff applied for an order that the documents be returned to it and not used for the purposes of the civil proceedings since they were privileged. The claim to privilege was resisted on the grounds that the documents were no longer confidential vis-à-vis the defendant. One of the points taken by the defendants was that the plaintiff should have foreseen that, having provided the documents to the police, they might end up in the defendants' hands. The Court of Appeal rejected this argument, holding that the claimants had made the documents available "for a limited purpose only, namely to assist in the conduct first of a criminal investigation and then of a criminal trial" (as Neill LJ put it at 1121E) and that could not be construed as a waiver of privilege more broadly.

47. In *Scottish Lion Insurance v Goodrich Corporation* [2011] CSIH 18, [2011] SC 534 the petitioner had applied for the court to sanction a scheme of arrangement between the petitioner and its creditors under section 899 of the Companies Act 2006. As part of that process, the petitioner applied for an order for meetings to be convened pursuant to section 896 of the Companies Act 2006 at which creditors could vote on whether to approve the scheme. An order was made for two meetings of different classes of creditors, with one vote being allocated to each £1 of value of a creditor's claim. In order to substantiate the value of their claims in advance of the meetings, creditors submitted documents to the petitioner, some of which were privileged. A majority in number representing 75% by value of each class voting in favour of the scheme was required in order for the court to have jurisdiction to sanction the scheme. A dispute arose as to the process by which claims had been valued, and hence as to whether the requisite majorities had been obtained. The court ordered that the parties be entitled to adduce evidence on this issue at the hearing of the application for sanction of the scheme. It also ordered that documentation submitted to the petitioner by certain creditors in support of the valuation of their claims be produced for the purposes of that hearing (subject to certain confidentiality restrictions). Some of the creditors (the

noters) objected to production of documents on the grounds of privilege. The petitioner contended that privilege had been waived by the noters by submitting the documents in support of the valuation of their claims.

48. The Inner House, whose opinion was delivered by Lord Reed, began at [45] by noting that there had been no express waiver and therefore the question was whether waiver was to be inferred. They went on to hold at [47] that waiver was to be judged objectively and that privilege could be waived for a limited purpose without being waived generally.

49. At [57] the Inner House stated that:

> "… the question whether, having disclosed the documents to the petitioner for the purpose of voting at the creditors' meetings, the noters are entitled to assert privilege in the present proceedings depends upon the relationship between the voting and the application under section 899: whether the relationship is such that disclosure could be limited to the voting exercise, without any implication that the noters would also consent to disclosure, if necessary, for the purposes of the sanction hearing; or whether the relationship is such that the creditor who elects to disclose privileged documents for the purposes of voting cannot, consistently with having done so, maintain that the documents are immune from disclosure at the sanction hearing."

50. Having explained at [58] that the procedure for making a scheme of arrangement binding involved three stages (namely, (i) an application to the court for creditors' meeting(s) to be convened, (ii) voting by creditors at the creditors' meeting(s) and (iii) an application to the court for sanction of the scheme) which "form part of a single process", the Inner House answered the question at [60] as follows:

> "In those circumstances, for a person to submit material for the purpose of the second stage of the statutory procedure for approval of a scheme of arrangement [the creditors' meetings] is inconsistent with his subsequently resisting the disclosure of that material when it is necessary at the third stage of the procedure [the application for sanction] in order for a relevant challenge to be properly considered, since such conduct at those two stages of the process is incompatible with the proper operation of the statutory procedure. As in *Goldman v Hesper*, and in distinction from such cases as *British Coal Corp v Dennis Rye Ltd (No 2)*, the disclosure of the material is inconsistent with the assertion of privilege in respect of the same material, since the assertion of privilege would prevent the proper operation of the procedure for the purpose of which the material was disclosed."

51. The Inner House went on at [64] to make it clear that this did not mean that the privilege was lost: the waiver was limited, and the noters could assert the privilege in any subsequent context.

