Neutral Citation Number: [2020] EWCA Civ 177

Case No: A3/2018/2378

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
Mr Justice Arnold
[2018] EWHC 2284 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2020

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE LEWISON
and
LADY JUSTICE ROSE

- -

Between :

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

- -
- -

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

Hearing dates: 29th and 30th January 2020

- -

Approved Judgment

Lady Justice Rose:

1. The Appellant ('Sports Direct') appeals against the order of Mr Justice Arnold dated 11 September 2018 by which he ordered it to disclose certain documents to the Respondent, the Financial Reporting Council ('the FRC'). The FRC is the body which is responsible for amongst other things regulating statutory auditors and audit work. Its powers to take action when auditors are suspected of misconduct are set out in the Statutory Auditors and Third Country Auditors Regulations 2016 (SI 2016/649) ('SATCAR'). SATCAR confers on the FRC a power to require certain persons to provide it with information relating to the audit of the accounts of "any public interest entity", a term which includes Sports Direct. The FRC has also adopted an Audit Enforcement Procedure ('AEP') which provides in more detail for how the FRC carries out investigations, takes decisions, imposes sanctions and determines appeals.

2. The FRC is currently conducting an investigation into the conduct of Sports Direct's former auditors, Grant Thornton UK LLP and of an individual at that firm referred to as Subject A. The investigation concerns the audit of the financial statements of Sports Direct and its subsidiaries for the year ending 24 April 2016 and in particular the engagement by a subsidiary of Sports Direct called Sports Direct Retail of an entity called Barlin Delivery Ltd to provide delivery services to that subsidiary's customers. The concern is that a relationship between the owners of Barlin and Sports Direct was not disclosed in the group's accounts.

3. Although the subjects of this investigation are Grant Thornton and Subject A and not Sports Direct, it is accepted that Sports Direct is one of the persons to whom a request for documents and information may be issued by the FRC. During April and May 2017, the FRC issued notices to Sports Direct under para. 1 Schedule 2 of SATCAR and rule 10(b) of the AEP seeking certain categories of documents. The relevant notice for our purposes was issued on 20 April 2017 ('the Notice'). It stated that for the purposes of the investigation being carried out by the FRC, Sports Direct was required to provide in electronic format all emails and attachments to emails in the possession and control of Sports Direct 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 one or more of 27 different specified search terms. The documents requested by the Notice were required to be produced on or before 18 May 2017 and the Notice set out the penalties that could be imposed on Sports Direct if it failed to comply.

4. About 2000 documents were provided by Sports Direct to the FRC in response to the Notice but 40 documents have been withheld on the grounds that they are covered by legal professional privilege ('LPP'). They comprise emails and attachments to emails sent to or by Sports Direct's legal advisers, either internal or external. The legal advice that Sports Direct sought related to various matters but included, for example, a challenge by the French, Irish and Finnish tax authorities to the arrangements devised by Sports Direct and its adviser Deloitte in respect of VAT on the international sales of Sports Direct Retail. Sports Direct has declined to say exactly what the attachments to the withheld emails are but have stated that they include for example contracts between a subsidiary and a third party. Arnold J was invited to determine the issues before him as a matter of principle without regard to the particular nature of the documents. We were invited to take the same approach in this appeal.

5. The FRC does not accept that Sports Direct is entitled to withhold the 40 documents. The FRC argues that although the emails do contain material that would ordinarily be regarded as protected by LPP, they fall within a narrow exception recognised in the case law which means that in the particular circumstances of this request there would be no infringement of Sports Direct's privilege if the emails were handed over. Alternatively, the FRC argues that any infringement would be a technical infringement only and would be authorised by the SATCAR regime. That issue is the first issue arising in this appeal and has been referred to as the "Infringement Issue". The judge accepted the FRC's argument on the Infringement Issue and ordered that the emails and their attachments be disclosed. The FRC argued in the alternative that even if the emails themselves were protected by LPP, some of the attachments to those emails were pre-existing documents and were not protected by LPP simply by being attached to privileged emails. The judge accepted that argument as well. That issue has been referred to as the "Communication Issue". Sports Direct appeals against the judge's decision on both the Infringement and the Communication Issues. Mr Lissack QC leading Mr Sher appeared before us on behalf of Sports Direct and Mr Simpson QC leading Ms Loveridge appeared on behalf of the FRC.

SATCAR and the FRC's information gathering powers

6. SATCAR implements the United Kingdom's obligations under Regulation (EU) 537/2014 on specific requirements regarding statutory audit of public interest entities (OJ L 158/77 27 May 2014). Regulation 3 of SATCAR sets out the responsibilities of the FRC, including the public oversight of statutory auditors; the determination of technical standards and other standards of professional ethics and internal quality control; the determination of eligibility criteria for appointing people to be statutory auditors and their registration; the monitoring of statutory auditors and audit work by means of inspection; the investigation of statutory auditors and audit work; and the imposition and enforcement of sanctions.

7. Regulation 10 of SATCAR provides for Schedule 2 to have effect with regard to the FRC's investigation powers. Schedule 2 provides as follows:

    i) Paragraph 1(3) provides that 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.

    ii) The persons mentioned in paragraph 1(4) include any person involved in the activities of a statutory auditor, any public interest entity and any subsidiary or parent of a public interest entity. A "public interest entity" is defined in regulation 2 as including "an issuer whose transferable securities are admitted to trading on a regulated market".

    iii) Paragraph 1(6) provides that a notice may require the creation or provision of documents specified in the notice.

    iv) Paragraph 1(8), which is key to this appeal, provides that a notice under sub-paragraph (3) does not require a person to provide any information or create any documents which the person would be entitled to refuse to provide or produce in proceedings in the High Court on the grounds of LPP.

v) Paragraph 2(1) provides that if a person fails to comply with a notice under paragraph 1, the FRC may apply to the court, which is defined by paragraph 4(4) so as to include the High Court.

vi) Paragraph 2(2) provides for what happens on such an application:

> "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."

