Legal Professional Privilege: a tide on the ebb?

Charles Phipps

Amanda Savage

February 2019

4 NEW SQUARE
LINCOLN'S INN
LONDON WC2A 3RJ
WWW.4NEWSQUARE.COM

T: +44 (0) 207 822 2000
F: +44 (0) 207 822 2001
DX: LDE 1041
E: CLERKS@4NEWSQUARE.COM

NEW SQUARE

Charles Phipps

Call: 1992

"He has a brilliant legal mind and looks at cases upside-down and back-to-front to absolutely get to grips with the issues." – *Legal 500*

Charles has a particular interest in disputes relating to obligations of confidentiality (including legal professional privilege) and was the co-author, with the late Lord Toulson, of the 3rd edition of Confidentiality (*Sweet & Maxwell, 2012*). He specialises in the pursuit and defence of claims (both civil and disciplinary) against professional advisers. According to the latest edition of Chambers & Partners, Charles is ***"Very measured, with a huge wealth of knowledge and case law at his fingertips." "He is one of the most user-friendly barristers I have dealt with and would be at the top of my list for a measured, strategic opinion on a technical professional negligence case."***

He specialises in professional liability claims involving lawyers, accountants and auditors, financial services professionals, insolvency practitioners, surveyors and valuers, construction professionals and insurance brokers, and is also instructed in more general chancery and commercial litigation.

Charles is experienced in advising solicitors about the problems posed by SRA investigations and has also been retained in cases before the Disciplinary Tribunal of the ICAEW.

Amanda Savage

Call: 1999

Winner of the prestigious Chambers & Partners *Professional Negligence Junior of the Yea*r award in 2014 and rated as a leading junior in Chambers & Partners and the Legal 500. She has been described as having ***"great attention to detail, strong on paper and very good on her feet.", "Her advice is always considered rigorous, practical and realistic."***, ***"Really bright but easy-going as well. She had the judge eating out of her hand"***, she is ***"very thorough and practical with excellent drafting skills."***

Amanda practises across the range of chambers' work, with a primary focus on professional liability claims, insurance and general commercial litigation. She has particular experience of claims against lawyers (including applications for wasted costs), being regularly instructed by leading solicitors' insurers and BMIF. Amanda has been involved in several high profile lawyers' claims, including the '*Right to Buy'* litigation, *GWM v Templeton, Williams v Thompson Leatherdale*, *Daniels v Thompson* and *Brown v Bennett*.

This dovetails with her regulatory practice which includes SDT and ACCA cases. She sat for several years as a judge on the Bar Disciplinary Tribunal which gives her an insight into how things look from the other side of the fence and she was junior counsel in the longest ever hearing before the Solicitors Disciplinary Tribunal (*SRA v Dennison and others*).

LEGAL PROFESSIONAL PRIVILEGE: A TIDE ON THE EBB?

Charles Phipps and Amanda Savage

February 2019

Introduction

1. English lawyers cling to legal professional privilege ("LPP") as one of the few absolutes. In R v Derby Magistrates' Court, ex p.B [1996] 1 AC 487, the House of Lords declined to overrule privilege even when the privileged communications might be highly relevant to the defence of a murder charge[1]. Lord Taylor said (at 507D):

   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.

2. However, LPP's status as an absolute principle is not unquestionable:
   2.1. In the common law world, the Canadian Supreme Court[2] refused to follow Derby Magistrates and the Australians have departed from it by statute[3].
   2.2. Questions have been raised at a high level whether the absolute rule is consistent with European human rights jurisprudence. In Medcalf v Mardell [2003] 1 AC 120, at [60], Lord Hobhouse said:

   > *It may be that, as in the context of articles 6 and 8 of the European Convention on Human Rights, the privilege may not always be absolute and a balancing exercise may sometimes be necessary*

3. In England, however, judges have confined themselves to policing the edges of the rule – limiting the circumstances in which LPP applies, or expanding upon the few recognised categories of exception. A well-known example is the decision of the Court of Appeal in Three Rivers District Council v Bank of England (No.5) [2003] QB 1556.

