envisaged that art.8 rights would necessarily be interfered with as the price of the SRA being able to investigate potential misconduct by solicitors whom it regulates. She said:

> "The question is whether such interference is proportionate. In my judgment, Parliament has struck a balance between the public interest in investigating the misconduct of solicitors and the Article 8 rights of their clients in this statutory scheme. It is not disproportionate for the SRA in this case to require [G] to disclose those files as they are relevant to the SRA's concerns. …Moreover, it is well established that this regime and its predecessors do not breach legal professional privilege; see *R (Morgan Grenfell) v Special Commissioners of Income Tax*…[Counsel], in his submissions, correctly recognised that if the statutory test for making the order is met the interference would be justified. I have held that the statutory test is met and it therefore seems to me to follow that any interference with [G's] Article 8 rights is both in accordance with law and proportionate."[347]

1-184 Further challenges to these powers will, without more, be fruitless, although as will be seen, the extension of this "technical abrogation" regime against clients directly will afford the Court of Appeal an opportunity to re-consider this line of authority in late 2019—see para.1-185 below.[348] In the meantime, there are at least some limits as regards who is entitled by way of the Law Society's Solicitors Act 1974 powers to access client files held by solicitors. In *Quinn Direct Insurance Ltd v The Law Society of England and Wales*,[349] the argument was advanced that solicitors' professional indemnity insurers also had access rights in certain circumstances. Here, the Law Society intervened in a solicitors' practice ("SBS") on the grounds of suspected dishonesty by one partner ("A") and non-compliance with solicitors' accounts rules by another ("B"). The firm concerned had the benefit of professional indemnity cover from Quinn Direct which sought access to the firm's files in the hands of the intervention agent appointed by The Law Society under s.35 Solicitors Act 1974, in order to see whether indemnity could be declined in respect of partner B on the grounds that he condoned A's fraud. Access was refused, so Quinn Direct applied under CPR Pt.8 for an order for access to the files in the power or control of The Law Society. It argued that as between it and SBS, the firm was obliged under the terms of its indemnity policy to produce all documents relevant to an actual or potential claim against it; and Quinn Direct itself was obliged to communicate to The Law Society circumstances suggestive of fraud under the provisions of a qualifying insurers agreement. This, argued Quinn Direct, meant that it was "meshed into" the solicitors regulatory scheme and so entitled it, as a qualifying insurer, to inspect documents in the possession of The Law Society or its intervention agent without causing infringement of any obligation of confidence owed by SBS to its client or the privilege of that client. Relying on the speech of Lord Hoffmann in *Morgan Grenfell*, Quinn Direct argued that it came within a "circle of confidence" that permitted such access without infringing the privilege of the clients whose documents were thereby accessed. This argument was necessitated by the facts that (i) Quinn Direct had no contractual entitlement to the clients' documents (since neither the clients nor The Law Society were parties to the insurance agreement with SBS); and (ii) there was no question of the clients' privilege having been waived in those cases where no claim against SBS and by SBS under the policy had been made.[350] The Chancellor rejected Quinn Direct's application:

> "I can see no reason why [a circle of confidence] should include the qualifying insurer. …there is no reciprocity between the functions of the qualifying insurer and either its insured or the Law Society. Further, it is not only a qualifying insurer who is bound to inform the Law Society of misconduct of a solicitor. Under Rule 20.06 of the Solicitors' Code of Conduct 2007 each solicitor is obliged…to report serious misconduct of any other solicitor of which he becomes aware. To that extent each solicitor is 'meshed in' to the regulatory system, but it would be absurd if that admitted every solicitor into the 'circle of confidence' so as to entitle him to information subject to the privilege of the client of another for use for his own private purpose."[351]

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347 [2015] EWHC 552 (QB) at [17].

348 These issues very briefly featured in the Court of Appeal in *R (on the application of Lumsdon, Taylor, Howker QC, Hewertson) v Legal Services Board* [2014] EWCA Civ 1276. Here, the claimants were barristers practising criminal law who challenged the lawfulness of the Legal Standards Board's decision to approve the introduction of a Quality Assurance Scheme for Advocates. A point made in the course of the challenge was that the assessing judge would not know about matters which were privileged or otherwise outside his knowledge: for example, an apparently incompetent advocate might explain his or her performance on the grounds, inter alia, that there had been a change of instructions by the client, but the client's privilege would prevent the advocate from putting forward points which might explain or mitigate what appeared to be incompetent advocacy. The Court of Appeal (at [25]) was inclined to agree (without deciding) with the Divisional Court, which indicated, in reliance on Lord Hoffmann's dicta in *Morgan Grenfell*, that in such a situation, 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.

349 [2010] EWCA Civ 805.

350 As to this, the Court of Appeal appeared to endorse the Law Society's view that it was only the making of a claim against SBS that would constitute a waiver of client privilege (as per *Lillicrap v Nalder* [1993] 1 W.L.R. 94, as discussed in Ch.7). The Chancellor said, at [2010] EWCA Civ 805 at [6]: "There is no issue in respect of files in respect of transactions where the client has made a claim against SBS which has been notified to Quinn. In such a case the Law Society takes the view that the making of the claim constitutes a waiver of client confidentiality and privilege and has allowed Quinn to have access to those files. …As to the remainder of the documents of SBS in the possession of the Law Society it appears to be common ground that they all contain information confidential to one or more clients of SBS whose privilege has not been waived." See also *Dooley v The Law Society* (2002) *The Times* 16 January 2002.

351 [2010] EWCA Civ 805 at [28]. This decision has given rise to a significant practical problem. As the Chancellor observed at [23] and [24]: "I do not accept that an insured solicitor under any form of 'claims made' policy is either entitled or bound to disclose to his insurer, either on inception, renewal or notification, confidential and privileged documents or information of the client without the client's consent…If the client will not waive his privilege to enable a proper notification to be made by the solicitor…then the solicitor will no doubt so inform his qualifying insurer. The solicitor is not entitled to ignore the client's privilege. …the consequence of the resulting conflict of interest will be that the insurance is vitiated or the notification inadequate but that is the problem of the solicitor not the client…The solicitor's duty of disclosure [under his policy of indemnity] cannot override the entitlement of the client." In *McManus (t/a Mcmanus Seddon Runhams (a firm)) v European Risk Insurance Company* [2013] EWHC 18 (Ch), the court noted at [61] that the *Quinn* decision "compounds the problems for any court trying to determine the true scope of a valid notification at the time when the notification is made. Although those problems may well also arise if the validity of the notification is called into question once a claim has been made, that is a better time at which to assess how far privilege needs to be waived, how far relevant material can be redacted to avoid the need for such waiver and by whom any privilege must be waived to enable the court to resolve the issues before it." Having regard to the decision in *Mortgage Express v Sawali* [2010] EWHC B23 (Ch) it may be that this problem can be resolved by a suitable provision in the client engagement letter whereunder the client permits the solicitor to share privileged information on a confidential basis with his professional indemnity insurer when he is obliged to do so under the terms of the policy. See further Ch.7, section 1. In *Capital Home Loans Ltd v Bennett Griffin LLP* [2013] EWHC 2613 (Ch) Deputy Judge Isaacs QC was satisfied in relation to a similar provision that there was no basis for implying a limitation into it the effect of which would be to exclude

1-185 In *The Financial Reporting Council Ltd v Sports Direct International Plc*,[352] the technical abrogation line of authority was taken a step further. Here, the FRC was conducting an investigation into the conduct of an auditor in relation to the audit of the financial statements of Sports Direct International (SDI) and had applied pursuant to reg.10 and Sch.2 para.2 of the Statutory Auditors and Third Country Auditors Regulations 2016[353] (SATCAR) and para.10(b) of the FRC's Audit Enforcement Procedure (AEP), directly against SDI for an order requiring it to provide the FRC with certain documents that SDI contended were privileged. One of the arguments deployed by the FRC was that production of the documents to the FRC for the purposes of its investigation would not infringe SDI's privilege, in other words there would at worst be a technical abrogation of its privilege. This led Arnold J. to review the above line of cases which he characterised as 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 the present case, but not one addressed in any great detail in his 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.

1-186 In reviewing the decisions discussed above, Arnold J. noted the criticism of this line of authority in earlier editions of this work and by Hollander (see fn.346) but was driven to conclude that *Parry-Jones* as interpreted in *Morgan Grenfell* remains good law.[354] 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 SDI in respect of those documents."[355]

1-187 The primary basis for this conclusion was Lord Hoffmann's view that *Parry-Jones* did not infringe the clients' legal professional privilege. Nonetheless, he considered Lord Hoffmann's alternative reason, namely that the statute providing the regulatory powers concerned authorised the abrogation of the privilege. As to this, SDI 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, Arnold J. noted—as was pointed out above—that Lord Hoffmann did not point to any wording in the Solicitors Act 1957 that either expressly or by necessary implication abrogated or overrode legal professional privilege. Rather, his reasoning was that, because the infringement (if

privileged material from inspection, since such a conclusion in the context of a mortgage transaction would deprive the clause of any real content at all in terms of its utility to the claimant.

352 [2018] EWHC 2284 (Ch).

353 Statutory Auditors and Third Country Auditors Regulations 2016 (SI 2016/649).

354 In addition, he noted comments of Lord Phillips in *McE v Prison Service of Northern Ireland* [2009] UKHL 15, [2009] 1 A.C. 908 discussed in the text at para.1-201.

355 [2018] EWHC 2284 (Ch) at [84]–[85].

infringement there was) was a technical one, then the general words contained in s.29(1) Solicitors Act 1957 were sufficient. That approach applied in the *FRC* case, save that Arnold J. had to address the further point that Sch.2 para.1(8)(a) of SATCAR (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") was inconsistent with such an interpretation because it expressly preserved privilege at the investigation stage (and not merely, as with s.46(6) of the 1957 Act, at the stage of disciplinary proceedings).

1-188 Arnold J. accepted FRC's response that Sch.2 para.1(8) preserved legal professional privilege in circumstances where the infringement was not a technical one. As to this, counsel for the FRC gave as an example of what this meant, namely the situation where a client such as SDI was contemplating a claim for negligence against the auditor, and obtained legal advice as to the merits of that claim, such that in those circumstances the client could rely upon its legal advice privilege pursuant to Sch.2 para.1(8) as an answer to any notice to produce documents recording that advice pursuant to para.1(3). Accordingly, Arnold J. held that there was a direct override of SDI'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."[356]

1-189 This a decision of some concern. Quite apart from the fact that SDI 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 these 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 an 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 to reaffirm) the correctness of this line of authority and closely examine in line with the principles of statutory construction approved in *Morgan Grenfell* whether this technical abrogation—or indeed, the actual overriding—of privilege is authorised as these cases all conclude. Furthermore, the second conclusion of Arnold J. in *FRC* would benefit from a closer examination of whether a privilege preservation provision really is properly limited in the way that he held. As to this, it is understood that *FRC* will be appealed to the Court of Appeal in late 2019.