8. The AEP, adopted on 17 June 2016, describes the various stages of the procedure to be followed when an auditor is alleged to have contravened the rules. The initial stages are conducted by a Case Examiner who determines whether the matter is suitable for resolution through "constructive engagement" with the statutory auditor or audit firm. If not, the Conduct Committee then decides if there is a good reason to investigate an allegation. If there is, the Conduct Committee refers the matter to the Executive Counsel who is a legally qualified officer of the FRC. The Executive Counsel has investigatory powers under rules 9 – 15 including wide powers to request specialist advice, engage experts and enter premises on notice. The Executive Counsel can issue a decision notice which sets out any adverse findings against the auditor with reasons and proposes a sanction with reasons. If the respondent does not agree with the decision notice or fails to comply with it, the Executive Counsel refers the matter to the Enforcement Committee. The Enforcement Committee arrives at a decision whether or not the respondent is liable to enforcement action. If the respondent rejects the Enforcement Committee's decision the Enforcement Committee refers the matter for a hearing before a tribunal. A respondent may appeal a final decision notice made by that tribunal to the Appeal Tribunal which may revoke or vary the decision, remake a decision or remit the case back to the tribunal.

The case law on LPP and statutory information gathering powers

9. Recent decisions of this court have considered the general principles governing LPP and the underlying policy rationale for those principles: see in particular *Addlesee and others v Dentons Europe LLP* [2019] EWCA Civ 1600, [2019] 3 WLR 1255 and *The Civil Aviation Authority v (R (oao Jet2.com Ltd) (The Law Society of England and Wales intervening)* [2020] EWCA Civ 35 ('*Jet2*'), the latter handed down the day before the hearing of this appeal. Any discussion of the modern law of LPP must start with the speech of Lord Taylor of Gosforth CJ in *R v Derby Magistrates' Court* [1996] AC 487 ('*Derby Magistrates*'). Lord Taylor (with whom the other members of the Appellate Committee agreed) referred at p. 203H to the long-established rule that a document protected by privilege continues to be protected so long as the privilege is not waived by the client; "once privileged, always privileged". The privilege is that of the client and only he can waive it. The refusal of the client to waive his privilege for whatever reason, or for no reason, cannot be questioned or investigated by the court. Having analysed the case law, Lord Taylor concluded at p. 507C:

> "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."

10. Lord Taylor referred in his speech to two exceptions. The first was the exception recognised by Stephen J in *Reg v Cox and Railton* (1884) 14 QBD 153, often referred to as the iniquity exception, that privilege does not arise from a communication between a client and his lawyer for a criminal purpose. As to the second, he said at p. 507G:

> "Nobody doubts that legal professional privilege could be modified, or even abrogated, by statute, subject always to the objection that legal professional privilege is a fundamental human right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969), as to which we did not hear any argument."

11. Lord Nicholls of Birkenhead rejected any idea of the court engaging in a balancing exercise between the interests of the client in maintaining privilege and the interests of the person seeking disclosure of the material. The prospect of a judicial balancing exercise was, he said, "illusionary, a veritable will-o'-the wisp" because: p. 512D

> "Confidence in non-disclosure is essential if the privilege is to achieve its raison d'etre. If the boundary of the new incursion into the hitherto privileged area is not principled and clear, that confidence cannot exist."

12. There have been a number of cases in which the exception to which Lord Taylor referred in *Derby Magistrates*, that is where statute has modified or abrogated LPP, has been discussed. The leading case is *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax and another* [2002] UKHL 21, [2003] 1 AC 563 ('*Morgan Grenfell*') which I will need to consider in more detail below. The case raised the question whether information gathering powers conferred on the Revenue by provisions of the Taxes Management Act 1970 ('the TMA') required the disclosure by a taxpayer of documents covered by LPP. At first instance, the Divisional Court (Buxton LJ and Penry-Davey J) held that the information gathering powers conferred on the Revenue did include a power to demand privileged documents: [2000] EWHC Admin 415. Buxton LJ described the principle of legality which applies when construing a statute for this purpose:

> "11. The rule of LPP is not only important in itself, but important also because it is, or at least was accepted before us as being, one of the fundamental, virtually constitutional, rules that are protected by what has recently come to be referred to as the principle of legality. That principle places limitations on the power of Parliament to legislate to abrogate or undermine those fundamental rules. True to the doctrine of Parliamentary

> sovereignty the principle remains a rule of construction, and not itself a fundamental constitutional rule, but it is a rule of construction of striking force. The position was expressed by Lord Hoffmann in *R v Secretary of State for the Home Department ex p Simms* [1999] 3 WLR 328 at p341F:
>
> > "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way, the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

13. The Divisional Court concluded that the Revenue had overcome the high hurdle to establish an implied abrogation of LPP. The Court of Appeal upheld that decision. The House of Lords allowed Morgan Grenfell's appeal. Lord Hoffmann, with whose speech the other members of the Appellate Committee agreed, emphasised that the information gathering powers must be examined in their context. He referred to two principles that were not in dispute, the first being that LPP was a fundamental human right. He went on:

> > "Secondly, the courts will ordinarily construe general words in a statute, although literally capable of having some startling or unreasonable consequence, such as overriding fundamental human rights, as not having been intended to do so. An intention to override such rights must be expressly stated or appear by necessary implication. The speeches of Lord Steyn and myself in *R v Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115 contains some discussion of this principle and its constitutional justification in the context of human rights. But the wider principle itself is hardly new. It can be traced back at least to *Stradling v Morgan* (1560) 1 Pl 199."

14. Lord Hoffmann concluded that there was nothing in the TMA that provided sufficient ground for finding a necessary implication that LPP had been excluded: para. 37. Lord Hobhouse of Woodborough delivered a short concurring judgment stating his

reasons for agreeing with the opinion of Lord Hoffmann. He viewed the question as one of statutory construction, in accordance with the principles stated in *Ex parte Simms*. That was a principle which had long been applied in relation to the question whether a statute is to be read as having overridden some basic tenet of the common law. In the absence of express words the question was whether there was a necessary implication to that effect: "A necessary implication is not the same as a reasonable implication; and is one which necessarily follows from the express provisions of the statute construed in their context". He described the distinction as:

> "45 … between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation."