4. In that case, the Bank of England had retained Freshfields to advise it in relation to the Bingham Inquiry into the collapse of BCCI. The Bank had established a Bingham Inquiry Unit and the Court of Appeal held that, although legal advice privilege attached to communication between the

[1] Other reported decisions relating to the same case suggest that the House of Lords were reasonably confident that no injustice was in fact being visited upon B.
[2] Smith v Jones [1999] 1 SCR 455
[3] Section 123 of the Evidence Act 1995, overruling the effect of *Carter v Northmore* (1995) 181 CLR 121 (HC)

Inquiry Unit and Freshfields, communications between Freshfields and other employees of the Bank (right up to and including the Governor) were not similarly privileged, because only the Inquiry Unit counted as Freshfields' client for the purposes of privilege.

5. The Court of Appeal's decision has been the subject of near-universal criticism in the textbooks[4] but has survived and remains the law more than 15 years later, despite (for example) the pleas of the successful appellants in Three Rivers District Council v Bank of England (No.6) [2005] 1 AC 610.

6. In this talk we examine two recent lines of authority, which might both be said to contribute to an overall picture of courts and regulators presently being willing to take the pruning shears to LPP in quite a dramatic fashion:
   6.1. the first relates to the exclusion of LPP from the professional disciplinary and/or regulatory sphere;
   6.2. the second relates to the strict confinement of litigation privilege to third party communications for the purpose of gathering information or advice.

Exclusion of LPP from the professional disciplinary and/or regulatory sphere

7. Although LPP may have begun as a procedural rule about disclosure, the scope of its protection has long been recognised as extending beyond the litigation sphere. As Lord Hoffmann said in R (Morgan Grenfell) v Special Commissioner of Income Tax [2003] 1 AC 563, at [30]:

   "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."

8. The Morgan Grenfell case is also authority for the proposition that LPP is a fundamental human right that can be overridden in legislation only by express words or necessary implication. Despite certain other *dicta* in Lord Hoffmann's speech (to which we return below), regulators and disciplinary authorities, with the sole exception of the Law Society/SRA, have since generally accepted that they are not entitled to access to documents protected by LPP in the absence of a waiver by the relevant client.

[4] See, for example, Passmore's Privilege (3rd edition, 2013), at paragraphs 2-032 to 2-041; Thanki's Law of Privilege (3rd edition, 2018), at paragraph 2.25; Phipson on Evidence (19th edition, 2017), at paragraph 23-72.

Financial Reporting Council Limited v Sports Direct International PLC

9. However, in his recent decision in Financial Reporting Council Limited v Sports Direct International PLC [2018] EWHC 2284 (the first case of its kind), Arnold J granted an order requiring Sports Direct to disclose to the FRC documents over which Sports Direct International (SDI) asserted LPP (the disputed documents). Disclosure was sought for the purposes of the FRC conducting an investigation into Grant Thornton, SDI's auditors. It was held that this was not an infringement of LPP.

10. The relevant statutory provisions (Regulation 10 and Schedule 2 SATCAR) permit the FRC to give notice to a relevant person/entity requiring them to provide information. Schedule 2, paragraph 1(8) also 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 grounds of legal professional privilege*".

11. Three privilege issues arose (paragraph 20 of the judgment): (a) whether legal advice privilege applied to documents by virtue of those documents having been attached to emails passing between SDI or its subsidiaries and its lawyers (the "Communication Issue"); whether SDI's waiver of privilege by sending copies of documents to GT for the purposes of audit extended to the FRC (the "Waiver Issue"); and whether production of the documents to the FRC would infringe any privilege of SDI (the "Infringement Issue") (which the Judge described as "… the most important and far-reaching issue raised by the present application, and the most difficult").

12. As to this: FRC argued that, even if the disputed documents were protected by legal advice privilege, and even if that privilege had not been waived by disclosing them to GT, disclosure of those documents for the purposes of the Investigation would not infringe SDI's privilege. One can see a contrary argument - that the issue of "infringement" is irrelevant in circumstances where the regulations expressly provide that FRC's notice may not compel the production of material for which LPP could be claimed.

