

## FRC v Sports Direct: An extension to the “technical” abrogations of privilege

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One concerning exception is so-called “technical” abrogations, which are beginning to spread.

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The respect and protection afforded to privilege under English law, both in the way that Parliament legislates and the courts interpret Parliament’s legislation, is such that there are very few instances where statutory powers impact on or undermine or interfere with a client’s entitlement to assert privilege.

One exception is so-called “technical” abrogations, which are beginning to spread - as seen in the recent case of *The Financial Reporting Council Limited v Sports Direct International plc* [2018] EWHC 2284 (Ch).

### Technical abrogations

In *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563, Lord Hoffman was compelled to acknowledge two situations in which a technical statutory abrogation of privilege might be said to occur: both the Law Society and the Inland Revenue can use their statutory powers (under, respectively, the Solicitors Act 1974 and, now, Sch.36 of the Finance Act 2008) to compel disclosure by a solicitor of information relating to its client’s affairs even though that information may be privileged. Thus, while criticising the reasoning employed by the Court of Appeal in *Parry-Jones v The Law Society* [1969] 1 Ch 1, Lord Hoffman held that that decision, together with *R v Inland Revenue, Ex p. Taylor (No.2)* [1989] 3 All E.R. 353, was correct on its facts.

The information so obtained can only be used, respectively, for the purposes of a Law Society investigation into the solicitor’s affairs and an Inland Revenue determination of the solicitor’s personal tax liabilities. Otherwise, it must be kept confidential and, in the case of the Inland Revenue, if privileged, cannot be used in connection with the tax liabilities of the client. Lord Hoffman suggested that the limited disclosure that the use of these statutory powers involved did not breach the client’s privilege. Alternatively, to the extent that it technically did, in both cases this was authorised by the

relevant statutory powers.

This reasoning is not without its difficulties. Apart from the question of whether the relevant legislation, properly construed, can be interpreted to authorise this technical abrogation (an exercise in construction that Lord Hoffman did not attempt), it cannot be right to say that there has been no infringement of the client's privilege - the contents of the communications that are being disclosed are no longer secret as between just client and lawyer. Further, it is difficult to see how a technical infringement can be justified. In *R v Derby Magistrates' Court ex p. B* [1996] 1 AC 487, it was held that privilege subsisted even though the client no longer had any recognisable interests in asserting it<sup>1</sup>; and Lord Hoffman himself recognised in *Morgan Grenfell* that the client is entitled to consult his lawyer on the footing that what he tells him 'will not be disclosed at all'<sup>2</sup>. The idea of a technical infringement sits, with respect, unhappily with the absolute notion of privilege described in *Derby Magistrates*.

Nonetheless, the availability of technical statutory abrogations following Lord Hoffman's speech in *Morgan Grenfell* continues to hold sway, and has now been extended so as to apply not only to the regulated entity but also to those entities' own clients.

## FRC v Sports Direct

By way of background, the FRC was conducting an investigation into the conduct of an auditor in relation to the audit of the financial statements of Sports Direct and had applied, pursuant to Regulation 10 and Schedule 2, paragraph 2 of the Statutory Auditors and Third Country Auditors Regulations 2016, SI 2016/649 (**SATCAR**), and paragraph 10(b) of the FRC's Audit Enforcement Procedure, directly against Sports Direct for an order requiring it to provide the FRC with certain documents that Sports Direct contended were privileged. One of the arguments deployed by the FRC was that the production of the documents to the FRC for the purposes of its investigation would not infringe Sports Direct's privilege, ie there would at worst be a technical abrogation of its privilege. This led Arnold J to review the technical abrogations line of authority, including *Morgan Grenfell*, which he characterised as "a line of cases in which it has been held that privilege cannot be relied upon as an objection to the production of documents to the regulatory body for solicitors... by solicitors or to the tax authority... by taxpayers or regulators of advocacy services by advocates." The distinction in *FRC v Sports Direct*, but not one addressed in any great detail in Arnold J's judgment, was that the regulator, here the FRC, was seeking disclosure of privileged material from the client directly and in circumstances where the client had deliberately taken steps to ensure its privileged material was not in the possession of its auditor.