15. Lord Hobhouse concluded that the statutory language of the TMA fell a long way short of meeting that criterion.

16. The Privy Council considered a similar question in an appeal from the Court of Appeal of New Zealand in *B and others v Auckland District Law Society and another* [2003] UKPC 38, [2003] 2 AC 736 ('*B v Auckland*'). The issue there was whether the powers conferred on the Auckland District Law Society for investigating a complaint against a law firm impliedly overrode any privilege held by the firm's clients in material which the Law Society requested for the purposes of its investigation. Lord Millett, giving the judgment of the Board, stated that the threshold for implying such an override into the information gathering powers had been authoritatively stated by Lord Hobhouse in *Morgan Grenfell*. As to whether a particular provision should be so interpreted, Lord Millett said:

> "59. … A useful test is to write in the words "not being privileged documents" and ask, not "does that produce a reasonable result?" or "does it impede the statutory purpose for which production may be required?" but "does that produce an inconsistency?" or "does it stultify the statutory purpose?" The circumstances in which such a question would receive an affirmative answer would be rare. But a statutory right to require production of correspondence between a person and his solicitor for the purpose of obtaining legal advice, for example, would obviously be inconsistent with the existence of a right to withhold documents on the ground of legal professional privilege. And unless a taxing master could require the production of privileged documents it would be impossible for him to perform his function of taxing a solicitor's bill of costs: see *Goldman v Hesper* [1988] 1 WLR 1238."

17. The Privy Council held that the test for necessary implication was not satisfied by the New Zealand Law Practitioners Act 1982 and that LPP was a good answer to a call for documents under that Act.

The Infringement Issue

18. When one considers paragraph 1 of Schedule 2 to SATCAR to see if one can discern Parliament's intention to override Sports Direct's LPP, the wording is certainly not promising from the FRC's point of view. There is no express provision overriding LPP. On the contrary, there is express provision dealing with LPP which appears to limit the FRC's power and confirm the protection of LPP. Sub-paragraphs 1(8) and (9) of Schedule 2 provide:

> "(8) A notice under sub-paragraph (1) or (3) does not require a person to provide any information or create any documents which the person would be entitled to refuse to provide or produce–
>
> (a) in any proceedings in the High Court on the grounds of legal professional privilege, or
>
> (b) in proceedings in the Court of Session on the grounds of confidentiality of communications.
>
> (9) In sub-paragraph (8) "communications" means—
>
> (a) communications between a professional legal adviser and his client, or
>
> (b) communications made in connection with or in contemplation of legal proceedings or for the purposes of those proceedings."

19. On what basis does the FRC contend that, despite that apparently clear choice expressed by the legislature, Sports Direct is bound to provide privileged material in response to a notice given under paragraph 1(3)? The answer lies in an observation made by Lord Hoffmann in his speech in *Morgan Grenfell* as to the rationale behind the decision of the Court of Appeal in *Parry-Jones v The Law Society and ors* [1969] 1 Ch 1 ('*Parry-Jones*'). *Parry-Jones* decided that a solicitor being investigated by the Law Society could not refuse to hand over documents requested pursuant to powers under the Solicitors Act 1957 on the grounds that those documents were privileged for the benefit of his former clients. It was argued before the House of Lords in *Morgan Grenfell* that it would be inconsistent for their Lordships to conclude that there was no statutory override for the benefit of the Revenue in the TMA, given the Court of Appeal's decision in *Parry-Jones* that there was such an override in the Solicitors Act 1957 for the benefit of the Law Society. Lord Hoffmann expressed doubts as to the reasoning in *Parry-Jones* which he regarded as suggesting that *any* statutory obligation to disclose documents would be construed as overriding the duty of confidence that a solicitor owed to his client. He went on:

> "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."

20. The FRC submits that in that paragraph, Lord Hoffmann recognised a further exception to LPP to the effect that where a regulator such as the Law Society or the FRC has a statutory power to request documents then either:

    i) there is no infringement of LPP when those documents are handed over in response to a request made under that power ('the no infringement exception'); or

    ii) any infringement of LPP is technical only and can be regarded as authorised by the relevant statutory provisions on the basis of a less stringent test than that applied by the House of Lords in *Morgan Grenfell* or by the Privy Council in *B v Auckland* ('the technical infringement exception').

21. The FRC accepts that for either the no infringement exception or the technical infringement exception to apply, three conditions must be met: (i) the request for the information must come from a regulator; (ii) the regulator must be bound by duties of confidentiality in its use of the information; and (iii) the holder of the privilege must be someone other than the person who is at risk of some adverse finding as a result of the use of the information by the regulator. The FRC accepts therefore that it cannot require the disclosure of documents in which Grant Thornton is entitled to claim privilege but contends that it is entitled to compel the disclosure of documents in which Sports Direct claims privilege, because Sports Direct is not the target of the investigation under SATCAR.

22. Arnold J accepted the FRC's submissions on the Infringement Issue. He considered in detail the judgments of the Court of Appeal in *Parry-Jones* and Lord Hoffmann's speech in *Morgan Grenfell*. He concluded at para. 74 that Lord Hoffmann's primary reason for supporting the decision in *Parry-Jones* was that there was no infringement of the clients' LPP. Lord Hoffmann's alternative reason was that the statute authorised it. The judge recognised that Lord Hoffmann's no infringement exception has been trenchantly criticised in practitioner textbooks: see Hollander, *Documentary Evidence* (13th ed) and Passmore *Privilege* (3rd ed). Despite these criticisms, the courts have continued to treat *Parry-Jones* and *Morgan Grenfell* as good law. Arnold J concluded:

> "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 [Sports Direct] 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 Hoffmann's alternative reason was inapplicable to the present case.
>
> 84. In my judgment counsel for [Sports Direct] 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 [Sports Direct] in respect of those documents."

Grounds of appeal 1 and 3

23. Ground 1 of Sports Direct's appeal is that Arnold J was wrong to regard Lord Hoffmann's observation in para. 32 of *Morgan Grenfell* as establishing a principle that the production of documents to a regulator is in some circumstances not an infringement of the LPP of clients of the regulated person. By Ground 3 it argues in the alternative that there can be no override of even a technical breach of privilege implied into Schedule 2 of SATCAR, given the clear and unambiguous terms of the limitation on SATCAR's power to call for documents.

