

Dispute Resolution
Case Law Update
Rosling King LLP



Background

In a recent decision of the Court of Appeal, Lord Justice Rose considered whether it was justifiable to withhold certain documents from regulatory bodies on the grounds that they are protected by legal professional privilege (“LPP”).

The Financial Reporting Council (the “FRC”) had issued notices to Sports Direct International Plc (“**Sports Direct**”) under the Statutory Auditors and Third Country Auditors Regulation 2016 (SI 2016/649) (“**SATCAR**”) seeking disclosure of certain documents to assist with their investigation into the conduct of Sports Direct’s former auditors, Grant Thornton UK LLP (“**Grant Thornton**”). Sports Direct provided the FRC with 2000 documents in response to this notice, however, 40 documents which comprised of 19 emails and 21 attachments, were withheld on the grounds that they were covered by LPP. The FRC did not accept Sports Direct’s claim of privilege and had for the first time under its power in the SATCAR, sought an order compelling Sports Direct’s compliance with the notice.

At first instance, the High Court (Mr Justice Arnold) held that the disclosure of Sports Direct’s withheld documents would not infringe LPP, therefore, Sports Direct could not withhold such documents when responding to the FRC’s notice.

Sports Direct appealed the High Court judgment dated 11 April 2018 by which they were ordered to disclose documents to the FRC. Sports Direct appealed the decision on two grounds:

1. whether the production of documents to the FRC for the purposes of a confidential investigation would be an infringement of LPP (the “**Infringement Issue**”); and
2. whether it was possible to claim legal advice privilege for a pre-existing document which was not privileged by virtue of it being merely attached to emails passing between Sports Direct and its lawyer for the purposes of legal advice (the “**Communication Issue**”).

Decision

Rose LJ gave the leading judgment in the Court of Appeal in a unanimous decision to allow Sports Direct’s appeal in respect of the infringement issue, however dismissed the appeal in relation to the communication issue.

The Infringement Issue

At first instance, the High Court had held that the production of documents by Sports Direct to the FRC for the purposes of a confidential investigation into its conduct does not infringe Sports Direct’s legal advice privilege. In concluding this, Arnold J followed Lord Hoffman’s dicta in *R (Morgan Grenfall & Co Limited) v Special Commissioner of Income Tax [2002] UKHL 21*, in which Lord Hoffman explained the rationale behind the Court of Appeal decision in *Parry-Jones v Law Society [1969] 1 Ch 1*. Agreeing with the decision in *Parry-Jones*, but not the reasoning, Lord Hoffman commented that in this situation the limited disclosure did not breach the clients’ LPP as the Law Society were only entitled to use the disclosed information for the purposes of their investigation, and even if it technically did, it “was authorised by the Law Society’s powers”.

The Court of Appeal rejected Arnold J's reasoning and considered that there was no justification for Arnold J to regard Lord Hoffman's comments in *Morgan Grenfall* as authority either for the existence of a "no infringement" exception, or for the application of a lower threshold in implying that the Sport Direct's infringement would be "technical" on the ground that LPP could be overridden by statute. Applying the test laid down in *Morgan Grenfall*, the Court of Appeal considered the wording of certain provisions in the SATCAR to determine whether Parliament intended to override LPP and concluded that there was no exception to the protection afforded by Sport Direct's LPP.

The Communication Issue

The FRC had argued that even if the emails themselves were protected by LPP, some of the attachments consisting of pre-existing documents could not also be protected simply because they were attached to an email covered by LPP.

Sports Direct accepted that pre-existing documents were not covered by LPP merely because they were sent to a lawyer, however it sought to distinguish between whether a certain attached document was privileged, and whether communication of the document attachment between a client and lawyer was privileged.

The Court of Appeal considered that whilst the emails satisfied the criteria set out in the FRC's notice, such as relevance, custodian, date and search terms, some of the attachments to the emails which comprised of pre-existing documents did not meet the criteria.

The Court of Appeal relied on the decision in *Ventouris v Mountain (Italia Express) (No 1) [1991] 1 WRL 607* and considered that even if an email is protected by LPP, that does not automatically confer privilege on pre-existing documents attached to the email. This is ultimately because privilege does not protect either the documents itself or the fact that it was sent to a legal professional under the cover of a privileged communication.

Sports Direct have sought permission to appeal to the Supreme Court on the Communication Issue, and the FRC have sought permission to appeal on the Infringement Issue.

Commentary

The Court of Appeal's decision to overturn the High Court judgment in respect of the infringement issue is a reminder the sanctity of LPP. The clarification on the law on legal advice privilege in the regulatory context should provide those seeking to withhold documents protected by LPP with a defence to a notice requiring disclosure of such documents, as long as the privilege is not expressly overridden by the relevant statute under which the order is sought.

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