13. However, Arnold J agreed with FRC, following Lord Hoffman's primary basis for rejecting the claim to privilege in R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax [2003] 1 AC 563 (interpreting the decision in Parry-Jones v Law Society [1969] 1 Ch 1). Arnold J acknowledged the trenchant criticism of those decisions but found that they represented 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" (emphasis added).

14. In case he was wrong in concluding that Lord Hoffman's primary reason represented the law as it stood, Arnold J went on to apply the 'alternative reason' given by Lord Hoffman in Morgan Grenfell: so that even if the disclosure of the documents to the FRC infringed any LPP, the statutory regime 'could be construed as having authorised it' on the basis the infringement was a 'technical one'. It was argued that the express preservation of LPP in Schedule 2 paragraph 1(8) (the equivalent of which did not exist in respect of SRA investigations, cf *disciplinary proceedings*) only preserved LPP in circumstances where the infringement was not a "technical" one. Arnold J recognised that this involved giving the provision "a much more restricted application than it appears to have on its face" but concluded ("with some hesitation") that such interpretation was correct.

15. Potential implications:
    15.1. Reasoning would extend to all professional regulatory investigations (perhaps even in the face of express legislative provisions purporting to preserve LLP);
    15.2. Practical and financial burden on audit clients;
    15.3. The likelihood of material remaining confidential, beyond the investigation phases;
    15.4. "Gateways" – sharing of material between regulators.

16. The decision has proved controversial (perhaps unsurprisingly) and is being appealed. But even a successful appeal may leave unchallenged Arnold J's approach in circumstances where there is no express preservation of LPP in the relevant legislation.

Changes at the BSB

17. Another straw in the wind may be the new guidance to Rule rC64 in the latest version of the BSB Handbook (version 3.4, November 2018)[5]. Previously, the guidance on the duty to provide documents to the BSB stated that the barrister was not entitled to disclose privileged information without the consent of the client. The guidance now provides:

[5] We are grateful to Mr David Simpson of BMIF for drawing this change to our attention.

gC93 The documents that you are required to disclose pursuant to Rule C64 may include client information that is subject to legal professional privilege. Pursuant to R (Morgan Grenfell & Co Ltd) v Special Commissioner [2003] 1 A.C. 563, referred to in R (Lumsdon) v Legal Services Board [2013] EWHC 28 (Admin) at [73], the BSB is entitled to serve you with a notice for production of those documents. Where you are being required to report serious misconduct by others and legal professional privilege applies, this will override the requirement to report serious misconduct by another. However, the BSB may subsequently serve you with a notice for production of documents in which case the same principles set out above apply.

18. So the BSB has ruled that its power to demand documents on notice will override clients' LPP. The entitlement to serve notice for production of documents is a general power in support of all the BSB's regulatory functions.

19. Potential implications:
    19.1. Conflict with a barrister's core duty to maintain client confidentiality
    19.2. Concerns about the extent to which the documents would remain confidential, particularly in relation to disclosure to the complainant and at any disciplinary hearing.
    19.3. Query whether the new guidance may be affected by the outcome of the appeal in FRC v Sports Direct (see above), or whether the regulators of lawyers may be in a special category of their own.

The narrow confinement of litigation privilege

20. Litigation privilege typically attaches to communications between either the client or their solicitor, on the one hand, and a third party, on the other, which are created while litigation is reasonably contemplated and for the dominant purpose of that litigation.

21. However, there was historically another category of litigation privilege which protected what was known as "materials for the brief" – in other words, material which had been assembled with a view to being put before one's lawyer for litigation purposes.