24. In my judgment both these Grounds should be upheld. There is no justification for regarding what Lord Hoffmann said in para. 32 of *Morgan Grenfell* as authority either for the existence of a no infringement exception to the protection conferred by LPP or for the application of some lower threshold for implying a statutory override on the grounds that any infringement of Sports Direct's LPP would be technical. The task of the court is to apply the test laid down in *Morgan Grenfell* and *B v Auckland*, by looking at paragraph 1 of Schedule 2 to see whether Parliament must have intended to override the privilege. Paragraph 1(8) and 1(9) of Schedule 2 preclude any such implication.

25. As to what para. 32 of *Morgan Grenfell* means, it is important to understand what prompted Lord Hoffmann to question the rationale behind the decision in *Parry-Jones*. In *Parry-Jones* the Law Society was exercising powers conferred upon it by

the Solicitors Act 1957. Section 29 of that Act provided that the council could make rules empowering them to take such action as may be necessary to enable them to ascertain whether or not the rules about holding client money or acting as a trustee were being complied with. The Law Society had made the Solicitors' Accounts Rules 1945 which took effect as if made under the 1957 Act. Rule 11 empowered the council to require any solicitor-trustee to produce a wide range of documents for the inspection of any person appointed by the council. The Law Society served on Mr Parry-Jones a notice under rule 11 requiring him to produce his books of accounts and other documents for inspection by the Law Society's accountant. Mr Parry-Jones' challenge to the notice was struck out and the Court of Appeal upheld that decision. Mr Parry-Jones argued that rule 11 was ultra vires because, amongst other reasons, it conflicted with section 46(6) of the Solicitors Act 1957. Section 46 dealt with the constitution and proceedings of a disciplinary committee convened to hear and determine applications or complaints under the Act. Subsection (6) provided that:

> "(6) For the purposes of any application or complaint made to the disciplinary committee under this Act, the committee or any division thereof may administer oaths, and the applicant or complainant and any person with respect to whom the application or complaint is made may issue writs of subpoena ad testificandum and duces tecum, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action."

26. Counsel for the Law Society, Mr T H Bingham, submitted that the language of section 29 of the 1957 Act was very wide and unequivocal and was not subject to any privilege or saving clause. If a solicitor were to be entitled to refuse inspection of documents, this would enable a fraudulent solicitor to prevent an investigating accountant from doing his duty. He submitted further that the power of investigation overrode the implied contractual confidence between solicitor and client. Lord Denning MR referred to the two privileges which exist between solicitor and client: p. 6

> "We all know that, as between solicitor and client, there are two privileges. The first is the privilege relating to legal proceedings, commonly called legal professional privilege. A solicitor must not produce or disclose in any legal proceedings any of the communications between himself and his client without the client's consent. The second privilege arises out of the confidence subsisting between solicitor and client similar to the confidence which applies between doctor and patient, banker and customer, accountant and client, and the like. The law implies a term into the contract whereby a professional man is to keep his client's affairs secret and not to disclose them to anyone without just cause (see *Tournier v National Provincial & Union Bank of England* [1924] 1 KB 461, 479-481). This particularly applies in the relationship of solicitor and client. The solicitor is not to disclose his client's affairs to anyone at all except under the most special and exceptional circumstances."

27. Lord Denning then set out section 29 and rule 11 and concluded that the rule was a valid rule which overrode 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."

28. In his judgment in *Parry-Jones*, Diplock LJ said that the action was misconceived because the inspection of documents under rule 11 was not in the nature of judicial or quasi-judicial proceedings. Privilege was, he said, irrelevant when one is not concerned with judicial or quasi-judicial proceedings. Mr Parry-Jones's writ raised the contractual duty of confidence but that was subject to the duty of any party to the contract to comply with the law of the land. He agreed with Lord Denning that section 29 empowered the council to make rules which entitled it to override that privilege. Salmon LJ agreed with both judgments.

29. The application of the decision in *Parry-Jones* to the information gathering powers conferred on the Revenue was then considered by the House of Lords in *Morgan Grenfell* when considering whether the Revenue's powers under the TMA should be treated as overriding privilege. The powers of the tax inspector to serve a notice requiring a person to deliver documents were set out in section 20 of the TMA (in the form in which they existed in 1999):

    i) Section 20(1), broadly, empowered an inspector to require a person to deliver to him documents which were relevant to any tax liability to which the person might be subject.

    ii) Section 20(3) conferred a power on the inspector, in addition, to require certain persons falling within the classes set out in subsection (4) – people other than the taxpayer himself - to provide him with information about the taxpayer's liability.

    iii) Section 20(7) provided that an inspector could not exercise the powers conferred by section 20 unless he was both authorised by the Board of the Inland Revenue and he had obtained the consent of a General or Special Commissioner. Further, the Commissioner could give his consent to the inspector issuing a notice only on being satisfied that in all the circumstances the inspector was justified in proceeding under that section.

30. Section 20B(3) then provided that an inspector did not have power under section 20(1) or (3) to give a notice to a barrister, advocate or solicitor, and that any such notice had to be given, if at all, by the Board. Thus, in the case either where the solicitor or barrister was himself the taxpayer (so otherwise falling within section

20(1)) or where he was within the classes covered by section 20(3) and was being asked to provide documents about a different taxpayer, the notice had to be given by the Board itself and could not be given by an inspector. Section 20B(8) then provided:

> "20B(8) A notice under section 20(3) … does not oblige a barrister, advocate or a solicitor to deliver or make available, without his client's consent any document with respect to which a claim to professional privilege could be maintained."

31. Thus section 20B(8) expressly preserved the ability of a lawyer to assert his client's privilege when he was being asked to provide documents, but only if the notice to which he responded was given to him under section 20(3), that is to say, not because he himself was the taxpayer under investigation but when he was being asked to provide documents about another taxpayer.