52. *Belhaj v Director of Public Prosecutions* [2018] EWHC 513 (Admin) concerned a judicial review of the decision of the DPP not to prosecute an individual for misfeasance in public office for alleged involvement in the unlawful rendition of the claimants to Libya. As part of the process of making the decision whether to prosecute, privileged material was passed by HM Government to the Metropolitan Police Service, the Crown Prosecution Service and the DPP. The material was provided pursuant to an express waiver of privilege limited to the purposes of the investigation. The claimants argued that the waiver must be taken to have extended not only to the police investigation and the decision whether to charge by the CPS and DPP, but also to any judicial review proceedings challenging that decision.

53. The Divisional Court rejected this argument for reasons which it encapsulated as follows:

> "31. If one applies the logic of the ruling in *Scottish Lion* to the present facts, in our judgment the distinctions are clear. In this case there is no inevitable or necessary nexus between, on the one hand, the advice to the DPP, the decision on prosecution and the review, and, on the other hand, a subsequent judicial review of the ultimate decision arrived at. These are discrete processes not one composite process.
>
> 32. The existence of judicial review is a generic remedy available to supervise all decisions of the executive. It is not in any way particular or special to the procedures which led to the instant decision being challenged. The decision in issue (to prosecute or not) is one taken on countless occasions in any given month or year. Challenges in the courts to such decisions are rare. The process leading to the decision and the legal challenge are quite different and reflect a fundamental separation of function and responsibility. The latter is not a 'composite' part of the former. The 'nexus' between the two is limited."

54. Turning to the present case, counsel for the FRC submitted that it was analogous to *Scottish Lion* because disclosure of privileged material to an auditor for the purposes of an audit necessarily required the regulator of that auditor when investigating the auditor's conduct of the audit to have access to the same material that the auditor had had. To allow privilege to be asserted against the FRC would inhibit the proper operation of the procedure for the purposes of which the material was disclosed. Furthermore, on the facts of the present case, this should not have come as any surprise to SDI, since GT's terms of engagement stated:

> "**Regulators' access to our files**
>
> [GT] is subject to the authority of a number of regulatory bodies including … [the FRC]. These bodies have various powers (statutory or otherwise) to inspect our files and working papers, including client confidential information contained in them. Such powers are exercised from time to time and we are obliged to comply with them."

55. Counsel for SDI submitted that the present case was analogous to *British Coal* and *Belhaj* because the regulatory process was entirely distinct from the process of audit. They were not in any sense part of a single process, but in the words of the Divisional Court reflected "a fundamental separation of function and responsibility". GT's terms of engagement took the FRC no further forward because they said nothing about privileged documents.

56. In my judgment SDI is correct on this issue for the reasons given by counsel for SDI. By sending privileged documents to GT for the purposes of audit, SDI did not waive privilege against the FRC. I cannot see that the FRC stands in any better position with respect to privileged documents which were sent to GT for other purposes.

The Infringement Issue

57. The FRC contends that, even if all of the 40 documents in question are covered by legal advice privilege and even if SDI has not waived privilege in any of those documents by sending them to GT, production of the documents to the FRC for the purposes of the Investigation would not infringe SDI's privilege. SDI disputes this. This is the most important and far-reaching issue raised by the present application, and the most difficult.

58. The starting point for considering this issue is that privilege is a fundamental human right: see *R v Derby Magistrates' Court ex p. B* [1996] 1 AC 487 at 507-509 (Lord Taylor of Gosforth CJ) and *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 at [7] and [39] (Lord Hoffmann). It follows that privilege can only be abrogated or overridden by primary legislation which so provides either expressly or by necessary implication: see *Morgan Grenfell* at [8] and [30] (Lord Hoffmann) and [44]-[45] (Lord Hobhouse of Woodborough).

