

Dispute Resolution  
Case Law Update  
Rosling King LLP



October 2018  
Page 2

### The Background

The Financial Reporting Council Ltd (the “**FRC**”) led an investigation into the conduct of Grant Thornton UK LLP (“**GT**”) and an individual at GT who dealt with the audit of the 2016 financial statements of Sports Direct International plc (“**SDI**”).

The FRC has been assigned statutory powers to carry out investigations into statutory auditors and their audit work and has the power to impose or enforce sanctions. The statutory powers provided by Schedule 2 to the Statutory Auditors and Third Country Auditors Regulations 2016, SI 2016/649, state that any obstruction or failure to comply with the FRC’s investigations, may be remediated in the civil courts and/or constitute a criminal offence.

When SDI failed to produce certain documents, claiming legal advice privilege over them the FRC applied to the High Court for an Order compelling SDI to provide the documents. The documents consisted of faxes, emails and email attachments between SDI and their lawyers which had been provided to GT as part the audit. They were withheld by SDI on the grounds that they formed part of lawyer-client communication and therefore were protected by legal advice privilege.

### Issues and Decisions

The issue in this case was that of legal advice privilege and whether SDI would be required to deliver the documents to the FRC for the purposes of a confidential investigation by the regulator into the conduct of the regulated entity.

The Court therefore had to consider the following issues:-

#### **1. Communication Issue – whether email attachments could be subject to legal advice privilege.**

SDI claimed legal advice privilege in respect of multiple emails and their various attachments. SDI contended that whilst the email attachments were not in themselves privileged documents, they should be considered to be privileged on the basis that they formed part of the lawyer-client communication.

The traditional view remains that privilege does not extend to pre-existing documents or documents created independently to the lawyer-client communication. In light of this, the Judge held that SDI was not entitled to rely on legal advice privilege in respect of the email attachments.

#### **2. Waiver Issue – whether SDI’s waiver of privilege, when they sent documents to GT for the purposes of the audit, extended to the FRC.**

SDI accepted that the emails sent to GT meant that there was a selective and limited waiver of privilege. However, SDI maintained that the waiver was limited only to the scope of the audit and therefore did not extend beyond GT. SDI argued that the

October 2018  
Page 3

FRC's request for documents specifically for the purpose of investigating GT's conduct, went beyond the scope audit and SDI were therefore not obliged to produce such documents.

The Judge identified that the regulatory process carried out by the FRC was separate from the audit carried out by GT. Therefore, by SDI producing the documents to the FRC, they would not have waived privilege for the purposes of the investigation.

### **3. Infringement Issue – whether the requirement to produce documentation would infringe upon SDI's right to legal professional privilege.**

Here, the Judge took into consideration the fact that privilege was a fundamental human right. However, it is important to also note such rights can be abrogated or overridden by primary legislation, either expressly or by necessary implication.

The Judge applied the principle in the case of *Morgan Grenfell* (which supported the earlier decision in *Parry Jones*) and concluded that, allowing the application and ordering SDI to produce the remaining documents to the FRC for the purposes of the investigation, would not in itself infringe SDI's legal advice privilege.

The application was allowed on the basis that non-privileged documents could not be subject to legal advice privilege simply because a law firm sent it to their client.

### **Conclusion**

In this case the production of documents to the FRC by a regulated person (an auditor) for the purposes of a confidential investigation into the regulated person's conduct was not an infringement of legal professional privilege.

The Judge did however acknowledge that his decision surrounding the infringement issue was not straightforward. He therefore granted permission to appeal the Court's findings on the infringement issue, as well as the application of *Morgan Grenfell*.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.