32. In *Morgan Grenfell*, the merchant bank had devised a tax scheme intended to confer a tax advantage on the bank's clients who would grant a long leasehold interest in property that they already owned to the bank, with the bank then leasing it back to the client. Tesco was one client who made use of this scheme. The tax inspector sought to use his statutory powers to investigate and obtained the consent of the Special Commissioner as he was required to do before serving the notice by section 20(7) of the TMA. Among the documents sought by the inspector were the instructions to and advice received from counsel in relation to the Tesco transaction. The Special Commissioner gave his consent. As I have already stated, the Divisional Court held that LPP was overridden by the TMA. I note here that the facts stated by the Divisional Court do not indicate whether the LPP asserted was that of Tesco or of the bank, but refer simply to the material as the bank's LPP material: para. 7. Buxton LJ held first that sections 20 to 20D TMA were intended to be a single code legislated by Parliament in that form. He then considered what indications could be found in the terms of the code pointing to a general rule with regard to LPP. The Revenue submitted that section 20B(8) would be otiose if there were a general rule that LPP material was protected. If Parliament had intended to incorporate the principle in *Derby Magistrates* into the code, the LPP material would by the application of that principle be protected in the lawyer's hands without the need for section 20B(8). There were further provisions elsewhere in the code expressly preserving privilege in specified circumstances: where the Revenue exercised their power to enter premises and seize documents they were precluded by section 20C(4) from seizing and removing items subject to legal privilege; a separate provision conferring a power to order delivery of documents in a case of suspected fraud excluded the operation of that power in respect of items subject to legal privilege. The Court concluded:

> "24. We find it difficult or impossible to understand why the specific provisions were included in the code unless the code itself does not recognise the common law rule of LPP."

33. The Court of Appeal (Schiemann and Sedley LJJ and Blackburne J) dismissed the appeal. Again, the facts as stated do not indicate whether the privilege asserted by the bank was its own privilege or that of Tesco; it does not appear to have been regarded as relevant to the answer to the question: para. 7. Blackburne J also described sections 20 – 20D of the TMA as an elaborate series of provisions constituting a detailed code

regulating to whom, by whom and subject to what threshold requirements both procedural and substantive, such notices could be given: para. 12. He concluded at para. 17 that, taken as a whole, the provisions of the code did carry the inescapable implication that the rule of LPP was excluded except where it was expressly preserved. A number of reasons were given for arriving at that conclusion including the existence of section 20B(8). At para. 22 Blackburne J posed the question: what could be the purpose of highlighting the preservation of LPP when a notice was served on a lawyer under section 20(3) but not where the lawyer was served under section 20(1) as the taxpayer, if there was an underlying assumption that documents covered by LPP were in any event protected from disclosure? He recorded the suggestion of Mr Beloff (acting for the bank) that the reason might be the uncertain scope in English law of the protection given to LPP in respect of material held by solicitors outside judicial or quasi-judicial proceedings at the time that the code was enacted. Mr Beloff had referred to *Parry-Jones*, in particular the judgment of Diplock LJ in that regard. That submission was rejected on the grounds that it did not explain why section 20B(8) was expressly limited to notices under section 20(3) and did not extend to section 20(1). The Court of Appeal therefore agreed with the conclusion of the Divisional Court that section 20B(8) would be otiose unless the scheme excluded LPP in those circumstances where it was not expressly preserved: para. 26.

34. In the House of Lords, Lord Hoffmann recognised that the provision which pointed most persuasively in favour of an implied override of LPP was section 20B(8). He therefore also addressed the question why Parliament should 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. David Pannick QC acting for Morgan Grenfell before the House made the same submission as his predecessor: section 20B(8) addressed the uncertain scope of LPP in English law outside legal and quasi-legal proceedings because of Diplock LJ's judgment in *Parry-Jones*. If there was no LPP outside such proceedings, the solicitor's duty to his client would be limited to a contractual duty of confidentiality. The Revenue might argue in the absence of a provision in the terms of section 20B(8) that that contractual duty had to give way to a statutory obligation to provide documents as Diplock LJ had held. Such an argument would only be available to the Revenue in respect of a notice to the lawyer in his capacity as lawyer under section 20(3) and any such argument would be defeated by section 20B(8).

35. Lord Hoffmann agreed that the problem to which section 20B(8) was addressed had been created by *Parry-Jones*. He also agreed that Diplock LJ's reasoning could not stand; indeed Lord Hoffmann stated that it was accepted by both Morgan Grenfell and the Revenue before the House that the material in dispute was protected by LPP and that the privilege could only be overridden by primary legislation containing express words or by necessary implication. He then departed from the solution that had been suggested by Mr Pannick and provided the rationale in para 32 (quoted at para 19, above) describing the no infringement exception and the technical infringement exception. He continued:

> "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. Lord Hoffmann went on to conclude that the provisions in the TMA on which the Revenue relied were not sufficient to create the necessary implication that LPP was intended to be excluded. He dismissed the Revenue's argument that it was important for them to have access to the taxpayer's legal advice in order to conduct their investigation. He noted that there are many situations in both civil and criminal law in which liability depends upon the state of mind with which something was done. That is not, save in exceptional cases, thought a sufficient reason for overriding LPP: para. 38. Similarly, he rejected the argument that the public interest in the collection of taxes could provide the necessary justification.

37. Lord Hobhouse delivered a short concurring judgment in *Morgan Grenfell* stating his reasons for agreeing with the opinion of Lord Hoffmann. He viewed the question as one of statutory construction, in accordance with the principle stated in *Ex parte Simms*. He also referred to the conundrum of section 20B(8) and the express preservation of LPP in respect of documents in the hands of the legal adviser. He did not refer to the no infringement or technical infringement exceptions described by Lord Hoffmann. He did refer to an implicit restriction upon the use which may be made of documents which are obtained under a statutory power. He commented that it is a general principle that where a power is given for a particular purpose it is not permissible to use that power for a collateral purpose: para. 48. Lord Hope of Craighead, Lord Scott of Foscote and Lord Nicholls agreed with the reasons of Lord Hoffmann in allowing the appeal.

38. Lord Hope, Lord Hobhouse and Lord Scott who had heard the *Morgan Grenfell* appeal subsequently sat on the appeal in *B v Auckland*. Since the appeal before the Privy Council concerned the application of the test for implying an LPP override in respect of a regulator's powers of investigation, the appeal provided an opportunity to adopt or expand upon the no infringement exception or the technical infringement exception if their Lordships had thought that appropriate. On the contrary, as I have described, Lord Millett reaffirmed the high threshold for the necessary implication of an override and treated the case as an exercise in statutory construction: "the task of the court is not to decide where the balance should be struck in the particular case, but where Parliament has struck it": para. 56.