59. Nevertheless, there is a line of cases in which it has been held that privilege cannot be relied upon as an objection to the production of documents to the regulatory body for solicitors (formerly the Law Society, now the Solicitors' Regulatory Authority) by solicitors or to the tax authority (formerly the Inland Revenue, now Her Majesty's Revenue and Customs) by taxpayers or regulators of advocacy services by advocates.

60. The first is *Parry-Jones v Law Society* [1969] 1 Ch 1. The Law Society served a notice on Mr Parry-Jones under rule 11(1) of the Solicitors' Accounts Rules 1945, which were made pursuant to section 29(1) of the Solicitors Act 1957, requiring him to produce for inspection his books of account and any other documents relating to his practice as a solicitor. (There was also a notice under the Solicitors' Trust Accounts Rules 1945 relating to trusts of which he was a trustee, but that did not raise any separate issues.)

61. Section 29(1) of the 1957 Act provided:

> "The council shall make rules (a) as to the opening and keeping by solicitors of accounts at banks for clients' money; and (b) as to the keeping by solicitors of accounts containing particulars and information as to moneys received, held or paid by them for or on account of their clients; and (c) empowering the council to take such action as may be necessary to enable them to ascertain whether or not the rules are being complied with; ..."

62. Rule 11(1) of the 1945 Rules provided:

> "In order to ascertain whether these rules have been complied with, the council, acting either - (a) on their own motion; or (b) on a written statement or request transmitted to them by or on behalf of the governing body of a provincial Law Society or a committee thereof; or (c) on a written complaint lodged with them by a third party; may require any solicitor to produce at a time and place to be fixed by the council, all books of account …"

63. Mr Parry-Jones contended that he could not be required to produce for inspection documents which were subject to (i) his clients' legal professional privilege and/or (ii) a contractual duty of confidentiality to his clients. The Court of Appeal rejected both parts of this contention.

64. Lord Denning MR dealt with both aspects together at 7D and 8B-D:

> "In my opinion the contract between solicitor and client must be taken to contain this implication: the solicitor must obey the law, and, in particular, he must comply with the rules made under the authority of statute for the conduct of the profession. If the rules require him to disclose his client's affairs, then he must do so.
>
> …
>
> In my opinion [rule 11(1)] is a valid rule which overrides any privilege or confidence which otherwise might subsist between solicitor and client. It enables the Law Society for the public good to hold an investigation, even if it involves getting information as to clients' affairs. But they and their accountant must, of course, themselves respect the obligation of confidence. They must not use it for any purpose except the investigation, and any consequential proceedings. If there should be subsequent application to the disciplinary committee, the information can be used for that purpose. In all other respects the usual rules of legal professional privilege apply - see section 46 (6) of the Act."

65. Diplock LJ addressed the two aspects separately. He gave his answer to the privilege claim at 9D-E:

> "So far as Mr. Parry-Jones' point as to privilege is concerned, privilege, of course, is irrelevant when one is not concerned with judicial or quasi-judicial proceedings because, strictly speaking, privilege refers to a right to withhold from a court, or a tribunal exercising judicial functions, material which would otherwise be admissible in evidence."

66. In relation to the contractual duty of confidence, Diplock LJ agreed with Lord Denning that this was subject to the duty of a party to the contract to obey the law and that section

29 of the 1957 Act and rule 11 of the 1945 Rules empowered the Law Society to override the duty of confidence.

67. Salmon LJ agreed with both judgments even though they gave different reasons for rejecting the claim to privilege.

68. In *R v Inland Revenue Commissioners ex p Taylor (No 2)* [1990] 2 All ER 409 the applicant was a solicitor who advised clients on tax matters. He was also a taxpayer in his personal capacity. The Board of the Inland Revenue served a notice under section 20(2) of the Taxes Management Act 1970 requiring him to deliver to an inspector documents specified in a schedule. The applicant applied to quash the notice. One of his arguments was that some of the documents were covered by his clients' legal professional privilege and so he could not be compelled to produce them.