In reviewing the technical abrogations line of authority, Arnold J noted its criticism from me (Privilege (3rd ed) at 1-127)) and Hollander (*Documentary Evidence* (13th ed) at 12-11 and 12-12; *Phipson on Evidence* (19th ed) at 23-10 to 23-11 (edited by Hollander)) but was driven to conclude that Parry-Jones as interpreted in *Morgan Grenfell* remains good law. However, he went on to extend the scope of these authorities when he held:

"... 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.

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."<sup>3</sup> (emphasis added)

The primary basis for this conclusion was Lord Hoffman's view in *Morgan Grenfell* that *Parry-Jones* did not infringe the

client's legal professional privilege. Nonetheless, Arnold J also considered Lord Hoffman's alternative reason, namely that the statute providing the regulatory powers concerned authorised it. As to this, Sports Direct submitted that it had not been shown by the FRC that the relevant statute contained wording which either expressly or by necessary implication abrogated or overrode legal professional privilege. In considering this, Arnold J noted that in *Morgan Grenfell* Lord Hoffman did not point to any such wording in the Solicitors Act 1957; rather, his reasoning was that, because the infringement (if infringement there was) was a technical one, then the general words contained in section 29(1) of the Act were sufficient. That approach applied in *FRC v Sports Direct*, save that Arnold J had to address the further point that Schedule 2, paragraph 1(8) of SATCAR<sup>4</sup> was inconsistent with such an interpretation because it expressly preserved privilege at the investigation stage (and not merely, as with section 46(6) of the Solicitors Act 1957, at the stage of disciplinary proceedings).

Arnold J accepted the FRC's response in this regard, namely that Schedule 2, paragraph 1(8) of SATCAR preserved legal professional privilege in circumstances where the infringement was not a technical one. Counsel for the FRC exemplified this by reference to the situation where a client was contemplating a claim for negligence against the auditor and obtained legal advice as to the merits of that claim - in those circumstance the client could rely upon its legal advice privilege pursuant to Schedule 2, paragraph 1(8) as an answer to any notice to produce documents recording that advice pursuant to paragraph 1(3). Accordingly, Arnold J held that there was a direct override of Sports Direct's privilege:

"I have not found this a straightforward point to resolve. The interpretation of Schedule 2 paragraph 1(8) advanced by counsel for the FRC involves giving it a much more restricted application than it appears to have on its face. Lord Hoffmann's primary reason in *Morgan Grenfell* avoids this difficulty. But if Lord Hoffmann's alternative reason represents the law, then I conclude with some hesitation that counsel for the FRC's interpretation is correct."<sup>5</sup>

## Comments

This is a decision of some concern. Quite apart from the fact that Sports Direct deliberately took steps to keep its privileged material out of the hands of its auditor so that the auditor's regulator, the FRC, could not seek those materials from the auditor itself, the extension of this regime so as to enable an application directly against the clients potentially opens the door to regulators more widely seeking privileged information from regulated entities in this way. It potentially raises the spectre that a regulator might even seek a regulated entity's privileged advice in circumstances where the regulator is investigating the behaviour of individuals employed (or formerly employed) by the entity. As importantly, it is submitted that there really is a need for the courts to reassess (and if need be reaffirm) the correctness of this line of authority and closely examine in line with the principles of statutory construction approved in *Morgan Grenfell* whether these technical abrogations - or indeed, the actual overriding - of privilege is authorised as the cases discussed here conclude. Furthermore, the second conclusion of Arnold J in *FRC v Sports Direct* would benefit from a closer examination of whether a privilege preservation provision really is promptly limited in the way that he held.

Sports Direct has obtained permission to appeal Arnold J's decision, which is due to be heard by 31 October 2019.

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<sup>1</sup> At [503].

<sup>2</sup> At [30].

<sup>3</sup> At [84] and [85].

<sup>4</sup> Which provides that a notice does not require a person to provide any information or create any documents which that

person “would be entitled to refuse to provide or produce in proceedings in the High Court on the grounds of legal professional privilege”.

<sup>5</sup> At [92].

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