39. Another opportunity to adopt or endorse those exceptions came in *Simms v The Law Society* [2005] EWCA Civ 749. The Divisional Court (Latham LJ, Curtis and Newman JJ) considered a challenge by a solicitor Mr Simms to the order made by the Solicitors Disciplinary Tribunal that he be struck off the Roll. Mr Simms complained that the decision of the Tribunal had been based in part on documents that were

subject to LPP to which his former clients were entitled. Mr Simms argued that *Parry-Jones* was no longer good law because of the decision of the Privy Council in *B v Auckland*. The Divisional Court rejected that submission without difficulty. They held that the Privy Council had concluded that the relevant New Zealand legislation did not expressly or by necessary implication override LPP. That case could, the Divisional Court held, "only be treated as an authority in connection with the New Zealand legislation or identical legislation elsewhere": para. 39. The Solicitors Act which applied in Mr Simms' case contained significantly different provisions. Later in the judgment, the Divisional Court quoted para. 32 of the speech of Lord Hoffmann in *Morgan Grenfell* to show that Mr Simms was wrong to suggest that the House of Lords had overruled *Parry-Jones*. The Court noted that the tribunal whose decision Mr Simms was challenging had concluded that LPP had not been lost by express words or necessary implication but that it was nonetheless proper to allow disclosure because the documents were not going to be used to the prejudice of the clients and steps were being taken to preserve the confidentiality of the documents. It appears that the tribunal had, therefore, relied on something like the no infringement exception. That approach was not endorsed by the Divisional Court. The Court said instead that *Parry-Jones* remained good law and further:

> "51 … 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 its statutory powers" to take possession of the documents and, as a result, did not breach LPP."

40. I do not see any support in the cases following *Morgan Grenfell* for the proposition that para. 32 of Lord Hoffmann's speech created a no infringement exception to the absolute protection provided by privilege. Lord Hoffmann did not express his conclusion as creating any such exception and the supposed existence of such an exception has not been picked up or relied upon in the subsequent case law, in particular in *B v Auckland* where it would have been most relevant. Lord Hoffmann was searching for some explanation for the existence of the express protection for privilege in section 20B(8) TMA to neutralise its potency as a basis for implying that no further protection for privilege was intended by Parliament. A satisfactory explanation was, I respectfully suggest, proposed by counsel for the bank. Lord Hoffmann's re-interpretation of *Parry-Jones* appears to have been a factor supporting his conclusion that there was no statutory LPP override in the TMA code. The usefulness of his analysis was, in my judgment, exhausted once it had fulfilled that purpose. Lord Hobhouse was content to arrive at the same conclusion without needing to unpick *Parry-Jones* to the same extent. I do not see that it is necessary to retrofit a new *ratio decidendi* into *Parry-Jones.* That case continues to stand, as it has stood for many years, as authority for two propositions: first, that rule 11 of the Solicitor's Account Rules 1945 conferred on the Law Society a power to compel the production of documents in the hands of the solicitor even though the clients of the solicitor could assert privilege in those documents; and second that rule 11 was not ultra vires the scope of the rule making powers in section 29 of the Solicitors Act 1957. Such a result is entirely consistent with the test for implied override set out by Lord Millett in *B v Auckland*, as the Divisional Court in *Simms* later held.

41. Arnold J referred not only to *Simms* but to two other cases as supporting Lord Hoffmann's rationale and the existence of an additional exception to the protection conferred by LPP. The first was *McE v Prison Service of Northern Ireland* [2009] UKHL 15, [2009] 1 AC 908. That case concerned whether the provisions of the Regulation of Investigatory Powers Act 2000 overrode LPP, empowering the security services to listen in to conversations between prisoners and their legal advisers. The House of Lords held that they did. In his review of the authorities, Lord Phillips of Worth Matravers cited para. 32 of *Morgan Grenfell* noting that the editors of *Phipson on Evidence*, 16th ed (2005) had observed at paras 23.22 – 23.26 that it was a novel approach to privilege and had expressed the hope that it will not be followed. He went on: (para. 10)

> "For myself I find that Lord Hoffmann's approach illuminates the issues that arise in the present case. The rationale underlying LPP is the fundamental requirement that a man should not be inhibited in speaking freely and frankly to his lawyer by concern that what he says may subsequently be disclosed to his prejudice. This appeal involves the tension between the importance of covert surveillance in the fight against terrorism and serious crime and the importance of LPP. In this context it is necessary to consider not merely whether and in what circumstances surveillance of communications subject to LPP should be permitted but the use that should be permitted of communications subject to LPP that are disclosed by such surveillance. This is a topic to which I shall return at the end of this opinion."

42. The context in which Lord Phillips found para. 32 of *Morgan Grenfell* illuminating became clear from para. 45 of his judgment when he referred back to that passage. It was relevant to his conclusion that the Covert Surveillance Code of Practice which made detailed provision for surveillance was inadequate in certain respects because it failed to address the use that might be made of such communications if disclosed. Lord Hoffmann's observation showed, Lord Phillips said, that the concerns protected by LPP relate not simply to the disclosure of the LPP material but also to the use of the material to the detriment of the client. I do not consider that Lord Phillips was therefore endorsing the existence of an additional exception to LPP as described by Lord Hoffmann in para. 32 of *Morgan Grenfell.*

43. The second case referred to by the judge was *R (Lumsdon) v Legal Services Board* [2014] EWCA Civ 1276, the decision on the challenge by a number of barristers practising in criminal law to the adoption of the QASA appraisal scheme. One objection was that barristers who receive a poor appraisal might be unable to defend themselves because of the assertion of LPP by their clients. In refuting this objection, the Divisional Court said at para. 73 of its judgment that if such a situation arose, the advocate "would be entitled to provide the gist of the privileged information to the regulator, which would in turn be bound not to use the information for any purpose other than determining the application for accreditation" and referred to para. 32 of *Morgan Grenfell*. On appeal, the Court of Appeal said they were inclined to agree with the Divisional Court but did not need to decide the point. Again, I do not see that as support for the existence of the no infringement exception.