22. Both categories appeared to have been included in Lord Edmund-Davies's adoption in Waugh v British Railways Board [1980] AC 521, at 543-544, of the test propounded by Barwick CJ in the Australian case of Grant v Downs:

*…a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice **or** to conduct **or** aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.'* [Emphasis added]

23. This test does not require that a document be a communication in order to attract privilege. Nor does it require that the document should necessarily have been created in order to obtain advice – it's enough (in the alternative) that the document should be used "to aid in the conduct of litigation". Thanki's Law of Privilege[6] follows this test when it suggests that:

    The starting point, however, is to emphasise that although communications with third parties might well be the paradigm situation to which litigation privilege applies, the privilege is not strictly limited in this way. It extends to any document generated for the dominant purpose – whether of its author or of the person or authority under whose direction it was produced or brought into existence – of actual or anticipated litigation.

24. That is justified if one considers what seems to us to be the ultimate purpose of litigation privilege. Although some have suggested[7] that litigation privilege exists only to serve legal advice privilege, and to provide another layer of protection for lawyer/client confidentiality, the better view[8] is that litigation privilege creates an essential zone of privacy for litigants preparing litigation – it enables litigants not only to consult others, but also to put their thoughts down on paper without anxiety that their notes will in due course be read by the other side and the court.

25. The point was put well by Pearson J in Mayor and Corporation of Bristol v Cox (1884) 26 Ch D 678, at 681-682, when he refused to order disclosure of the minutes of meetings of two local authority committees:

    All those documents or minutes made by the committees of the corporation to whom the matters were referred, and which contain nothing more … than simply a record of proceedings which took place at the meetings of the committee, with reference either to litigation, which it was contemplated might take place, or to the litigation which did take place before, or the litigation which is now in existence—whether the minutes relate to either one or the other of those matters, I am of opinion that those minutes are privileged. I conceive that any notes

[6] (3rd edition, 2018), at paragraph 3.02
[7] See, in particular, Re Barings plc [1998] Ch 356, *per* Sir Richard Scott V-C.
[8] See, eg, Thanki's Law of Privilege (3rd edition, 2018), at paragraph 3.153.

made by a man with reference to his own conduct in the litigation—simply notes made of his own opinions—are just as much privileged as the thoughts which pass through his mind, and I conceive, inasmuch as this corporation cannot in its corporate capacity either think or write or act except by certain machinery, which is, so to speak, extraneous of itself, the corporation is perfectly justified in referring all these matters to a committee and asking the committee to deal with them as it would deal with them itself, and they are simply the agents of the corporation for the purpose of considering what ought to be done, and their reports are confidential matters; and under those circumstances those matters are to my mind protected.

26. However, two recent authorities have called this broad approach into question.

27. The first is the Court of Appeal's decision in Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd [2018] EWCA Civ 2006. This is better known as the decision in which the Court of Appeal *upheld* litigation privilege by over-ruling Andrews J's decision that litigation privilege did not extend to documents created for the dominant purpose of *avoiding* litigation (because, in Andrews J's view, avoiding litigation was not the same thing as conducting it)[9].

28. Much less remarked upon has been a paragraph in which the Court of Appeal purported to set out "the basic parameters" of legal professional privilege:

[62] In Regina v. Central Criminal Court Ex parte Francis & Francis [1989] 1 AC 346, the House of Lords approved the principle that the various statutory definitions of legal professional privilege accurately reflected the common law. The parties agreed that the definition in section 10(1) of the Police and Criminal Evidence Act 1984 provided an appropriate example of this definition, as follows:-

> *"(1) Subject to subsection (2) below, in this Act "items subject to legal privilege" means—*
>
> *(a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;*
>
> *(b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such*

[9] Although subsequent decisions have somewhat dampened the expectations of litigants seeking to suggest that the Court of Appeal's decision has moved the law significantly in favour of those claiming privilege: as well as the Court of Appeal's decision in WH Holding Ltd v E20 Stadium LLP [2018] EWCA Civ 2652 (discussed further below), see also Teare J's decision in Sotheby's v Mark Weiss Ltd [2018] EWHC 3179 (Comm).

representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings…"

29. Although apparently uncontroversial between the parties in SFO v ENRC this passage is not without its dangers:

29.1. First, it is not in fact correct to say that the House of Lords in Ex parte Francis approved the principle that the "various statutory definitions of legal professional privilege accurately reflected the common law". In the course of the speeches in the House of Lords, their Lordships discussed the question whether section 10 of PACE was intended to represent a statutory codification of the common law:

29.1.1. Lord Bridge (dissenting) thought that section 10 was *not* intended as a codification of the common law;

29.1.2. Lord Oliver (dissenting) thought that the question was irrelevant;

29.1.3. Lord Brandon (in the majority) expressed no view on the question;

29.1.4. Lords Griffiths and Goff (both in the majority) both expressed the view that section 10 *was* intended as a codification of the common law.