69. The Court of Appeal rejected this argument for the reasons given by Bingham LJ at 413j-414c:

> "It is quite plain that Parliament had the position of professional legal advisers very much in mind. So much is plain from s 20B(3) and (8). Parliament has expressly preserved the client's legal professional privilege where disclosure is sought from a lawyer or tax accountant in his capacity as professional adviser and not taxpayer. That is the position covered by s 20B(8). Parliament has, moreover, provided a measure of protection where the notice is given under s 20(1) or (3) concerning documents relating to the conduct of a pending appeal by the client. But there is no preservation of legal professional privilege and no limited protection where the notice relates to a lawyer in his capacity as taxpayer who is served with a notice under section 20(2). The clear inference is, in my judgment, that a client's ordinary right to legal professional privilege, binding in the ordinary way on a legal adviser, does not entitle such legal adviser as taxpayer to refuse disclosure. That is not, to my mind, a surprising intention to attribute to Parliament. In different circumstances the Court of Appeal has held that the Law Society is entitled to override a client's right to legal professional privilege when investigating a solicitor's accounts: see *Parry Jones v Law Society* [1969] 1 Ch. 1. It is, as I think, altogether appropriate that the Inland Revenue, being charged with the duty of collecting the public revenue, should enjoy a similar power."

70. In *Morgan Grenfell* an inspector of taxes served a notice under section 20(1) of the 1970 Act requiring Morgan Grenfell to disclose its instructions to, and the advice of, counsel in relation to a tax avoidance scheme. Morgan Grenfell applied to quash the notice. One of its grounds was that the documents were protected by privilege.

71. One of the arguments advanced by the Revenue was the argument which had succeeded in *Taylor*. As Lord Hoffman, with whom the other members of the House of Lords agreed, explained:

> "21. The argument for the revenue on sections 20B(8) and 20C(3) is simple. If Parliament intended to preserve LPP in general, why did it specifically provide for its preservation in respect of documents in the possession or power of a lawyer? The inescapable inference is said to be that LPP was not intended to be preserved for documents in the possession or power of the taxpayer. This was the view of the Divisional Court, the Court of Appeal and also Bingham LJ in *R v Inland Revenue Comrs, Ex p Taylor (No 2)* [1990] 2 All ER 409, 413-414.
>
> 22. I see the force of this argument but I think that it has difficulties which were not fully addressed either in the Court of Appeal or in the *Taylor* case. Why should Parliament want to preserve LPP for documents in the hands of the lawyer but not for documents (which may well be copies or originals of the same documents) in the hands of the taxpayer? … "

72. Having explained the difficulties that this would give rise to, Lord Hoffmann went on:

> "25. Despite these difficulties, one is bound to ask why Parliament should have dealt expressly with documents in the hands of the lawyer but not with those in the hands of the client. LPP is, after all, a single privilege, for the benefit of the client, whether the documents are in his hands or that of his lawyer. When the lawyer is served with a notice under section 20(3) or 20A(1), he has no privilege of his own but may, indeed must, assert that of his client.
>
> 26. I think that the explanation may lie in *Parry-Jones v Law Society* [1969] 1 Ch 1. …"

73. Having quoted passages from the judgments of Lord Denning MR and Diplock LJ, Lord Hoffmann went on:

> "30. One could hardly imagine a stronger Court of Appeal, but I am bound to say that I have difficulty with the reasoning. It is not the case that LPP does no more than entitle the client to require his lawyer to withhold privileged documents in judicial or quasi-judicial proceedings, leaving the question of whether he may disclose them on other occasions to the implied duty of confidence. The policy of LPP requires that the client should be secure in the knowledge that protected documents and information will not be disclosed at all. The reasoning in the *Parry-Jones* case suggests that any statutory obligation to disclose documents will be construed as overriding the duty of confidence which constitutes the client's only protection. In the present proceedings, however, it is accepted that the client is protected by LPP and that this can be overridden only by primary legislation containing express words or necessary implication.