44. The result of the preceding lengthy digression into the interstices of *Parry-Jones*, *Morgan Grenfell* and subsequent case law is that there is nothing in them that suggests that paragraph 1(8) of Schedule 2 to SATCAR means something different from exactly what it says. The recipient of a notice given by the FRC under paragraph 1(1) or 1(3) is not required to hand over privileged documents, whether the person entitled to the privilege is the auditor under investigation or the auditor's clients. Lord Hoffmann's comments in para. 32 do not provide a basis for saying that paragraph 1(8) is qualified by the no infringement exception. As Mr Lissack says, that would greatly reduce the protection conferred by it. Moreover, if Parliament had intended to preserve some general exception applicable where documents are sought pursuant to regulatory powers, paragraph 1(8) would not have been drafted in the way it is. The scope of LPP protection conferred is expressly aligned with the scope arising "in proceedings in the High Court on the grounds of legal professional privilege". The context in which Lord Hoffmann was discussing the potential no infringement exception was specifically outside the context of court proceedings.

45. I would therefore hold that Ground 1 is well founded and that the judge erred in ordering disclosure of the privileged documents on the grounds that such disclosure would not infringe Sports Direct's LPP in those documents.

46. Turning to Ground 3 of the appeal, I find there is no support in the case law for a gradation of infringements of privilege or for a lower threshold to be applied when the override sought to be implied is for technical infringements only. Mr Simpson accepted that an override of the LPP belonging to the target of the investigation could only be implied if the stringent test described in *Morgan Grenfell* and *B v Auckland* was met. In the present case, however, where it is Grant Thornton rather than Sports Direct which is the target of the FRC's investigation, a less stringent test for the implication of an override of Sports Direct's privilege would be appropriate. He pointed out that counsel for the Law Society in *B v Auckland* had described the documents in dispute there as privileged because of the firm's own legal privilege rather than that of its clients. The high test expounded by Lord Millett was appropriate in that case but was not appropriate here.

47. There are two answers to this submission. The first is that Lord Millett did not himself refer to any such distinction between the law firm's own privilege and that of its clients on the facts. On the contrary, at para. 12 he recorded that it was common ground for the purposes of the appeal that all the documents were covered by LPP: in some cases the privilege was that of the firm itself or its partners and in others it was that of its clients. Whether or not that was factually correct, that was certainly the basis of his judgment. The second answer is that, as Lord Scott explained in *Three Rivers DC v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610 at para. 35, legal advice privilege "should be given a scope that reflects the policy reasons that justify its presence in our law". The emphasis in all the case law has been on the importance as a matter of public policy of the client being able to speak frankly to his legal adviser in the knowledge that his legal adviser cannot reveal those communications even if at some point in the future it becomes convenient for the legal adviser to do so. If the client has no objection to the disclosure of his privileged material, he can waive his privilege at the request either of his legal adviser or of the regulator. The potential for waiver and the inability of the legal adviser to prevent his client from waiving privilege erodes, in my judgment, any

justification for some different rules to apply depending on whose privilege is engaged.

48. Mr Simpson drew our attention to the evidence of Mr David Salcedo, a solicitor and Senior Lawyer in the Enforcement Division of the FRC who has conduct of the investigation into Sports Direct's accounts. Mr Salcedo states that Sports Direct's refusal to make available the privileged material is having a disruptive impact on its investigation. The documents may provide evidence of what Grant Thornton and Subject A knew or ought to have known about the reasons for creating Barlin and for the non-disclosure of Barlin as a related party in the accounts.

49. I do not accept that any hindrance of the FRC's investigatory powers either in this particular case or more generally as a result of LPP can be relied on to imply an override of LPP given the wording of paragraph 1 of Schedule 2. As Lord Millett said in *B v Auckland*, our task is to decide where Parliament has struck the balance between the imperatives of the FRC's regulation of auditors and the fundamental rights of those auditors and their clients to protect their privileged material. Paragraph 1(8) shows where Parliament decided that balance should be struck.

The Infringement Issue: Ground 2

50. Given my conclusions on Grounds 1 and 3 that neither the no infringement exception nor the technical infringement exception exists to be relied on by the FRC, I do not need to consider whether the conditions to which the FRC said the application of those exceptions was subject are met in this case. We received detailed submissions from the parties about the other regulatory functions conferred on the FRC, the extent to which it could or could not use the information provided in response to the Notice in the exercise of those functions and the width of the information gateways provided to the FRC by section 1224A of the Companies Act 2006. This was said to be relevant to deciding whether, if the application of the exceptions were conditional on the regulator being bound not to use the information disclosed for a purpose other than the investigation, that condition was satisfied in the case of the FRC. We also heard submissions about the circumstances in which Sports Direct would or might be adversely affected by any published criticism of Grant Thornton, in particular the powers that the FRC had to redact information from its published reports in order to avoid infringing the rights of third parties. This was said to be relevant to deciding whether, if the application of the exceptions was also conditional on the information not being liable to be made public or used against the person entitled to the privilege, that condition was or was not satisfied in the case of the FRC.

51. All these submissions served to fortify my conclusion that there are no exceptions to LPP other than the two recognised by Lord Taylor in *Derby Magistrates*. As Lord Nicholls said in that case, any incursions into the hitherto privileged area must be principled and clear, otherwise the confidence of the client in non-disclosure cannot exist. The difficulty of applying the supposed conditions for the new exceptions relied on by the FRC show that they are neither principled nor clear.

The Communication Issue: Ground 4

52. The dispute to which Ground 4 relates arises in respect of 19 emails which have 21 attachments. It is common ground that:

i) the emails meet the four criteria as to relevance, date, custodian, and search terms but are standard lawyer/client communications covered by legal advice privilege (given that I would uphold Grounds 1 and 3 of the appeal);

ii) some of the attachments to the emails are pre-existing documents which, looked at by themselves separately from the emails, would not be protected by LPP;

iii) those attachments taken by themselves do not meet the four criteria set out in the Notice; they only fall within the scope of the Notice if they are treated as part and parcel of the email to which they are attached.