29.2. Secondly, there is an obvious danger in starting with the premise that section 10 of PACE was intended to reflect the common law, and then turning that argument around to reach the conclusion that the common law should reflect section 10 of PACE.

29.3. Thirdly, the Court of Appeal's quotation omitted section 10(1)(c) of PACE:

(c) items enclosed with or referred to in such communications and made—

(i) in connection with the giving of legal advice;

or

(ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings

29.4. Fourthly, even when expanded by reference to subsection (c), PACE's definition of litigation privilege is confined to communications and accompanying documents; it does not extend to other documents created for the dominant purpose of litigation.

30. In SFO v ENRC the Court of Appeal had available to it the *dicta* of Lord Edmund-Davies in Waugh v British Railways Board, but preferred to define litigation privilege by reference to the narrower statutory test employed in section 10 of PACE. The Court of Appeal's yet more recent decision in WH Holding Ltd v E20 Stadium LLP [2018] EWCA Civ 2652 suggests that the adoption of a narrower test may have been deliberate.

31. West Ham FC has been in dispute with E20, the owners of the London Stadium, in which West Ham plays. E20 claimed privilege in (among other documents):

> *…six emails, all dated 30 January 2017, passing between the Board members of the Respondent, E20 Stadium LLP ("E20"), and between E20 Board members and stakeholders. E20 asserts that each of the six emails were composed with the dominant purpose of discussing a commercial proposal for the settlement of the dispute between E20 and West Ham in relation to rights arising under the agreement between the parties providing for West Ham to use the London Olympic Stadium for its home football matches (the "Concession Agreement") at a time when litigation was in reasonable contemplation.* (at [5])

32. West Ham argued that the documents were not privileged because they neither sought advice or information for the purpose of conducting litigation, nor revealed the nature of such advice or information. At first instance Norris J rejected this submission and pointed out some of its potential consequences (at [55], quoted in the Court of Appeal's judgment at [8]):

> *The consequence of this submission appears to be that if E20 in fact made a "without prejudice" offer to West Ham to dispose of the impending litigation then that document would not be before the Court in any subsequent case: but any document (not passing between solicitor and client) recording the terms of the proposed offer, or recording discussion of the offer, or authorising the terms and putting of the offer would be open to inspection and to inclusion in the trial bundle. That is odd. It is even odder if the discussion within the board of a corporate party arises during the trial itself: can it really be the case that that party (under its ongoing disclosure obligation) is bound to disclose to its opponent documents recording its settlement strategy because they are not covered by litigation privilege? I do not think that can be right.*

33. The Court of Appeal again chose not to avail itself of the *dicta* of Lord Edmund-Davies in Waugh v British Railways Board, but centred its decision on Lord Carswell's speech in Three Rivers (No.6):

[11] Lord Carswell's summary of the scope of litigation privilege in Three Rivers… was accepted by both sides on this appeal as an authoritative statement. He said, having considered many authorities:

> *"The conclusion to be drawn from the trilogy of 19th century cases to which I have referred and the qualifications expressed in the modern case-law is that communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied: (a) litigation must be in progress or in contemplation; (b) the communications must have been made for the sole or dominant purpose of conducting that litigation; (c) the litigation must be adversarial, not investigative or inquisitorial."*

34. There is, it seems to us, a danger in founding on Lord Carswell's *dicta* in Three Rivers 6 as an authoritative and complete exposition of litigation privilege for all purposes:
    34.1. the House of Lords' decision in fact related to legal advice privilege and Lord Carswell was examining litigation privilege primarily for the light that it shone upon legal advice privilege; and
    34.2. Lord Carswell was not concerned with any distinction between communications and other documents, but was concerned only with the question as to what *kinds* of communications attracted privilege.