1-190 **Surveillance powers** Perhaps the most controversial encroachment upon a client's privilege is that which can arise under the UK's surveillance legislation, starting with the Regulation of Investigatory Powers Act 2000 (RIPA) and the Police Act 1997, and since supplemented (and to some extent replaced) by the Investiga-

356 [2018] EWHC 2284 (Ch) at [92].

tory Powers Act 2016.[357] The encroachment under RIPA was considered at length by the House of Lords in the McE decision, that is *McE v Prison Service of Northern Ireland (Northern Ireland Human Rights Commission Intervening), C v Chief Constable of the Police Service of Northern Ireland, M v Same*.[358] While the nature of the encroachment that can arise here may arguably not constitute a true abrogation of privilege, as will be discussed below, nonetheless the manner in which security services, criminal justice agencies and others are potentially entitled to intrude upon a client's privilege, usually without his knowledge, constitutes (as Lord Hope observed in *McE*) an "interference" with fundamental rights.[359] That may be to understate the legislation's impact, particularly in light of concerns that were aroused by reports in 2014 that the UK's securities services may have used this legislation more frequently than was understood to be the case following the *McE* decision itself; and no doubt that explains why the passage of the Investigatory Powers Bill through Parliament received so much attention.

1-191 *McE* concerned the use in Northern Ireland of covert electronic surveillance carried out by the police of conversations between suspects held in custody, who had been arrested under s.41 Terrorism Act 2000, and their legal advisers. Media coverage of the practice had led to requests being made of the police for assurances that such monitoring was not taking place, assurances which the police routinely refused to give. The House of Lords therefore had to consider the effect of covert surveillance under RIPA upon privileged communications and on the allied statutory rights of a person detained in a police station or in a prison to consult a lawyer in private (as per s.58(1) Police and Criminal Evidence Act 1984 and para.7(1) of Sch.8 Terrorism Act 2000 and their Northern Irish equivalents). The key provision in RIPA relevant to these issues is s.27(1) which applies to directed surveillance (defined in s.26(2)) and intrusive surveillance (defined in s.27(3)). Section 27(1) provides as follows:

> "Conduct to which this Part applies shall be lawful for all purposes if—(a) an authorisation under this Part confers an entitlement to engage in that conduct on the person whose conduct it is; and (b) his conduct is in accordance with the authorisation."

1-192 The House of Lords in *McE* was unanimous that RIPA entitled the State to undertake covert surveillance of privileged communications where the surveillance was conducted in accordance with an authorisation properly granted under the Act and in accordance with the surveilled prisoner's Convention rights (although Lord Phillips dissented on the question of whether RIPA overrode the suspect's statutory rights in detention). On the facts of *McE*, the surveillance complained of was unlawful because it breached the prisoners' Convention rights, for reasons which are considered in Section 8 below.[360]

1-193 The Law Lords' conclusion that RIPA was capable of permitting such surveil-

[357] For the sake of completeness, other early surveillance legislation includes s.94 Telecommunications Act 1984, the Security Services Act 1989, the Intelligence Services Act 1994, Pt 11, Anti-Terrorism, Crime and Security Act 2001 and the Wireless Telegraphy Act 2006.

[358] [2009] UKHL 15; [2009] 2 W.L.R. 782.

[359] [2009] UKHL 15; [2009] A.C. 908 at 930, [61].

[360] The appeal came to the House of Lords in slightly unusual circumstances in that the appellants had succeeded in persuading the Divisional Court of Northern Ireland that the surveillance undertaken in this case was unlawful, but not that surveillance could never be conducted in respect of privileged communications. Fortunately, the House overcame its doubts about its jurisdiction to hear this important appeal.

lance was based upon the clear words of s.27(1) RIPA, the requirements of the Human Rights Convention as spelt out in Strasbourg jurisprudence and the limits on the scope of the protection conferred by privilege at common law. As to this last point, Lord Carswell inclined to the view that privilege extends only to the protection of the product of legal consultations, rather than rendering their surveillance unlawful per se. Lord Phillips, in similar vein, noted that privilege does not confer at common law an unqualified right to privacy of lawyer-client communications so as to render the surveillance of such communications unlawful and the product of such surveillance inadmissible in legal proceedings. Had that been the case, then he suggested there would have been strong grounds for contending that RIPA should not be construed as implicitly authorising a diminution of privilege.[361]

1-194 As for Convention jurisprudence, this recognises that, although State surveillance activities may engage both arts 6 and 8, there is no absolute prohibition on surveillance of client-lawyer discussions since the key issue is whether supervision of legal consultations has the effect of preventing the client from instructing his lawyer and receiving his advice. Such decisions, therefore, according to Lord Carswell, focus on the effect of the surveillance and not the surveillance itself. Further:

> "What is clear is the European court contemplates both in legal consultation cases and the telephone tapping cases that some exceptions to the general prohibition may exist."[362]

1-195 Thus, from a human rights perspective, surveillance is permissible so long as the importance of the confidentiality of client-lawyer communications is recognised by ensuring that interference by such means is carefully regulated in a manner that complies with art.8(2) of the Convention. As to this, the House concluded that Parliament intended that RIPA (which was enacted just before the introduction of the Human Rights Convention into domestic law under the Human Rights Act 1998) sought to satisfy Convention requirements by regulating such interference through the Covert Surveillance Code of Practice ("the Code") made pursuant to s.71 RIPA and laid before both Houses of Parliament in accordance with s.71(4).

[361] [2009] UKHL 15; [2009] A.C. 911, Lord Carswell at 936, [83], Lord Phillips at 924, [34]. Lord Phillips noted in this respect s.97(2) Police Act 1997, which required authorisation by a senior police officer and approval by a commissioner of entry on or interference with property under ss.92 and 93 of that Act where the person so authorising believed that any property specified in the authorisation was likely to result in "any person acquiring knowledge of—(i) matters subject to legal privilege…" According to Lord Phillips, while these provisions made lawful actions that would otherwise have constituted trespass, the express provisions made in relation to privilege implicitly recognised that privilege did not confer an absolute right to privacy in respect of communications between a lawyer and his client. He said: "I do not consider that, at the time the 1997 Act was enacted, it was considered that such an occurrence constituted an infringement of the common law right to LPP." ([2009] UKHL 15; [2009] A.C. 911 at 791–792, at [18]–[19]. See also [2009] UKHL 15; [2009] A.C. 911 at 793, at [25] and 795, at [35].) See also Baroness Hale (at 804, [69]): the scheme under Pt III of the Police Act 1997 "expressly contemplated that authorised bugging might result in the obtaining of privileged or other confidential information and provided extra safeguards where this was likely". Previous editions of this book have noted the concerns voiced by Lord Brown-Wilkinson in the House of Lords' debate on the Police Bill on 28 January 1997, when he said: "…the effect of covert surveillance is not limited to the suspected villain…If that bug is in the villain's solicitor's office it picks up not only what the suspected criminal says but what all other people say who come into the office…It is therefore a major infringement of perfectly innocent people's personal integrity and privacy if those bugs are placed in such places." See now the Investigatory Powers Act 2016, discussed below.

[362] [2009] UKHL 15; [2009] A.C. 911 at 936/937, at [84]–[86].

The House of Lords thus accepted that regulation of the way in which surveillance interacts with privilege fell within the ambit of RIPA and could properly be addressed by the Code.[363]

1-196 As for the provisions of the Act itself, Lord Hope of Craighead said of s.27(1) RIPA:

> "Section 27(1) is expressed in clear and simple language, and it must be taken to mean what it says. It does not refer to legal privilege or to any other kind of right or privilege or special relationship which would otherwise be infringed by the conduct that it refers to. But the generality of the phrase 'for all purposes' is unqualified. The whole point of the system of authorisation that the statute lays down is to interfere with fundamental rights and to render this invasion of a person's private life lawful. To achieve this result it must be able to meet any objections that may be raised on the ground of privilege. I would hold therefore that provided the conditions in section 27(1) which render it lawful for all purposes are satisfied, intrusive surveillance of a detainee's consultation with his solicitor cannot be said to be unlawful because it interferes with common law privilege. It seems to me that the phrase 'for all purposes' which section 27(1) uses is a clear indication that this was Parliament's intention. It cannot be said that Parliament was unaware of the importance of preserving the protection of privilege in other circumstances arising from provisions of RIPA: see sections 19(6) to (8) and 54(6) to (8)."[364]

Lord Carswell agreed that, in its natural and ordinary sense, s.27(1) was capable of applying to privileged consultations and there was nothing in its wording which would operate to exclude them:

> "It seems to me unlikely that the possibility of RIPA applying to privileged consultations could have passed unnoticed. On the contrary, it is an obvious application of the Act, yet no provision was put in to exclude them."[365]

1-197 These are curious observations: as the Bar Council commented in February 2012.

> "It is significant that RIPA contains no express provision about privilege, so the issue was not debated when the legislation was considered in Parliament. Instead, a significant departure from existing law came about not through open debate or votes by both Houses, but by the retrospective application of rules of statutory construction. Whenever Parliament has had an opportunity to consider LLP, it has consistently voted to protect it, subject

[363] Per Lord *Phillips* [2009] UKHL 15; [2009] A.C. 911 at 923/924, at [33]–[35].