53. In his judgment, Arnold J cited the authorities which establish that pre-existing documents which are not themselves privileged do not achieve the protection of privilege by being attached to a privileged letter: see *Ventouris v Mountain* [1991] 1 WLR 607 and *Imerman v Tchenguiz* [2009] EWHC 2902 (QB). He rejected a submission that a contrary proposition was supported by the reasoning of Snowden J in *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2015] EWHC 3187 (Ch). He concluded on that basis that the attachments were not covered by privilege.

54. The arguments before this court were more subtle. Mr Lissack accepted that pre-existing documents are not covered by privilege simply because they are sent to a legal adviser. He drew a distinction, however, between whether a particular document was privileged (in this case, the attachment itself) and whether a particular communication was privileged (the communication in this case being of the fact that the attachment had been sent to its legal adviser for advice). This did not, as I understood it, amount to reliance on the line of case law conferring privilege on documents or selections from documents which reveal the "trend of advice" provided by the legal adviser: see *Lyell v Kennedy (No 3)* (1884) 27 Ch. D 1 discussed by Bingham LJ in *Ventouris* at p. 615A-F.

55. So far as concerns the proposition that what is privileged in this case is not the document but the fact of the communication of that document to a legal adviser, that distinction cannot, in my view, survive the judgment in *Ventouris* and the cases cited in there. In those cases the documents in dispute were pre-existing documents that the solicitor had acquired from a third party for the purpose of assisting in anticipated or pending litigation. Bingham LJ stated that since the obligation of disclosure in our system of civil procedure is generally beneficial, any exception based on LPP must be justified as serving the public interest: pp. 611 – 612. He referred to *Southwark and Vauxhall Water Co v Quick* (1878) 3 QBD 315 as authority for the proposition that pre-existing documents "laid before the company's solicitor for his advice" were not covered by privilege: p. 613D.

56. The ordinary civil procedure process requires the disclosure of all free-standing documents which are relevant to the pleaded issues in dispute between the parties, regardless of whether they have been attached to emails at any point. A party does not have to disclose more than one copy of each document. This means that if a pre-existing document is simply handed over as part of that disclosure process, the receiving party might never find out that that document or a copy of it had at one time been sent to the legal adviser. When a party asserts privilege and seeks to withhold the documents, however, he draws attention to the fact that the document was sent to

his lawyers. If that assertion is not upheld by the court and the documents are ordered to be disclosed, the receiving party does then know that they were sent to the legal adviser. That was the position in *Southwark and Vauxhall Water* and in *Ventouris* itself. In neither case did that consequence cast doubt on the court's conclusion that the documents must be disclosed.

57. The Notice here differs from the ordinary disclosure rules because it does not ask for free standing documents but only for emails and their attachments. Sports Direct's argument is that the attachments fall between two stools. They can only be regarded as meeting the four criteria set in the Notice, and thereby as falling within the scope of the Notice, if they are treated as part of a single communication with the email to which they were attached. If the attachments and the email are treated as a single communication then, since it is accepted that the content of the email itself is privileged, the whole communication should be regarded as privileged. Alternatively, if the attachments are regarded as separate documents from the email then they should be considered separately to see if they meet the four criteria themselves. Since in this case they do not, they do not fall within the scope of the Notice and do not need to be disclosed.

58. Both parties sought to draw support from the judgment of this court in *Jet2*. Hickinbottom LJ (with whom Peter Jackson and Patten LJJ agreed) dealt with the application of privilege where a single email is sent to a number of recipients, one or more of whom may be lawyers. One of the grounds of appeal raised the question whether the CAA, being the party making disclosure, had to assess whether each email and each attachment considered separately was privileged. Counsel for the CAA argued that LPP protects communications and an attachment to an email cannot be regarded as a separate communication from the email itself. Hickinbottom LJ commented that the ground had not featured heavily before the court and did not raise any point of principle. He referred at para. 107 to *Ventouris* as establishing that a document which is not privileged does not become so simply because it is sent to lawyers even as part of a request for legal advice. He went on:

> "107. … In giving disclosure, some separate consideration of substantive documents and attachments therefore has to be undertaken. Whilst an email and attachment can be regarded as a single communication, separate consideration will need to be given to the attachment, given that it will have been received or created by the sender, and therefore may require discrete consideration."

59. It does not appear to me that this passage resolves the present dispute since the discussion took place in a context where, as I have described, freestanding documents are liable to be disclosed in ordinary civil proceedings if they are relevant, having regard to the pleadings in the case, and not privileged. An analogous situation in the *Jet2* case would have arisen if the issue had been whether documents which were not themselves relevant to the issues in the case should be disclosed because they were attached to emails which were relevant but which were privileged. That was not an issue considered by the court in that case.

60. We did not hear extensive argument on the proper interpretation of the wording of the Notice. In my judgment, however, it is an overly technical approach to that wording

to interpret it as requesting "all emails which meet the four criteria and all documents which were attached to those emails provided that the documents also separately meet the four criteria" rather than as meaning "all emails which meet the four criteria together with any attachments to those emails". The difference in interpretation would, of course, have a significant effect on the scope of the request putting aside any question of privilege. If an email satisfying the four criteria had, for example, five attachments, it does not make sense to construe the request as asking for only three of the five to be provided because on separate examination it appears that only those three themselves meet the four criteria. There may well be instances in which an attachment viewed as a separate document was not responsive itself but where that document becomes significant to the investigation because it is attached to an unprivileged email that is within scope.

61. I would reject this ground of appeal and hold that on a proper construction of the Notice, an attachment is to be regarded as meeting the four criteria in the Notice if it is attached to an email which meets the four criteria. If the email is itself privileged, that does not confer privilege on the pre-existing document because on the authority of *Ventouris*, privilege does not protect either the document itself or the fact that it was sent to a legal adviser under cover of a privileged communication.

Conclusion

62. I would therefore allow the appeal in relation to the emails that are covered by LPP but dismiss the appeal in relation to the attachments to those emails in so far as those attachments are not themselves privileged.

Lord Justice Lewison

63. I agree.

The Master of the Rolls

64. I also agree.