31. It is unfortunate that the Court of Appeal was not referred to valuable judgments of the Supreme Court of New Zealand in *Comr of Inland Revenue v West-Walker* [1954] NZLR 191, which reached the opposite conclusion in the context of a statutory power to require the production of documents and information for the purposes of the administration of the taxing statutes. The New Zealand judges pointed out that LPP was not merely a rule of evidence but a substantive right founded on an important public policy.

32. This is not to say that on its facts the *Parry-Jones* case was wrongly decided. But I think that the true justification for the decision was not that Mr Parry-Jones's clients had no LPP, or that their LPP had been overridden by the Law Society's rules, but that the clients' LPP was not being infringed. The Law Society were not entitled to use information disclosed by the solicitor for any purpose other than the investigation. Otherwise the confidentiality of the clients had to be maintained. In my opinion, this limited disclosure did not breach the clients' LPP or, to the extent that it technically did, was authorised by the Law Society's statutory powers. It does not seem to me to fall within the same principle as a case in which disclosure is sought for a use which involves the information being made public or used against the person entitled to the privilege.

33. In the light of the *Parry-Jones* case, it seems to me explicable that Parliament should wish to make it clear that even if the Court of Appeal was right in saying that the true basis for the client's right to prevent his lawyer from disclosing documents concerned with obtaining legal advice to the tax authorities (or any other non-judicial authorities) was a duty of confidence rather than LPP, no such disclosure could be required under sections 20(3) or 20A(1) without the client's consent. No such provision was of course required in the case of documents in the hands of the client himself, to which the duty of confidence was obviously irrelevant. Any protection to which such documents were entitled had to be based upon LPP and, so far as it existed, would be subject to the principle that it could be removed only by express language or necessary implication.

…

36. I therefore do not think that the provisions upon which the revenue relies are sufficient to create a necessary implication that LPP was intended to be excluded. This means that I respectfully think that the reasoning of Bingham LJ in *R v Inland Revenue Comrs, Ex p Taylor (No 2)* [1990] 2 All ER 409, 413-414 was too broad. It suggests that because Mr Taylor was the taxpayer, any documents subject to LPP could have been demanded, whether the beneficiary of the LPP was the client or himself. In my opinion, Mr Taylor would have been entitled to

refuse to produce documents in respect of which he personally was entitled to LPP, such as legal advice from counsel about his own tax affairs. But, as in *Parry-Jones v Law Society* [1969] 1 Ch 1, I do not suggest that the actual decision was wrong. In the Divisional Court the Inland Revenue accepted that, as the information was sought under section 20(2) for the purpose of determining Mr Taylor's own liability to tax, it could be used only for that purpose. It could not, if subject to LPP, be used in connection with the tax liabilities of his clients. Glidewell LJ [1989] 3 All ER 353, 360 accepted this concession as correct and although he suggested that the revenue might make other use of a discovery that a particular document existed, I am not sure that this is right. It is not necessary to decide the point, but I do not think that the Inland Revenue were entitled to use any information supplied by Mr Taylor for another purpose. In consequence, I do not think that the disclosure of the documents by Mr Taylor in confidence for the limited purpose of determining his own tax liability infringed any LPP vested in his clients. If I am wrong about this and technically it did, then I think that to that extent the statute can be construed as having authorised it."

74. It is clear from this reasoning that Lord Hoffmann disapproved the reason given by Diplock LJ for rejecting the claim to privilege in *Parry-Jones*. Lord Hoffmann's primary reason for supporting the decision was that there was no infringement of the clients' legal professional privilege. His alternative reason was the same as that given by Lord Denning: the statute authorised it. He gave the same reasons for supporting the decision in *Taylor*.