[364] [2009] UKHL 15; [2009] A.C. 911 at 930, [61]–[62]. Baroness Hale was driven to the same "unpalatable conclusion" by both "the plain words of the Act and by the history of legislation on the subject" [2009] UKHL 15; [2009] A.C. 911 at 803, [67]. On this basis, was the interpretation of s.338(4) POCA in *Bowman v Fels* [2005] EWCA Civ 226; [2005] 4 All E.R. 609 correct? See the discussion at para.1-156 above. See also *AJA, ARB, Thomas Fowler v Commissioner of Police for the Metropolis, Chief Constable of South Wales Police, Association of Chief Police Officers AKJ, KAW, SUR v Commissioner of Police for the Metropolis, Association of Chief Police Officers* [2013] EWCA Civ 1342 where the Master of the Rolls, said of *McE* at [31]: "…the House of Lords held that the general words 'lawful for all purposes' were sufficiently clear to indicate that Parliament intended them to bear their natural and ordinary meaning, despite the fact that such an interpretation involved overriding essential privacy rights. An important part of the reasoning was that the whole point of the system of authorisation under RIPA was to enable state agents to interfere with an individual's fundamental rights, provided that the conditions of necessity and proportionality stated in section 29(2) were satisfied. The protection for the individual afforded by these conditions meant that giving the words 'lawful for all purposes' their plain and ordinary meaning would not produce startling or unreasonable consequences which Parliament could not have intended."

[365] [2009] UKHL 15; [2009] A.C. 911 at 943, [100].

> to provisions…that prevent the abuse of privilege for a criminal purpose. Any extension beyond these powers needs to be openly debated in Parliament and in public."[366]

1-198 Even so, the *McE* decision undoubtedly represents English law and as will be seen Parliament showed no desire to address the Bar Council's concerns when the Investigatory Powers Act 2016 was passed. There is however another major dimension to these issues which has continued to trouble the UK Government's use of surveillance powers and that arises from Convention issues. Thus, although the House of Lords concluded that RIPA permitted the covert surveillance of privileged communications carried out in accordance with its authorisation procedures, and to that extent overrode both a client's common law rights as to his privilege and (by a majority)[367] his right as detainee to a private consultation under the legislation mentioned in para.1-191 above, the acts of surveillance carried out in these cases were nonetheless unlawful. As to this, the Secretary of State did not appeal the Divisional Court's ruling—which the House of Lords approved—that if private consultations between lawyers and clients could be the subject of surveillance, then the controls over such surveillance under RIPA and the Code were insufficient to satisfy art.8(2) of the Convention (there being no breach in these cases of the appellants' art.6 rights as there was no evidence that they had been deprived of a fair hearing). The manner of surveillance adopted in these cases, namely directed surveillance under s.26(2) RIPA, was held not to be proportionate in terms of the interference that the surveillance involved and the degree of protection available for the interests that can be affected. In effect, the Divisional Court had held that the requisite degree of compliance with Convention requirements could only be achieved in these circumstances by means of intrusive surveillance under s.26(3) which brought into play enhanced levels of safeguards.[368] [369]

1-199 As a result of *McE*, the Government sought to address the House of Lords'

[366] See its paper, "*Protection of Freedoms Bill – House of Lords Report Stage*", paras 17 and 18. It repeated these concerns in March 2016 in its "Written Evidence to the Investigatory Powers Bill Committee" at para.10 where it said: "…the Bill which led to [RIPA], made no reference to [privilege]. Hence Parliament had no opportunity to consider the relationship between the authorities' information-gathering powers and the protection of [privilege]. That contrasts sharply with every other statute enacted since 1984 dealing with investigation of terrorism and other threats to national security." Note the Court of Appeal's observations, however, in *FAJA, ARB, Thomas Fowler v Commissioner of Police for the Metropolis, Chief Constable of South Wales Police, Association of Chief Police Officers, AKJ, KAW, SUR v Commissioner of Police for the Metropolis, Association of Chief Police Officers* [2013] EWCA Civ 1342 where the Master of the Rolls said at [19]: "In *McE*, the House of Lords considered it significant that Parliament had already authorised interference with the privilege in earlier statutes and so had already expressly confronted the issue." In this regard see for example Lord Neuberger in *McE* at [107].

[367] Lord Phillips dissented. Contrary to the approach of the majority, he concluded (at 925, at [41]) that so far as concerned the statutory rights of those in custody to a private consultation with a lawyer, this was a case for the application of the maxim *generalia specialibus non derogant*, and that therefore the power to supervise such consultations should be granted by a statute that adequately defined the exceptional circumstances in which it might be carried out.

[368] See Lord Carswell at 940, at [93]–[94]. Lord Carswell was critical of the Secretary of State's failure at the time of the hearing before the Lords to make an order under s.47(1)(b) RIPA to characterise surveillance of legal consultations as intrusive surveillance, notwithstanding the Divisional Court had made its ruling a year earlier and there had been no appeal from it. See also Lord Neuberger of Abbotsbury, who said that the Divisional Court's decision was "plainly right" and "realistically" was not challenged by the Secretary of State: at 946, [113]. He also commented, at 948, [119]: "Unless no surveillance of privileged and private consultations has been going on for the past year in the United Kingdom (which appears most unlikely) this strongly suggests that the Government has been knowingly sanctioning illegal surveillance for more than a year. If that is indeed so, to describe such

of the gathering of the information in a number of reports was to enable the defendant to be advised on its prospects in relation to any claim.[106]

3-057 Are there other situations where an incident can be investigated in such a way that any ensuing report is properly the subject of a claim to litigation privilege?[107] What, for example, of a fraud committed by a bank employee which results in losses to the bank's customer? The bank's immediate reaction may well be to try to ascertain how the fraud occurred and to prevent it from happening again. A report prepared for those purposes will almost certainly not be privileged. But suppose the bank's primary—and demonstrable—consideration in investigating the fraud is to seek to ascertain and to protect its position in any litigation it reasonably anticipates the customer may be minded to bring against it in consequence of the losses which he has suffered. In those circumstances, it is not impossible (as the *McAvan* decision mentioned above shows) that the bank can prepare an internal report, that may well include records of interviews of potential witnesses and that investigates the background to the fraud from the dominant standpoint of the bank's potential exposure to its customer.[108] A secondary purpose—or even by-product—of such a report might well enable the bank to examine to some extent how the loss actually occurred. Even then, provided it can be demonstrated that its dominant purpose is to further the bank's interests in the event of litigation then reasonably in prospect, the report may well be privileged.

3-058 That all said, the challenges facing those who claim litigation privilege over accident and investigation reports should not be underestimated, as the decisions in the Buncefield oil terminal explosion litigation exemplify, as do recent decisions concerning liquidators of a company trying to determine whether they need to litigate in order to recover assets for the benefit of the company's creditors.

3-059 Beatson J.'s decision in *West London Pipeline and Chambers QC Ltd v Total UK Ltd*[109] is a prime example of the scale of such challenges. Here, the Court was concerned with the question of whether communications made by Total's Accident Investigation Team (AIT), set up in the immediate aftermath of a major oil refinery explosion, were made for the dominant purpose of identifying the causes of the explosion so that their solicitors could provide legal advice in connection with the legal proceedings which inevitably followed. The claimants contended that the communications would have happened in any case as health and safety investigations inevitably follow immediately upon such a major incident. In the event, Beatson J. gave Total, one of the alleged operators of the site where the explosion

[106] In *Messrs X and Carlow County Council* [2002] IEIC 10 (July 10, 2002), the Irish Information Commission was concerned with reports prepared by the Council into the causes of a fire that led to a claim under Ireland's Malicious Injuries Act 1981. Based upon the wording and contents of the County Engineer's report made the day after the fire, the Commissioner was satisfied that its dominant purpose was by way of preparation for anticipated litigation. But a Fire Officer's report made four days later failed the dominant purpose test since, although it referred to the need to retain experts, the focus of the report was to explain why the Fire Brigade had been unable to contain the fire when it broke out.

[107] Evidential difficulties will need to be considered. As will be considered below, the extent to which the litigant is able to say on oath, or now in a witness statement under the Civil Procedure Rules, that the dominant purpose test is satisfied, may be an important—but by no means determinative—factor in the claim's success.

[108] Of course, as discussed below, the party claiming privilege will also have to show that litigation was reasonably in contemplation at this point.

[109] [2008] EWHC 1729 (Comm); [2008] 2 C.L.C 258. The decision is considered in detail in Ch.9, in the context of the court's consideration of the circumstances of when it is entitled to go behind a deponent's affidavit or witness statement when this makes an inadequate assertion of privilege.

occurred, the chance to file further evidence in order to bolster its claim to privilege,[110] an opportunity that was ultimately declined This appears from the subsequent decision of HH Judge Chambers QC in the same litigation, where he noted in respect of the claim to privilege over the AIT materials that it was:

> "...fair to say that the concerns expressed by Beatson J. in respect of deficiencies in the evidence produced by Total must be treated as having a certain cogency. To this may be added the fact that the documents that have been produced...show that, on any considered assessment of their contents, it would have been unwise to adopt a particularly sanguine view of the prospects of success enjoyed by the claim for privilege."[111]

3-060 Before the judge, Total pursued a claim to privilege confined to communications arising from the instruction of experts who were said to have been instructed for the purposes of assisting Total's lawyers to investigate the cause of the explosion for the purposes of the litigation. A somewhat sceptical judge was unpersuaded by Total's solicitor's statements in support of the claim to privilege that he read:

> "...as being a carefully nuanced account of relations between [Total's solicitors, the experts] and Total which [were] calculated to convey to the reader that relations between Total and [the experts] were kept to the absolute minimum needed for [the experts] independently to perform its role pursuant to continuing instructions issued for the sole purpose of providing legal advice in respect of anticipated litigation."[112]

Unfortunately, that account was undone by documents already disclosed by Total; and were compounded by the solicitor's attempts to address the position in further statements, which only served to reinforce a disparity with his original version of events. The judge was ultimately driven by the evidence to the conclusion that the experts' expertise was intended to form a valuable part of the accident investigation effort as well as having the potential to be used in litigation. Thus, the dominant motive for their appointment was not the threat of litigation.

3-061 The Federal Court of Australia's decision in *Southern Cross Airlines Holdings Ltd v Arthur Andersen & Co*[113] similarly demonstrates the practical difficulties involved here, albeit the decision was made at a time when Australia employed the sole purpose test (before its replacement by the dominant purpose test in 1999). Here, a bank investigated irregularities in the treatment of a customer account through one of its employed solicitors. The question arose whether certain documents generated in the course of the solicitor's enquiry, that did not amount to the giving of legal advice to the bank, were covered by litigation privilege. The bank argued that the enquiry was conducted solely to enable the solicitor to give legal advice about the bank's exposure to the customer. Dowsett J. rejected this since it was obvious that a major irregularity of the sort with which the enquiry was concerned was a matter which would have serious consequences for various aspects of the bank's activities. So, it was necessary to consider the question of the

[110] [2008] EWHC 1729 (Comm); [2008] 2 C.L.C 258 at [101].