35. Be that as it may, the Court of Appeal (at [15]) held that subparagraph (b) in Lord Carswell's formulation represented not an extension to, but a restriction on, the general principle that a privileged communication must be made for the purpose of obtaining information or advice in connection with existing or contemplated litigation.

36. The Court of Appeal did accept (at [20]) that a document in which advice or information obtained for the sole or dominant purpose of conducting litigation cannot be disentangled, or a document which would otherwise reveal the nature of such advice or litigation, would itself be covered by litigation privilege. But the Court of Appeal (at [22]) rejected West Ham's claim to privilege based, as it was, on the relevant documents having been created "with the dominant purpose of discussing a commercial settlement of the dispute when litigation… was in contemplation".

37. The Court of Appeal quoted the judgment of Pearson J in Mayor of Bristol v Cox, which we suggested had put the matter so well, but said it was wrong and should be over-ruled:

> "*We cannot see any justification for covering all internal corporate communications with a blanket of litigation privilege*" ([26]).

38. The Court of Appeal summarised its conclusions thus (at [27]):

> *i) Litigation privilege is engaged when litigation is in reasonable contemplation.*
>
> *ii) Once litigation privilege is engaged it covers communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with the conduct of the litigation, provided it is for the sole or dominant purpose of the conduct of the litigation.*
>
> *iii) Conducting the litigation includes deciding whether to litigate and also includes whether to settle the dispute giving rise to the litigation.*
>
> *iv) Documents in which such information or advice cannot be disentangled or which would otherwise reveal such information or advice are covered by the privilege.*
>
> *v) There is no separate head of privilege which covers internal communications falling outside the ambit of litigation privilege as described above.*

39. Taken together, the second and fifth of these subparagraphs suggest strongly that the Court of Appeal wishes to restrict litigation privilege to (a fairly narrow view of) its historical core purpose. The idea that litigation privilege has evolved to provide litigants (whether individual or corporate) with a general zone of privacy for their litigation, enabling them to think and discuss the litigation in writing freely and without fear of exposure, has received a powerful check.

40. Opinions can no doubt vary as to whether this is a desirable direction of travel. It may not be too long before one discovers whether the Supreme Court agrees.

Conclusion

41. LPP can represent a significant obstacle for a court (or a regulator) seeking to establish the truth and in Three Rivers 6 (at [86]) Lord Carswell observed that the importance of keeping to a minimum the withholding of relevant material from the court is self-evident, So perhaps it is unsurprising that the boundaries of the doctrine of LPP continue to be so vigorously contested. At present, there are some indications that the doctrine of LPP is in retreat but, one suspects that, like the tide, the waters will return to the shore.

Charles Phipps and Amanda Savage

4 New Square Chambers

Disclaimer: *this handout is not to be relied upon as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.*

Legal Professional Privilege: a tide on the ebb?

By Charles Phipps and Amanda Savage

Introduction

The absolute nature of LPP…

R v Derby Magistrates ' Court ex p B

Or not…

Canadian Supreme Court

Medcalf v Mardell

Three Rivers District Council v Bank of England (No.5)

Scope of protection

Scope of protection beyond the litigation sphere:

Lord Hoffmann in *R (Morgan Grenfell) v Special Commissioner of Income Tax*

"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."

FRC v Sports Direct International

First case of its kind

Issue: whether production of the documents by audit client (SDI) to the FRC would infringe any privilege of SDI (the "Infringement Issue")

The relevant statutory proviso (Schedule 2 SATCAR): FRC 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 grounds of legal professional privilege"*

Arnold J's decision: primary basis

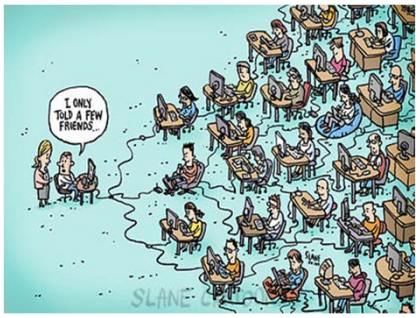
Current state of the law is as per Lord Hoffmann's primary reason for rejecting claim to privilege in *Morgan Grenfell* interpreting the decision in *Parry-Jones v Law Society*

"*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*" (emphasis added).