75. Lord Hoffmann's statements at [32] and [36] that the clients' legal professional privilege was not infringed by limited disclosure to the Law Society or the Inland Revenue for the purposes of investigations into the solicitor or the taxpayer have been trenchantly criticised: see Hollander, *Documentary Evidence* (13th ed) at 12-11 and 12-12, *Phipson on Evidence* (19th ed) at 23-10 to 23-11 (edited by Hollander) and Passmore, *Privilege* (3rd ed) at 1-127. Hollander suggests that *Parry-Jones* is best seen as a case where the privilege was impliedly overridden by statute. Although he does not comment on *Taylor*, I presume he would take the same view. Notwithstanding these criticisms, the courts have continued to treat *Parry-Jones* as interpreted in *Morgan Grenfell* as good law in a series of subsequent cases.

76. In *Simms v The Law Society* [2005] EWHC 408 (Admin) Mr Simms had been struck off by the Solicitors Disciplinary Tribunal and appealed to the Divisional Court. One of the grounds of his appeal was that the SDT had been wrong to rely on documents which were privileged (the privilege being that of his clients, which had not been waived). In support of this argument, he relied upon the decision of the Privy Council in *B v Auckland District Law Society* [2003] UKPC 38, [2003] 2 AC 736.

77. The Divisional Court rejected this argument for the following reasons:

"48. In our judgment the New Zealand case did not change the law in England and Wales. Apart from the distinctions which we have

drawn between the two schemes, the case of *Parry-Jones* was cited in argument before the Board of the Privy Council (page 745 E–F) and was referred to in argument as an example of a situation where the Rules '… included a power to override a claim of privilege'. As we have already observed, the Board of the Privy Council decided that the legislation in New Zealand did not override LPP. Further, Lord Hobhouse and Lord Scott were members of the Board in the New Zealand case and were members of the Committee of the House of Lords giving judgment in the earlier *Morgan Grenfell* case.

49. Contrary to the appellant's submission to the Tribunal and to this court, *Parry-Jones* was not overruled by the House of Lords. Lord Hoffmann stated the opposite (paragraph 32): ….

50. The Tribunal, in this case, was significantly influenced by the speech of Lord Hoffmann. It gave careful consideration to the statutory scheme and concluded:

(1) that LPP had not been lost by express words or necessary implication; and

(2) following Lord Hoffmann, concluded that: 'If the disclosure of the document is not to be used 'against the client' or 'to his prejudice' and if steps can be taken to preserve the confidentiality of the document then … it is proper to allow' disclosure to the Tribunal (see paragraph (5) page 171 of the Ruling).

51. It is unnecessary for us to consider whether or not Lord Hoffmann's conclusion that the Law Society was authorised by statutory powers should be taken as a conclusion that LPP had been lost by express words or necessary implication and that, as a result, the Tribunal erred in its conclusion because we are satisfied that the Tribunal's decision was right. *Parry-Jones* remains good law. This court is not concerned to engage in a debate which might be said to arise in connection with the underlying rationale advanced by Lord Hoffmann. Suffice it to say that Lord Hoffmann stated that the Law Society was 'authorised by … statutory powers' to take possession of documents and, as a result, did not breach LPP."

78. Waller LJ refused to grant Mr Simms permission for a second appeal to the Court of Appeal: [2005] EWCA Civ 749. In relation to privilege, he said:

"30. So far as legal professional privilege is concerned, the position is as follows. Firstly, the *New Zealand* case did have this feature. It was concerned with documents that had been seized for which the solicitors themselves could claim their own privilege as well as documents that were held by them and for whom the privilege, if there was one, was their client's.