[111] *West London Pipeline and Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm); [2008] 2 C.L.C. 258 at [3].

[112] *West London Pipeline and Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm); [2008] 2 C.L.C. 258 at [21].

[113] [1999] FCA 786. For an Irish case that demonstrates similar challenges in the context of investigations into financial irregularities that precede litigation, see *Woori Bank v KDB Ireland Ltd* [2005] IEHC 451 where an internal report for which litigation privilege was claimed was held to have been created for an equal purpose of a report for management or corporate governance purposes.

continued employment of a particular employee connected with the irregularities, the adequacy or otherwise of internal bank procedures, the commercial exposure of the bank and also its position vis-à-vis the banking regulators and the Australian Stock Exchange. The judge held that by causing a solicitor to undertake a substantial enquiry into the irregularities, the bank was expecting not just legal advice but also the ascertainment of various facts which, although necessary for the purposes of that advice, would also be useful for the other assorted purposes set out above. Since the bank was not at that time undertaking any other enquiries into the irregularities, the judge inclined to the view, on the balance of probabilities, that the bank anticipated that the solicitor would generate a record of the relevant facts surrounding the suspect transaction which would be of use for a number of purposes. A claim to privilege, based on the sole purpose test, was accordingly rejected. It is interesting to speculate whether the same materials could have been withheld had the court been free to apply the dominant purpose test.[114]

3-062 Clearly, where there is a dual purpose, a claim to privilege will be closely scrutinised. The claim in *Price Waterhouse v BCCI Holdings (Luxembourg) SA*,[115] discussed in the text below, demonstrates the difficulties that can be encountered, as does the *Tchenguiz* litigation, concerned with liquidators' reports, also discussed below. Akenhead J. noted the challenge that dual purposes present the court when he said in *Transport for Greater Manchester v Thales Transport & Security Ltd*:

> "It is clear from…the authorities…that the onus of proof that documents are subject to litigation privilege is on the party asserting such privilege. It is not enough that there are two equal reasons why the documents came into being, where one of them is in contemplation of litigation, because neither reason would then be a 'dominant' one such as to justify a claim of litigation privilege. The exercise of determining whether that onus has been discharged rests with the judge to be based on all the available information and the judge must be able to have regard to all such evidence as well as appropriate inferences to be drawn from the evidence which he or she is presented with. There are no particular cases which determine precisely how a judge should assess and analyse that evidence as cases will vary in an infinite way."[116]

3-063 It will be difficult to prove that a document which has been created in accordance with standing instructions or procedures set out in documents such as an accident response manual is prepared for the dominant purpose of use in litigation, unless these are specifically geared to the creation of documents in (so-called) disaster scenarios which can be shown to have been predominantly intended for use in any resultant litigation, or to enable legal advice to be sought. As Lord Edmund-Davies commented in *Waugh*:

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[114] Two further Australian decisions that will be considered in more detail in Ch.4 are of interest here. In both *Seven Network Ltd v News Ltd* [2005] FCA 142 and *Sydney Airports Corp Ltd v Singapore Airlines Ltd* [2005] NSWCA 47, the fact that the documents for which privilege was claimed were made or commissioned by in-house lawyers whose roles were more 'commercial' than 'legal' pointed to the fact that the dominant purpose was not satisfied.

[115] [1992] B.C.L.C. 583.

[116] [2013] EWHC 149 (TCC); [2013] B.L.R. 339; 146 Con. L.R. 218 at [9]. The claim to litigation privilege was examined in detail by Akenhead J. and ultimately refused. The evidential issues arising when the claim to privilege is challenged are considered in detail in Ch.9 (and to some extent below).

> "[T]he test of dominance will…be difficult to satisfy when enquiries are instituted or reports produced automatically whenever any mishap occurs, whatever its nature, its gravity, or even its triviality."[117]

Thus, a subordinate's report to a superior, sent in consequence of a general order to report, or in the ordinary course of his duty, will not normally be privileged, whether made before or after litigation began,[118] since the dominant purpose behind its creation will not be use in the litigation.[119]

3-064 Furthermore, a claim to privilege will not be greatly advanced by the use of self-serving labels on a standard report form: the key issue is always, what was the dominant purpose for which the document was created?[120] In *Waugh*, the accident report was headed: "For the information of the Board's solicitor: this form is to be used by every person reporting an occurrence when litigation by or against the B.R.B. is anticipated…". However, this heading was not in any way determinative of the appeal's outcome and was effectively ignored, since "words cannot alter the character of the report which is made by the employee for the purpose of informing his employers of the accident, and made at the time".[121] In any event, as Lord Wilberforce noted, despite the heading, the Board's affidavit made clear the report was prepared for a dual purpose, which brought the dominant purpose test into play.[122]

3-065 Dual purpose issues also arise where there exist complaints procedures which are triggered prior to the commencement of litigation. The question then arises whether information gathered by the body that is the subject of the complaint, in order to address it, is privileged in any subsequent litigation if the complaint is not resolved

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[117] [1980] A.C. 521 at 544. As the Court of Appeal expressed it in *Director of the Serious Fraud Office v Eurasian Natural Resources Corpn Ltd (Law Society intervening)* [2018] EWCA Civ 2006; [2019] 1 W.L.R. 791 at [118]: "The policy of the board in *Waugh* requiring it to investigate all accidents was a distinct purpose that prevented the possible litigation being the dominant purpose."

[118] See *Woolley v North London Railway Co* 4 CP 602 and *Fenner v The London & South Eastern Railway Co* (1872) L.R. 7 Q.B. 767.

[119] Per Millett J. in *Price Waterhouse v BCCI Holdings (Luxembourg) SA* [1992] B.C.L.C. 583 at 597. An "incident involving customer" form completed whenever a customer suffered an accident in a food store chain was held not to have been completed for the dominant purpose of litigation in the Canadian case of *Fred v Westfair Foods Ltd* [2003] YKSC 39. The store had come to expect litigation in the wake of such accidents, but in this case, on the evidence, litigation was a "far off" purpose. In an Irish case, *University College Court - National University of Ireland v Electricity Supply Board* [2014] IEHC 135, claims arose out of a 2009 flooding in relation to which reports on the causes of earlier floodings were relevant. Some of the flood reports were produced as part of a normal practice whereby the defendant electricity supplier engaged an associate company to prepare a report following a flood incident. Those reports were detailed statements of fact from personnel operating the defendant's plants at the time of the floods which contained the primary and basic information from those directly involved as to their cause. As this information was essential information to enable a review to be carried out as to the causes of the flood, in accordance with the defendant's usual practice, then it was not possible to say that their dominant purpose was for use in apprehended or threatened litigation.

[120] In *Re Highgrade Traders Ltd* [1984] B.C.L.C. 151, discussed below, Oliver L.J. commented (at 175) that "…the court is concerned to determine the actual intention of the party claiming privilege and, where it discerns a duality of purpose, to determine what is the dominant purpose…I would not want it to be thought the mere writing of such a letter by solicitors [i.e. written with a view to preclude further challenge to the privileged status of certain documents]…sometimes perhaps as a matter of drill, is in all cases necessarily going to be determinative".

[121] Lord Strathclyde in *Whitehill v Glasgow Corp* 1915 SC 1015 at 1017, quoted by Lord Edmund-Davies in *Waugh* [1980] A.C. 521 at 539.

[122] [1980] A.C. 521 at 531.

consideration of the relevant evidence. It is not one that will necessarily be determined in favour of the party claiming the privilege simply because its deponent asserts that the essential elements of litigation privilege are present.[132] In *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership*,[133] a case discussed below, the Court of Appeal accepted that the dominant purpose of a document must be viewed objectively by reference to the evidence available to the court.[134]

3-072 In *West London Pipeline and Storage Ltd and another v Total UK Ltd*, Beatson J. said:

> "The burden of establishing that a communication is privileged lies on the party claiming privilege. This is implicit in Lord Edmund Davies's words in *Waugh*'s case…and is also implicit in the other speeches in *Waugh*'s case: see also *Re Highgrade Traders Ltd* [1984] BCLC 151, at 175d; *National Westminster Bank plc v Rabobank Nederland* [2006] EWHC 2332 (Comm) at [53]; *LFEPA v Halcrow Gilbert & Co Ltd* [2004] EWHC 2340 (QB) at [48]; …affidavits claiming privilege whether sworn by the legal advisers to the party claiming privilege as is often the case, or, as in this case, by a Director of the party, should be specific enough to show something of the deponent's analysis of the documents or, in the case of a claim to litigation privilege, the purpose for which they were created. It is desirable that they should refer to such contemporary material as it is possible to do so without making disclosure of the very matters that the claim for privilege is designed to protect. On the need for specificity in such affidavits, see for example, Andrew Smith J. in *Sumitomo Corp v Credit Lyonnais Rouse Ltd* [2001] 151 NLJ 272 at [39], referred to without criticism by the Court of Appeal [2002] 1 WLR 479 at [28]."[135]

3-073 And in *Tchenguiz v Director of the Serious Fraud Office (Non-Party Disclosure) Court*, Tomlinson L.J. said:

> "The burden of proof is on the party claiming privilege to establish that the dominant purpose test is satisfied: *West London Pipeline and Storage v Total UK* [2008] 2 CL 259 paragraph 50, (Beatson J). A mere claim in evidence before the court that the document was for a particular purpose will not be decisive: *Neilson v Laugharne* [1981] QB 736, 645 (Lord Denning), 750 (Oliver LJ). The court will look at 'purpose' from an objective standpoint, looking at all relevant evidence including evidence of subjective purpose: Thanki [*The Law of Privilege* (2nd edn)] paragraph 3.75 and the cases cited at footnotes 187 and 188. The evidence in support must be specific enough to show something of the deponent's analysis of the purpose for which the documents were created, and should refer to such contemporary material as is possible without disclosing the privileged material: *West London Pipeline and Storage v Total UK* at paragraph 53 (Beatson J)."[136]

3-074 A similar approach is found in Australian case law. Thus, in *Grant v Downs* it was said more generally in relation to claiming privilege:

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the approach of the Court of Appeal in scrutinising the evidence is one that still needs to be treated with respect.

132 [2003] EWCA Civ 474; [2003] Q.B. 1556 at 1583, [35]. These issues are considered in detail in Ch.9.

133 [1987] 1 W.L.R. 1027. See the doubts expressed about the correctness of this decision in *Re Barings Plc* [1998] 1 All E.R. 673.

134 [1987] 1 W.L.R. 1027 at 1037.