Arnold J's decision: alternative basis

Alternative basis

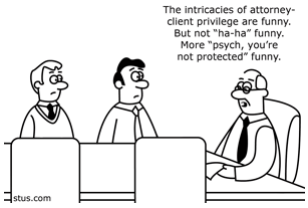
Express preservation of LPP in Schedule 2 only preserved LPP in circumstances where the infringement was not a "technical" one



Changes at the BSB

New Handbook
gC93

Power to demand documents on notice will override clients' LPP
- Conflict with a barrister's core duty to maintain client confidentiality
- Extent to which confidentiality will be maintained



How broad is litigation privilege?

Historically, two subcategories of protected documents:

- Third-party communications
- "Materials for the brief"

Amalgamation of the two subcategories

Waugh v British Railways Board (adopting Grant v Downs)

*... a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice **or** to conduct **or** aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.'*

Followed by Thanki's Law of Privilege

The real purpose of litigation privilege

- An aid to legal advice privilege? (Sir Richard Scott V-C in Re Barings plc)

OR

- A zone of privacy for the litigant (Pearson J in Mayor and Corporation of Bristol v Cox)

The Court of Appeal's *dicta* in SFO v ENRC

The "basic parameters" of LPP:

In Regina v. Central Criminal Court Ex parte Francis & Francis [1989] 1 AC 346, the House of Lords approved the principle that the various statutory definitions of legal professional privilege accurately reflected the common law. The parties agreed that the definition in section 10(1) of the Police and Criminal Evidence Act 1984 provided an appropriate example of this definition, as follows:-

> *"(1) Subject to subsection (2) below, in this Act "items subject to legal privilege" means—*
>
> *(a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;*
>
> *(b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings..."*

The Court of Appeal's decision in WH Holding v E20

Following Lord Carswell in Three Rivers DC v Bank of England (6):

"The conclusion to be drawn from the trilogy of 19th century cases to which I have referred and the qualifications expressed in the modern case-law is that communications between parties or their solicitors and third parties ***for the purpose of obtaining information or advice*** *in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied: (a) litigation must be in progress or in contemplation; (b) the communications must have been made for the sole or dominant purpose of conducting that litigation; (c) the litigation must be adversarial, not investigative or inquisitorial."*

The Court of Appeal's decision in WH Holding v E20

- Appeal against the decision of Norris J allowed: documents created with the dominant purpose of discussing a commercial settlement of a dispute when litigation is in contemplation are **not** privileged.
- The *dicta* of Pearson J in Mayor and Corporation of Bristol v Cox disapproved:

"*We cannot see any justification for covering all internal corporate communications with a blanket of litigation privilege*"

The Court of Appeal's decision in WH Holdings v E20

Summary of the Court of Appeal's conclusions at [27]:

i) Litigation privilege is engaged when litigation is in reasonable contemplation.

ii) Once litigation privilege is engaged it covers communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with the conduct of the litigation, provided it is for the sole or dominant purpose of the conduct of the litigation.

iii) Conducting the litigation includes deciding whether to litigate and also includes whether to settle the dispute giving rise to the litigation.

iv) Documents in which such information or advice cannot be disentangled or which would otherwise reveal such information or advice are covered by the privilege.

v) There is no separate head of privilege which covers internal communications falling outside the ambit of litigation privilege as described above.

4 NEW SQUARE LINCOLN'S INN
LONDON WC2A 3RJ

WWW.4NEWSQUARE.COM

T: +44 20 7822 2000
DX: LDE 1041
E: CLERKS@4NEWSQUARE.COM