> 31. In this case Mr Simms is seeking to assert the inadmissibility of documents for which he has no claim to privilege. These are documents which, if they are privileged, are privileged in the hands of the clients. This is the point that was made by the disciplinary tribunal when they ruled on the privilege aspect. In essence they, having emphasised that point, relied very much on the dictum of Lord Hoffmann in the *Morgan Grenfell* case where he dealt with the *Parry-Jones v Law Society* decision. …
>
> 32. What the disciplinary tribunal did was to seek to protect the privilege of the clients and to preserve the Legal Professional Privilege. When the Divisional Court came to deal with the matter they upheld the way in which the tribunal had dealt with this aspect, pointing out how difficult it would be for the Law Society to investigate the type of improper conduct which they were investigating in this case unless there was a means whereby the documentation which might be privileged in the hands of the clients was documentation to which they could have access.
>
> 33. The holding of the Divisional Court was that in fact *Parry-Jones* remains good law. The Divisional Court too relied on the dictum of Lord Hoffmann in the *Morgan Grenfell* case. In my view the Divisional Court were right so to rule. In any event, as it seems to me, it lies ill in the mouth of Mr Simms, whose privilege it is not, to seek to try to keep out documents which the disciplinary tribunal has thought it right to look at while still preserving the privilege of the clients. In my view, again, no important point of principle or practice is raised by this point."

79. Again, these decisions have been criticised: see Hollander at 12-13 and Passmore at 1-142 and 1-143.

80. *McE v Prison Service of Northern Ireland* [2009] UKHL 15, [2009] 1 AC 908 concerned covert surveillance of prisoners in Northern Ireland under the Regulation of Investigatory Powers Act 2000. The House of Lords held that the Act overrode legal professional privilege. Lord Phillips of Worth Matravers, having cited what Lord Hoffmann said in *Morgan Grenfell* at [32], observed at [10]:

> "The editors of *Phipson on Evidence*, 16th ed (2005), observed, at para 23.22-23.26, that this is a novel approach to privilege and express the hope that it will not be followed. For myself I find that Lord Hoffmann's approach illuminates the issues that arise in the present case."

81. *R (Lumsdon) v Legal Services Board* [2014] EWHC 28 (Admin) was a judicial review into the introduction of the QASA quality assurance scheme for advocates. One of the many objections taken to the scheme was that advocates might be prevented by legal professional privilege from putting forward to the regulator points which might explain or mitigate what had been perceived by the judge to be incompetent advocacy. The Divisional Court did not consider that privilege would often prevent the advocate from relying upon mitigating circumstances, but it went on at [73]:

> "In any event, the problem of privilege has long existed, at least in theory, in relation to allegations of misconduct or inadequate professional services, but we were given no evidence that it has proved a problem in practice. If a situation does arise in which there is some privileged information which excuses what might be perceived as poor performance and which could not be revealed to the trial judge, the advocate would in our view be entitled to provide the gist of it to the regulator, which would in turn be bound not to use the information for any purpose other than determining the application for accreditation; see per Lord Hoffmann in *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax* [2003] 1 AC 563, [32]."

82. On appeal the Court of Appeal stated that it was "inclined to agree*"* with the Divisional Court on this point, but did not need to decide it: [2014] EWCA Civ 1276, [2014] HRLR 29 at [25]. The point did not arise in the Supreme Court.

83. Against that background, counsel for the FRC submitted that *Parry-Jones* as interpreted in *Morgan Grenfell* was binding on this Court, and that even if it was not strictly binding, it was good law and supported by a consistent line of subsequent authority. Counsel for SDI submitted that *Parry-Jones* was not binding because Lord Hoffmann's primary reason for supporting the decision was obiter and contrary to principle for the reasons given by Hollander and Passmore and Lord Hoffman's alternative reason was inapplicable to the present case.

84. In my judgment counsel for SDI is correct in his submission that Lord Hoffmann's primary reason in *Morgan Grenfell* for supporting the decision in *Parry-Jones* was strictly obiter. Nevertheless, it was an important step in his reasoning in that case, and it has the persuasive force of a unanimous House of Lords. Moreover, it receives support from the subsequent case law. Notwithstanding the criticisms of it, there is no authority to the contrary. Accordingly, I consider that it must be taken to represent the current state of the law. Thus the production of documents to a regulator by a regulated person solely for the purposes of a confidential investigation by the regulator into the conduct of the regulated person is not an infringement of any legal professional privilege of clients of the regulated person in respect of those documents. That being so, in my judgment the same must be true of the production of documents to the regulator by a client.