135 [2008] EWHC 1729 (Comm); [2008] 2 C.L.C. 258 at [50]–[53]. The Court of Appeal noted in *Director of the Serious Fraud Office v Eurasian Natural Resources Corpn Ltd (Law Society intervening)* [2018] EWCA Civ 2006; [2019] 1 W.L.R. 791 at [104]: "Thus in *Re Highgrade Traders* [1984] BCLC 151 … it was made clear that the exercise of determining dominant purpose in each case is a determination of fact, and that the court must take a realistic, indeed commercial, view of the facts."

136 [2014] EWCA Civ 136; [2014] 4 All E.R. 627; (also known as *Rawlinson and Hunter Trustees SA. v Akers*) at [13]. In Ireland, see the discussion in *Colston v Dunnes Stores* [2019] IECA 59.

> "It is for the party claiming privilege to show that the documents for which the claim is made are privileged. He may succeed in achieving this objective by pointing to the nature of the documents or by evidence describing the circumstances in which they were brought into existence. But it should not be thought that the privilege is necessarily or conclusively established by resort to any verbal formula or ritual. The court has power to examine the documents for itself, a power which has perhaps been exercised too sparingly in the past, springing possibly from a misplaced reluctance to go behind the formal claim of privilege. It should not be forgotten that in many instances the character of the documents the subject of the claim will illuminate the purpose for which they were brought into existence.[137], [138]"

3-075 And Young J. helpfully summarised the position, in a way that is reflective of the approach of the English courts, as follows in *AWB Limited v Honourable Terence Rhoderic Hudson Cole*:

> "In *Commissioner of Taxation (Cth) v Pratt Holdings Pty Ltd*,[139] Kenny J. observed…that the dominant purpose must be determined objectively, having regard to the evidence, the nature of the document and the parties' submissions. Kenny J. added that the evidence of the intention of the document's maker, or of the person who authorised or procured it, is not necessarily conclusive of that purpose…it may be necessary to examine the evidence concerning the purpose of other persons involved in the hierarchy of decision-making or consultations that lead to the creation of the document and its subsequent communication."[140]

3-076 **Post-*Waugh* decisions** As predicted in earlier versions of this work, English courts have not been flooded with disputes concerning the application of the dominant purpose test. Nonetheless, there has been a small stream of instructive decisions. Included in these, discussed variously throughout this chapter, are cases where clients and their advisers fall foul of the evidentiary approaches just set out and see their claims to privilege rejected.

3-077 One early, post-*Waugh* decision which authoritatively examined how the dominant purpose test operates is *Re Highgrade Traders Ltd*,[141] a decision that arose in the context of an insurer's investigation report. Here, the stock and premises of a company were destroyed by fire in June 1980, shortly after a substantial increase in insurance cover had been taken out. The insurers suspected foul play and had several reports prepared by external investigators into the cause of the fire. From the time they received their first report, it was clear that any claim on the policy might be disputed, so solicitors were instructed. This first report was a preliminary one prepared by the insurers' loss adjusters as a consequence of which their suspicions were aroused as to the cause of the fire and the probability that any claim

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137 [1976] HCA 63; (1976) 135 CLR 674 at 689, per Stephen, Mason and Murphy JJ. In *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122; (2004) 136 F.C.R. 357 Finn J. at 366 said that the authorities accept that an appropriate starting point when applying the dominant purpose test is to ask what was the intended use or uses of the document which accounted for it being brought into existence.

138 As will be discussed in Ch.9, Australian courts are far more ready than English courts to inspect documents in respect of disputed claims to privilege. Inspection still only happens in extreme cases in England.

139 (2005) 225 A.L.R. 266 at 278.

140 [2006] FCA 571 at [110].

141 [1984] B.C.L.C. 151. The decision was criticised in *Re Barings* [1998] 1 All E.R. 673 discussed in Section 3 above. Two post-*Waugh* Court of Appeal decisions which touch on the availability of litigation privilege in relation to police enquiry reports are *Neilson v Laugharne* [1981] 1 Q.B. 736 and *Peach v Commissioner of Police of the Metropolis* [1986] 2 W.L.R. 1080.

under the policy would be disputed. Three further reports were commissioned, from the loss adjusters and two other investigators, before liability was repudiated under the policy in April 1981.

3-078 Shortly afterwards, the company entered into a members' voluntary liquidation. The only hope the creditors had of making any realistic recoveries was if the insurance claim was met. The liquidator attempted to negotiate a resolution with the insurers in the course of which he requested copies of the three later reports, so that he could understand the basis upon which liability was repudiated. These were withheld on the grounds of privilege, whereupon he applied for an examination under s.268 Companies Act 1948 (now s.236 Insolvency Act 1986) of a responsible officer of the insurers, coupled with an order for production of the reports.

3-079 At first instance, Mervyn Davies J. held that the reports served a dual purpose because the insurers wanted not only to obtain the advice of their solicitors, but also to ascertain the cause of the fire. The Court of Appeal disagreed, finding these two issues:

> "...quite inseparable. The insurers were not seeking the cause of the fire as a matter of academic interest in spontaneous combustion. Their purpose in instigating the enquiries can only be determined by asking why they needed to find out the cause of the fire. And the only reason that can be ascribed to them is that of ascertaining whether, as they suspected, it had been fraudulently started by the insured. It was entirely clear that, if the claim was persisted in and if it was resisted, litigation would inevitably follow...It is entirely unrealistic to attribute to the insurers an intention to make up their minds, independently of the advice which they received from their solicitors, that the claim should or should not be resisted. Whether they paid or not depended on the legal advice which they received, and the reports were prepared in order to enable that advice to be given. The advice given was necessarily to determine their decision and...whether the anticipated litigation would or would not take place."[142]

Accordingly, the reports were held to be privileged and the liquidator failed to gain access to them.

3-080 It is worth focusing on why the railways board report in *Waugh* was held not to be privileged, whereas the insurers' investigations reports were held to fall within the scope of litigation privilege in *Re Highgrade*. As well as being a demonstration of the fact specific nature of these sorts of matters, the distinction between the two outcomes reflects the facts that in *Re Highgrade*, the report was directed, not towards finding the cause of the fire with a view to preventing a recurrence, something in which the insurers would have had no direct interest, but towards establishing legal responsibility for its cause; and thus informing the insurers' decision whether or not to litigate the liquidator's claim; in *Waugh*, the documents would have had to be produced for the Board's internal purposes in connection with railway safety, where preventing the type of accident that killed Mr Waugh was at least an—if not the most—important purpose behind the Railway Board's investigation.[143] In *Director of the Serious Fraud Office v Eurasian Natural Resources Corpn Ltd (Law Society intervening)*, the Court of Appeal noted a submission:

> "...that there was a tension between the decision in *Highgrade* and the House of Lords' decision in *Waugh*, and that the latter should be followed here. We do not accept that the decisions are irreconcilable: they follow an identical principle, reaching different conclusions for fact specific reasons. The House of Lords specifically concluded that the fatal accident report over which privilege was asserted had been prepared for two purposes of equal importance only one of which concerned litigation whereas in *Highgrade*, as Oliver L.J. explained at pages 174-175 of his judgment:- 'The instant case is not, in my judgment, on all fours ... with [Waugh]. In ... [Waugh] the documents in question would, in any event, have had to be produced for the Board's internal purposes in connection with railway safety. Those seem to me to be quite different circumstances from those of the instant case where there was no purpose for bringing the documents into being other than that of obtaining the professional legal advice which would lead to a decision whether or not to litigate ...'."[144]

3-081 A more recent decision which also demonstrates the fact specific nature of a determination as to whether an investigation report is made for the dominant purpose of litigation, as well as the need for precision and focus in the claiming party's evidence, is *Starbev GP Ltd v Interbrew Central European Holding BV*.[145] Here, the claim concerned the defendants' entitlement to additional consideration when a business it sold was on-sold by the claimant purchaser. The consideration provisions, which included a defined term called the "Investment Amount" (the amount of which was central to the defendants' additional consideration entitlement), were complex and when the defendants became aware of the on-sale they investigated whether that sale had been structured so as to avoid the defendant's entitlement to more money. To this end, and against a background of prior disputes between the parties, the defendants' evidence was that they sought advice from their investment bankers, Barclays Capital, as to what steps were available to them to challenge the structuring of the on-sale, with a view to discussing this further with their legal advisors.

3-082 Hamblen J. rejected the submission that this was sufficient to show that litigation between the parties was reasonably anticipated and that the dominant purpose of instructing Barclays was in connection with that anticipated litigation. Subjecting the defendants' witness's evidence to "anxious scrutiny",[146] he held:

> "I consider the effect of his evidence to be that [the witness] had a suspicion concerning the sale of the Business by Starbev and instructed Barclays to investigate in order to see if there was substance to his suspicion. Barclays' role was investigatory. Unless and until they confirmed that there was substance to [the witness's] suspicion there was no real reason to anticipate litigation. This is borne out by his statement that 'it occurred to me that [Interbrew] would end up in another dispute with Starbev.' This suggests no more than

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[142] Per Oliver L.J., [1984] B.C.L.C. 151 at 173. Strictly, then, this was not a "dual purpose" case. The decision can be contrasted to some extent with that of the High Court of Australia in *National Employers Mutual General Insurance Association Ltd v Waind* (1979) 141 C.L.R. 648 where it was held that five reports from a firm of loss assessors and six medical reports obtained by an insurer did not attract privilege because they were brought into existence for the dual purpose of enabling the insurer to decide what it would do, as well as for use in litigation by legal advisers against its insured if the occasion arose. The decision was, of course, made before Australia adopted the dominant purpose test in 1999. Similar issues have been addressed by Canadian courts, which have been keen to identify whether information is gathered by an insurer's agent or loss adjusters both for the purpose of investigation and assessment, as well as for the purpose of defending a possible claim, in which case convincing evidence is required as to whether the dominant purpose is litigation: see, for example, *Ontario Inc v Zurich Insurance Co* (2003) CanLII 5014 (ON SC). In this case, Karakatsanis J. said that litigation privilege is not dependent upon advising the insured of a denial of coverage.

[143] See Oliver L.J. in *Re Highgrade* [1984] B.C.L.C. 151 at 174.

[144] [2018] EWCA Civ 2006; [2019] 1 W.L.R. 791 at [106].

[145] [2013] EWHC 4038 (Comm).

[146] Per Eder J. in *Tchenguiz v Director of the SFO* [2013] EWHC 2297 (QB) at [52].

were given of the "legal options and strategies being considered". Having then read the document, he noted that there was no reference in it to "legal options and strategies", and that the court was left to speculate what was meant by this. He concluded:

> "In the result it is difficult for the court to conclude on an objective basis that [the pages to be redacted] are the subject of litigation privilege. On an objective basis the purpose of all the options appears to have been to consider how costs could be reduced. That is not a purpose which would attract litigation privilege. If that was one purpose and 'an analysis of legal options and strategies' was another that would also not be enough to make [those pages] subject to litigation privilege unless the latter analysis was the dominant purpose…There is no evidence from [the solicitor] that that was the dominant purpose. It may be that the reason why there is no such evidence is that [the solicitor's] evidence is that the only purpose of [those pages] was to analyse legal options and strategies. But if so, such evidence would sit unhappily with the language of the document itself which suggests that the aim of the document was to consider options to mitigate costs."[151]

3-088 In reaching this conclusion, Teare J. also gave the claim to litigation privilege "anxious scrutiny". Further, he kept in mind that a witness statement claiming privilege is normally conclusive, and that the solicitor giving evidence was a most experienced solicitor. But the conclusion which he reached, bearing in mind (a) the objective indications that the pages to be redacted, like the rest of the document, were concerned with reducing costs, (b) the shortness of the explanation for claiming privilege, and (c) the absence of any assertion as to what the dominant purpose, was "that something must have gone wrong with the claim to litigation privilege in this case".[152]

3-089 **Liquidations** Investigations undertaken by liquidators often give rise to challenges in terms of whether their enquiries into background matters relating to the company's demise, and which are a necessary prelude to litigation, are protected by litigation privilege. On the one hand is the Hong Kong Court of Final Appeal decision of *Akai Holdings Limited (in compulsory liquidation) v Ernst & Young (a Hong Kong firm)*,[153] where the Court upheld claims to privilege over the transcripts and notes of a series of private examinations and interviews conducted pursuant to or under threat of s.221 Companies Ordinance (Cap 32) (the Hong Kong equivalent to s.236 Insolvency Act 1986). Lord Hoffmann N.P.J. said that the case turned upon the answers to two simple questions: whether the liquidators conducted the examinations for the sole or dominant purpose of obtaining advice from their solicitors as to bringing or conducting legal proceedings; and whether such proceedings were reasonably anticipated at the time? These questions were "an application to the facts of this case of the general principles of legal professional privilege stated by the House of Lords in *Waugh v British Railways Board…*".[154]

3-090 On the other hand, there are the decisions in *Price Waterhouse v BCCI Holdings (Luxembourg) SA*[155] and *Tchenguiz v Director of the Serious Fraud Office (Non-Party Disclosure)*,[156] in both of which the dominant purpose test was not satisfied. The *Price Waterhouse* decision was considered in Ch.2, Section 5 in relation to an unsuccessful claim for advice privilege over reports prepared by an investigation committee established by BCCI, of which some of the plaintiffs' partners were members. In the alternative, it was argued that the reports were protected by litigation privilege because they were prepared in order to obtain legal advice in connection with possible litigation for the recovery of outstanding loans. This much was conceded, but Millett J. refused to accept that this was the dominant purpose behind their preparation. Rather, this was to establish the facts necessary to enable BCCI's financial position to be determined, something that was not "of merely academic interest", since only then could a decision be taken to institute recovery proceedings. Here, the two purposes were "quite independent of each other".[157]

3-091 In *Tchenguiz v Director of the Serious Fraud Office (Non-Party Disclosure)*,[158] dual purposes issues also featured at some length. Here, the claimant brothers, together with companies and trusts through which their business was conducted, sought damages from the Director of the SFO arising from their arrests and the execution of search warrants at their residences and business premises. The search warrants were illegally obtained.[159] The claimants asserted that, in seeking them, the SFO relied upon various draft reports prepared by a firm of UK accountants who had shown the reports to the SFO but had not provided them with copies. The claimants sought their disclosure from representatives of the accountants pursuant to CPR 31.17, which entitles a litigant to seek disclosure from a person who is not a party to the proceedings. The application was made against two such representatives who had been appointed as Joint Liquidators of the Oscatello group of companies (the "JLs"). The JLs acknowledged that they had commissioned the reports the subject of the application but they claimed that they were subject to litigation privilege. Eder J. rejected the claims to privilege and ordered their disclosure in a judgment that the Court of Appeal substantially upheld.

3-092 The main point of interest in these decisions is the way in which both Eder J. and the Court of Appeal focused on the need for the party claiming privilege to do so in a way that clearly demonstrated that the relevant communications were made for the dominant purpose of identified litigation. The draft reports that the claimants sought were said by the JLs to have been made in connection with complex litigation against Oscatello entities, that began shortly after their appointment, and included proceedings in Guernsey. The main function of the Oscatello Companies had been to hold positions by way of direct equity/debt investments and to participate in large-scale derivatives and futures trading. Investment decisions underlying Oscatello's activities were made in conjunction with or at the direction of an entity called R20 Limited (R20) of which one of the claimants was a director.

3-093 So, in relation to one report, the JLs' evidence was criticised by Eder J. because their witness did not in terms say explicitly that it was produced for the dominant purpose of obtaining information or advice in connection with pending or contemplated litigation, or of conducting or aiding in the conduct of such litigation. Rather, the witness referred to the report having been "commissioned" in order to "assist" the JLs in formulating their response to the Guernsey Proceedings; that the

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151 [2018] EWHC 1763 (Comm) at [18].

152 [2018] EWHC 1763 (Comm) at [31]. Identical conclusions were reached with the other January 2012 documents.

153 [2009] HKCFA 14.

154 [2009] HKCFA 14 at [117]. The case is discussed further in Section 10 below.

155 [1992] B.C.L.C. 583.

156 *Tchenguiz, v Director of the Serious Fraud Office (Non-Party Disclosure)* [2013] EWHC 2297 (QB) and, in the Court of Appeal, [2014] EWCA Civ 136.

157 [1992] B.C.L.C. 583 at 590.

158 *Tchenguiz v Director of the Serious Fraud Office (Non-Party Disclosure)* [2013] EWHC 2297 (QB) and, in the Court of Appeal, [2014] EWCA Civ 136.

159 See *R. (on the application of Rawlinson & Hunter Trustees) v Central Criminal Court* [2012] EWHC 2254 (Admin); [2013] 1 W.L.R. 1634.

remains fraught with danger, as it is for the courts objectively to determine whether there has been a wider waiver. Two examples suffice to illustrate the point.

7-077 In *Oxford Gene Technology v Affymetrix Inc*,[145] the claimants, OGT, gave notice of intention to seek amendment of a patent pursuant to s.75 Patents Act 1977 and in due course served their statement of reasons. Affymetrix were the only opponents. OGT were ordered to serve a list of documents relevant to "the court's discretion to permit or refuse amendments of the patent in suit in accordance with the claimant's obligation of utmost good faith to put all relevant matters before the court."[146] In compliance, its list disclosed privileged documents but asserted that limited inspection only would be permitted in order to meet its obligation of utmost good faith. To that end, and pursuant to a provisional agreement reached in correspondence between the parties' solicitors, it permitted disclosure only to Affymetrix's English solicitors. However, having inspected the documents, the solicitors for Affymetrix concluded that they needed help and advice from their clients and so sought permission inter alia to share the privileged materials with representatives of their clients, including personnel based in the United States. OGT opposed this, fearing that such disclosure would destroy their ability to assert privilege in any US proceedings.

7-078 Pumfrey J. held that the form of the list of documents and inspection by Affymetrix's UK-based solicitors meant that privilege had been lost because the documents had been handed over to OGT's opposing party, albeit on a limited basis. Notwithstanding that he had decided that the privilege had gone, he held that he had a discretion to limit use of the documents to the purposes for which they were disclosed, namely the amendment proceedings. The Court of Appeal, in dismissing Affymetrix's appeal, held that privilege in OGT's documents had not been lost: both the terms of OGT's list and the correspondence pursuant to which disclosure was given made it clear that there was to be no disclosure by OGT to Affymetrix's personnel, whose counsel accepted that Affymetrix's solicitors remained under a duty of confidence not to disclose the documents to their clients or to others. Approaching the matter on the basis that whether or not any act amounted to waiver of privilege was a decision for the court, Aldous L.J. held that the documents remained confidential, a prerequisite to a claim for privilege, as the documents had not been disclosed to their adversary in the litigation and that it would otherwise be unjust to regard the events surrounding the limited disclosure as giving rise to a general waiver.[147] This was, no doubt, a practical and fair conclusion, albeit it appears instinctively odd to say that disclosure to an opponent's solicitors does not amount to disclosure to an adversary but such, it seems, was the nature of the agreement reached between the parties when limited disclosure was given.

7-079 The *Oxford Gene* decision was unsuccessfully prayed in aid in *Dupont Nutrition Biosciences ApS v Novozymes A/S*.[148] This concerned an application to use a document ("the Luna memo") that the defendant, Novozymes, claimed was privileged and had been disclosed by mistake. Here, disclosure was given in the

[145] [2001] R.P.C. 18.

[146] This order reflected a widely understood practice at the time that patentees had to disclose privileged materials, a practice which the Court of Appeal held was based upon a misunderstanding (see the next footnote).

[147] [2001] R.P.C. 18 at 320, [32]. As discussed at para.7-385 below, the court also made it clear that there is no obligation on a patentee in amendment proceedings to disclose privileged materials (at 317 and 326).

[148] [2013] EWHC 155 (Pat).

unusual circumstances that the defendants could not be sure whether there existed a claim to privilege over certain documents because (a) the solicitor responsible for conducting the document review exercise pursuant to which the disclosure was made, one B, needed the assistance of a Novozymes representative, one G, who could definitively determine questions of privilege; but (b) G was unavailable during the review process because she was on holiday and uncontactable by telephone. As a result, a list of documents was prepared and served in accordance with B's own review. B however asserted in a contemporaneous witness statement that it was possible that some documents which had not been recognised as privileged might be so identified once G returned from her vacation. On this basis, the Luna memo was disclosed in the non-privileged section of the list then served. It was not until nearly three weeks later that Novozymes' solicitors claimed to recognise that the Luna memo was privileged after all. By this time the claimants had made use of the memo.