85. Applying that principle to the present case, it follows that the production of the 40 Additional Documents to the FRC for the purposes of the Investigation would not infringe any legal advice privilege of SDI in respect of those documents.

86. In case I am wrong in concluding that Lord Hoffmann's primary reason represents the law, I turn to consider his alternative reason. As noted above, counsel for SDI submitted that this was inapplicable to the present case. This is because of the differences between the relevant statutory regimes.

87. In this regard, counsel for SDI pointed out that *Parry-Jones* was concerned with an investigation by the Law Society. Section 29 of the 1957 Act said nothing about legal professional privilege in that context. By contrast, section 46(6), to which Lord Denning

referred, preserved objections to writs *duces tecum* (which would include legal professional privilege) in proceedings before the disciplinary committee.

88. Turning to the present context, curiously neither side referred me to the statutory powers pursuant to which SATCAR was made. In those circumstances I assume that the relevant statute contained general words sufficient to authorise the making of Regulation 10 and Schedule 2, but said nothing about legal professional privilege.

89. Counsel for the FRC submitted that Lord Hoffmann's alternative reason was equally applicable to the present case. Even if production of the 40 Additional Documents would technically infringe SDI's legal advice privilege, it was impliedly authorised by Schedule 2 paragraph 2 of the SATCAR and the statutory powers pursuant to which those rules were made.

90. Counsel for SDI advanced two answers to this submission. His first was that it had not been shown by the FRC that the relevant statute contained wording which either expressly or by necessary implication abrogated or overrode legal professional privilege. I do not accept this argument. Lord Hoffmann did not point to any wording in the Solicitors Act 1957 that either expressly or by necessary implication abrogated or overrode legal professional privilege. Rather, his reasoning was that, because the infringement (if infringement there was) was a technical one, then the general words contained in section 29(1) were sufficient. In my judgment the same approach is applicable here, subject to counsel for SDI's second point.

91. Counsel for SDI's second argument was that Schedule 2 paragraph 1(8) was inconsistent with such an interpretation because it expressly preserved legal professional privilege at the investigation stage (and not merely, as with section 46(6) of the 1957 Act, at the stage of disciplinary proceedings). Counsel for the FRC submitted that Schedule 2 paragraph 1(8) preserved legal professional privilege in circumstances where the infringement was not a technical one. He gave by way of example the situation where a client such as SDI was contemplating a claim for negligence against the auditor, and obtained legal advice as to the merits of that claim. Counsel for the FRC submitted that in those circumstances the client could rely upon its legal advice privilege pursuant to Schedule 2 paragraph 1(8) as an answer to any notice to produce documents recording that advice pursuant to paragraph 1(3). (Counsel for the FRC also suggested a way in which Schedule 2 paragraph 1(8) could apply even in the circumstances of a notice under paragraph 1(1), but this is more complicated. Given that it is not directly germane to the present case, I do not propose to explore it.)

92. I have not found this a straightforward point to resolve. The interpretation of Schedule 2 paragraph 1(8) advanced by counsel for the FRC involves giving it a much more restricted application than it appears to have on its face. Lord Hoffmann's primary reason in *Morgan Grenfell* avoids this difficulty. But if Lord Hoffmann's alternative reason represents the law, then I conclude with some hesitation that counsel for the FRC's interpretation is correct.

<u>Conclusion</u>

93. For the reasons given above, I shall order SDI to produce (a) any of the documents in the "pool of potentially responsive documents" which are capable of fitting Mr

McMullan's description and (b) the 40 Additional Documents it has withheld on the ground of privilege.