7-080 Holding that there was no basis in fact on which the claimants' solicitors should have appreciated that the Luna memo was privileged, Floyd J. rejected the defendants' argument that the circumstances of its disclosure (namely B's statement that it was possible that some documents would be later identified as privileged, and the other circumstances concerning G's absence on holiday) meant that privilege had not in fact been waived in the Luna memo. As to this, the defendants argued that the case was analogous to *Oxford Gene*, in that in order to comply with the onerous obligations for disclosure, the documents had been supplied to the claimants for the limited purpose of allowing them to see the documents until G had had the chance to complete her own review. The claimants pointed out that, on this basis, it would be open to a solicitor to accompany any list of documents with a statement like the one B made, so that no list of documents need ever waive privilege. Floyd J. rejected the defendants' argument and held that the document was being disclosed for the general purposes of the action. While it was true that the claimants were aware of the possibility that, in relation to any one of the (more than 100) documents disclosed in the non-privileged part of the list, a mistake might have occurred, that did not justify the suggestion that the Luna memo was being disclosed for a limited purpose. And since there was no basis in fact which would have put a reasonable solicitor on notice that the Luna memo had been disclosed by mistake, it followed that privilege in the Luna memo was waived, and that there was no basis for placing the receiving party under any restriction as to its use.[149]

Disclosure to the criminal justice authorities and to regulators

7-081 It is now appropriate to examine in detail the considerable body of case law which supports and expands upon many of the various situations outlined above.

[149] As for the defendants' submission that a party could serve a list of documents but assert a lack of intention to waive privilege, it will be recalled (see above) that in *Causton v Mann Egerton (Johnsons) Ltd*, Lord Denning MR said a solicitor's authority over the conduct of his clients' litigation meant that he could waive his clients' privilege "[u]nless his client has expressly withdrawn that authority or any part of it, the other party is entitled to assume that he is acting within his authority" [1974] 1 W.L.R. 162 at 167. However, this does not allow solicitors to disclaim any ability to waive a clients' privilege. Of the Serious Fraud Office's attempt to do this in the context of a huge disclosure exercise where mistaken disclosure of privileged materials occurred, Moore-Bick L.J. said: "...I do not think that general assertions in correspondence that the SFO did not intend to waive privilege are sufficient to make it obvious that any document arguably privileged must have been disclosed by mistake": *Tchenguiz v Director of the Serious Fraud Office (No.2)* [2014] EWCA Civ 1129; [2015] 1 W.L.R. 797 at [15].

The usual starting point is the decision in *British Coal Corporation v Dennis Rye Ltd (No.2)*[150]; which was concerned with the consequences of making a disclosure of privileged information to the criminal justice authorities. Issues of disclosure to the criminal justice authorities (as well as other regulatory authorities) will usually arise in two circumstances: (i) where a third party makes such disclosure in order to assist the authorities, as in *British Coal* itself and (ii) where a suspect decides to make such disclosure in an attempt to persuade those authorities not to prosecute him. In the first case, the privilege holder will be keen to ensure that his privilege is used only for the purposes of the authority's investigation, such that there is no wider loss of privilege as against third parties with whom the privilege holder might be in dispute. In the second, the privilege holder will often wish to make a limited disclosure in order to persuade an authority or regulator that the misconduct they are suspected of is unfounded; and likewise they will wish to ensure both that no third party becomes entitled to use their privileged materials against them and ideally, but more difficult, that the authority is limited in what it can do with the disclosed privileged materials. The starting point is the first scenario considered in the *British Coal* decision.

7-082 Here, the plaintiff had investigated overcharging by one of its suppliers with a view to taking legal proceedings against it. Copies of privileged reports and other material which resulted from its investigation were made available to the police, who were also investigating the defendants' conduct. A prosecution followed, in the course of which some of the privileged material made available to them by British Coal was disclosed by the police to the defendants under the Attorney General's Guidelines on Disclosure of Information.[151] Some of the remaining material supplied by British Coal to the police was disclosed to the defendants during the course of the criminal trial pursuant to orders made by the trial judge.

7-083 When the criminal proceedings concluded, British Coal instituted civil proceedings against the defendants and applied for the return of all its privileged materials held by them. The defendants argued that any privilege in the documents had been lost since the documents came into their hands quite properly and in circumstances in which the plaintiff either approved or acquiesced in their disclosure to the defendants, since there had been no express reservation by the plaintiffs of their privilege. In the Court of Appeal, Neill L.J. said:

> "[I]t is clear that the plaintiff made the documents available for a limited purpose only, namely to assist in the conduct first of a criminal investigation and then of a criminal trial. This action of the plaintiff, looked at objectively as it must be, cannot be construed as a waiver of any rights available to them in the present civil action for the purpose of which the privilege exists…The action of the plaintiff in making documents available for the purpose of the criminal trial did not constitute a waiver of the privilege to which it was entitled in the present civil proceedings."[152]

7-084 The decision is a pragmatic one, designed to encourage those with relevant knowledge to assist the criminal justice authorities in circumstances where those authorities could not use their compulsory powers of disclosure (for example, under s.2 Criminal Justice Act 1987) to obtain such information, since those powers do not cover the disclosure of privileged information. Indeed, Neill L.J. expressly

[150] [1988] 1 W.L.R. 1113.

[151] The Attorney General's Guidelines are now based inter alia upon prosecution disclosure obligations contained in the Criminal Procedure and Investigations Act 1996: see briefly Ch.3, Section 12.

[152] [1988] 1 W.L.R. 1113 at 1121-1122.

referred to the plaintiff's disclosure to the police as being "in accordance with its duty to assist in the conduct of criminal proceedings".[153] Further, it would, in his view, have been contrary to public policy if a person who assisted the police in this way were subsequently to find his privilege was lost for the purposes of civil proceedings.

7-085 *British Coal* demonstrates then that under English law voluntary disclosure of privileged materials to the criminal justice authorities, even where those materials are then disclosed to a defendant to criminal proceedings, who happens to be the privilege holder's own adversary in pending civil proceedings, will not result in a general waiver of privilege. But the decision is as important for the fact that it forms the basis for the English courts' general acceptance in situations aside from disclosure to such authorities that disclosure of privileged materials can occur for specific and limited purposes without there being a wider loss of privilege beyond those to whom the disclosure is made, including even where the disclosure is made to an adversary. That said, the decision in *British Coal* is not, it is suggested, without its conceptual difficulties.[154] The absence on the facts of *British Coal* of an express reservation of the plaintiff's privilege at the time of disclosure,[155] coupled with an express or deliberate disclosure to the defendants by the prosecution—albeit pursuant to what would now be a statutory obligation under the Criminal Procedure and Investigations Act 1996 (CPIA)—makes it difficult to see how the confidentiality in the disclosed documents had not, as against the defendants, been lost—or at least set aside—especially as the circumstances were such that once the documents were made available by the plaintiffs to the police the defendants ultimately became *entitled* to access to the information concerned and then to use them in their defence.[156] Of course, there are now other restrictions on the collateral use to which a criminal defendant can put materials disclosed to him as either prosecution

[153] [1988] 1 W.L.R. 1113 at 1121–1122. See also *R. v Skingley and Burrett*, unreported 17 December 1999, Case No.9903677Z2/9904709/9903679, where the Court of Appeal thought that depriving the defendants of potentially valuable material relevant to their defences, including privileged materials, undermined their convictions, albeit in the event such prejudice was held to be more apparent than real.

[154] And it is not without its doubters. In *R. v Ahmed* [2007] EWCA Crim 2870, Moore-Bick L.J. said at [25] that the scope of the *British Coal* principle "may require further elucidation in due course…". See also J. Brabyn, "Limited Purpose Waivers of Legal Professional Privilege" (2012) C.J.Q. 176, who critiques a "(mis)use" of the *British Coal* decision and criticises the "very thin foundations" (at 184) on which limited purpose waivers are built. Her analysis asserts that "a combination of historical accident, pragmatism and loose jurisprudence have made limited purpose waivers…a real possibility in the British Isles…" (at 187).

[155] The defendants appeared to accept that had the plaintiff made a reservation of its right to privilege when making its documents available to the police and defendants then no question of waiver of privilege would have arisen: [1988] 1 W.L.R. 1113 at 1121.

[156] Similarly, in *R. v Ungvari* [2003] EWCA Crim 2346, a defendant authorised his solicitor to make a statement to the Customs and Excise authorities and to make his file available to them. The material was relevant unused material that Customs was under a duty to disclose to his co-defendant who ran a "cut throat" defence, and called the defendant's solicitor in the face of his attempt to withdraw his waiver of privilege through counsel at trial. Before the Court of Appeal, the defendant argued on the basis of *British Coal* that he could not have intended to permit the solicitor to give evidence against him at the instance of his co-defendant. Clarke L.J. held (at [67] and [68]) that, as in *British Coal*, the defendant made materials available for the limited purpose of the criminal trial. By making his solicitor available also, Customs could have called him to give evidence and the defendant could have had no complaint, nor could he have withdrawn his waiver. That being so, there was no reason why the same was not true of the co-defendant, to whom Customs was bound to disclose the privileged material, who was then entitled to deploy it in evidence, subject to the ordinary rules of evidence.

evidence (that is, used material) and unused material, as per s.17 CPIA and the House of Lords' decision in *Taylor v Director of the Serious Fraud Office*.[157] These could therefore now only be used by the defendant in other proceedings with the court's permission given under either r.3.5 Criminal Procedure Rules 2015 or s.17(4) CPIA. Such an application would require the court to address how the additional factor that any such material is privileged would be dealt with and whether, for example, fairness considerations, discussion of which was notably absent in *British Coal*, would have any role to play: it is, it is submitted, pertinent to ask whether it is fair to deprive the defendant to a civil action of access to the very material he has seen when a defendant to a criminal proceeding involving the same subject matter? The answer to that, based on the reasoning deployed in *British Coal*, would in all likelihood have been that as the defendant had no entitlement to see the plaintiff's privileged materials in the civil proceedings, and had only seen the privileged materials in the criminal proceedings, then from the perspective of the civil proceedings the defendant was in no worse position by being denied access to what he had already seen in the criminal proceedings. In other words, the English courts are likely to continue to follow *British Coal* in this regard.

7-086 But would the same answer be reached if the privileged materials had actually been deployed in the criminal proceedings—would they thereby have entered "the public domain"? It appears that the privileged information disclosed to the defendants in *British Coal* was not deployed in evidence, so that the Court of Appeal did not have to address this question. Had the materials been so used, it is submitted that unless the court had gone into closed session at this point, or an order against further use had been made under the Contempt of Court Act 1981, then it is difficult to see how the plaintiff in the civil action could have succeeded in maintaining a claim to privilege in respect of that material in the later civil action. As noted earlier, once privileged documents are used in open court, even in criminal proceedings, they become susceptible to disclosure under the open justice principles and privilege is no answer to disclosure under this route. Furthermore, s.17(3) CPIA provides expressly in relation to unused material that the accused can use it "to the extent that it has been communicated to the public in open court".[158] [159]

7-087 While the courts encourage co-operation with criminal justice authorities, including by way of a third party making its privileged materials available to them, the risks in doing so have to be recognised, despite the outcome in *British Coal*, since the privilege holder has effectively lost control over his documents. Absent considerable care, the consequences for that privilege can be damaging, even where such materials are shared on an apparently agreed and limited waiver basis. This

[157] [1999] 2. A.C. 177.

[158] Regard should also be had in criminal matters to the various Criminal Practice Directions 2015 and note in particular PD 5B.14, entitled "Documents read aloud in part or summarised aloud". This provides: "Open justice requires only access to the part of the document that has been read aloud. If a member of the public requests a copy of such a document, the court should consider whether it is proportionate to order one of the parties to produce a suitably redacted version. If not, access to the document is unlikely to be granted; however open justice will generally have been satisfied by the document having been read out in court."

[159] In civil proceedings, there appears to be a tendency by the courts to seek to ensure that any loss of privilege is limited so far as possible. Thus, as will be seen below, the Court of Appeal in *Eurasian Natural Resources Corporation Ltd v Dechert LLP* was anxious to ensure that a s.70 Solicitors Act 1974 costs assessment was heard in private in order to protect the clients' privilege over documents that the SFO, which was conducting an investigation into ENRC's affairs, was keen to see. See too Knowles J. in *Vincent Tchenguiz v Director of the Serious Fraud Office* [2017] EWHC 2644 (Comm) at [36].

is well illustrated by the Hong Kong Court of Appeal decision in *Rockefeller & Co Inc v Secretary for Justice*.[160] The facts were that the plaintiff was notified by Hong Kong's financial regulator, the Securities and Futures Commission (SFC), of its concerns over the conduct of Rockefeller's Hong Kong subsidiary and that subsidiary's managing director (L). Shortly afterwards, L was interviewed by a Rockefeller manager and its accountants and lawyers. The SFC served a notice on Rockefeller, pursuant to s.33(4) Securities and Futures Commission Ordinance (Cap 24), requiring it to produce certain documents. Although such a notice could not compel the production of privileged materials, Rockefeller nonetheless decided to produce the interview notes, subject to the terms of a letter written by its solicitors to the SFC. The intention behind the letter was to try to ensure that the disclosure of the documents to the SFC amounted only to a limited relaxation of the confidentiality and privilege which Rockefeller could otherwise assert over the documents, thus enabling Rockefeller, so it was thought, to assert that confidentiality or privilege as against other parties.

The flaw in this plan was that, by the terms of the solicitors' letter, the SFC was **7-088** expressly permitted to use the documents in the discharge of its regulatory responsibilities, which included assisting in bringing a prosecution in Hong Kong. The SFC was also permitted to disclose the documents to persons specified in s.59 of the Ordinance but otherwise undertook to keep the documents confidential.

The SFC supplied copies of Rockefeller's documents to Hong Kong's corrup- **7-089** tion and investigation body, the ICAC, which in turn passed them to Hong Kong's Secretary for Justice, who passed them as unused material to L's solicitors—L by now a defendant to criminal proceedings. Rockefeller intervened in the criminal proceedings to assert its privilege over the documents as against the Secretary for Justice and as against L. Rockefeller lost at first instance and its appeal was dismissed by the Hong Kong Court of Appeal, albeit for varying reasons. One judge thought that the terms of the solicitors' letter permitted the prosecution's use of the documents; another, surprisingly—and with respect, incorrectly—thought it was conceptually unsound to assert privilege over documents that had been voluntarily produced to the SFC[161]; while the third took the view that privilege was irrelevant since the documents were already in the hands of the Secretary for Justice and L's solicitors, and because Rockefeller was not being asked to produce them for use in evidence. That being so, Godfrey V.P. determined the application solely on the basis of the SFC's obligation of confidence and ruled that the public policy in favour of all unused material in the possession of the prosecution in a criminal trial being made available for use by the defence outweighed the public policy in favour of preserving the plaintiff's confidentiality in relation to documents to which privilege would attach.[162] [163]

Limited waiver by a criminal suspect? The waiver issues considered above are **7-090**

[160] [2000] 3 HKC 48. While this is an interesting case study in what can go wrong, it has to be noted that much of the reasoning adopted by the Court is open to challenge, or is even wrong, as explained in footnotes below.

[161] This issue has now been resolved by the Hong Kong Court of Appeal's decision in *CITIC Pacific Ltd v Secretary for Justice* [2012] HKCA 153; [2012] 2 HKLRD 701, discussed below.

[162] [2000] 3 HKC 48 at 59. Godfrey V.P. went on to suggest that it was open to the trial judge to hear *in camera* those parts of the evidence that necessitated reference to the plaintiff's confidential information.

[163] The facts of this case thus present a salutary warning about the dangers of sharing privileged information, even though the decision needs to be used with care because of unsatisfactory elements in the reasoning adopted by the Court of Appeal (not least Godfrey V.P.'s "rule of evidence"-based ap-

ones where third parties disclose privileged materials to criminal justice authorities in order to assist an investigation into the conduct of a third party suspect whose own privileged materials are not in issue. However, the issue occasionally arises in practice as to whether the suspect in a criminal investigation, or a party who has entered into a Deferred Prosecution Agreement pursuant to Sch.17 to the Crime and Courts Act 2013 can and should engage in some sort of limited waiver of privilege as against those very authorities. These are extreme examples of the privilege holder making disclosure to his adversary. So far as the English criminal justice agencies are concerned, this may be a hypothetical consideration since it is unlikely as a matter of practice hitherto that authorities such as the English Serious Fraud Office would accept any limits on a proposed waiver of privilege to be made to them by a suspect. This would be for a number of reasons, including the fact that it might hinder their co-operation duties with other international law enforcement agencies, because disclosure of relevant material could not be received on a basis which would hinder its use in relation to a subsequent prosecution, and because any such material would have to be disclosed in any case to the suspect's co-defendant (if he has one) as unused materials under the CPIA and other disclosure obligations—as noted above. An example in relation to waiver to the UK Revenue authorities is the decision in *R. v Ungvari*,[164] noted at fn.156 above.

7-091 It is difficult to see that *British Coal* would be relevant to or would aid the suspect in such situations. At best, any such disclosure by the suspect on a limited waiver basis is only likely to benefit him in relation to attempts by other parties, perhaps his adversaries in civil litigation, to gain access to his privileged materials. Even then, he is at risk, in the event his privileged materials are used in any criminal prosecution, to his civil opponents obtaining them in any event under the open justice principles. Furthermore, as discussed in Section 7 below, the English courts' approach to situations where a defendant's privileged material comes into the possession of the criminal justice authorities as a result of inadvertence, or even by unconditional consent (as in *R. v Cottrill*[165]), is that, as a matter of public policy, the criminal justice agencies are entitled to use such material in their prosecution of the defendant.

7-092 The Administrative Court's judgment in *R. (on the application of AL) v Serious Fraud Office ("XYZ")*[166] illustrates the very real difficulties that are found here. Here, a company (referred to as XYZ) became aware that it may have won a number of contracts because its employees had paid bribes. It instructed external lawyers to conduct a review of their behaviour to enable it to decide whether or not to self-report these issues to the SFO. Lengthy interviews of four individual employees were conducted by XYZ's lawyers. The interviews were not recorded, but the interviewing lawyers took detailed notes. The notes of interview formed part of the material used by XYZ to decide that it should self-report. Subsequently, the SFO concluded a Deferred Prosecution Agreement (DPA) with the company under which it prepared a draft indictment which was then suspended with the approval

proach to privilege, and Keith J.A.'s rejection of the notion of limited waiver—now resolved by the *CITIC* decision mentioned in the text below, and because it is not clear whether the *Ashburton v Pape* [1913] 2 Ch. 469 line of authority considered below in Section 7 was cited to the court). Furthermore, even though there is English authority in support of the Court of Appeal's outcome, such as Goff J.'s decision in *Butler v Board of Trade*, [1971] 1 Ch. 680, also discussed in Section 7 below, even here care is needed as the *CITIC* decision declined to follow *Butler*.

164 [2003] EWCA Crim 2346.

165 [1997] Crim L.R. 56 (28 June 1996, Court of Appeal (Criminal Division), transcript no.950810).

166 [2018] EWHC 856 (Admin); [2018] 1 W.L.R. 4557.

of the Crown Court. Inevitably, the DPA contained as a condition of the continued suspension of the indictment a requirement that XYZ would "co-operate fully and truthfully" with the SFO in its efforts to investigate and proceed against XYZ's employees.

7-093 Before any prosecutions of various individuals were commenced, the SFO sought the full interview notes. XYZ asserted privilege over them. Although the SFO disagreed with this assertion, after some negotiation XYZ agreed to allow one of its external lawyers to give an "oral proffer". Under this process, the lawyer read out, but did not provide a copy of, a statement which purported to summarise interviews with four key employees. The lawyer stated that no privilege was waived over the full notes of the interviews. The SFO recorded and then transcribed the summaries. Ultimately, one of the four employees was charged, with others, to all of whom the SFO disclosed the summaries. As XYZ continued to assert privilege over the full interview notes, one defendant, AL, applied to the Crown Court for an order requiring the SFO to disclose the full interview notes. The judge in the Crown Court refused on the basis that the notes were not in the SFO's possession (as required by its CPIA disclosure obligation), albeit he expressed misgivings about the situation. The SFO again asked XYZ to produce the full notes and again it refused. The SFO informed AL it would take no further steps against the company.

7-094 The Administrative Court held that the High Court was not the appropriate forum in which a dispute about disclosure of this sort should be litigated. It concluded that there were adequate alternatives open to the claimant in the Crown Court, e.g. pursuant to s.2 Criminal Procedure (Attendance of Witnesses) Act 1965, which it suggested would be sufficient to enable this issue to be resolved. In effect the judgment suggested that thereby XYZ would be ordered to bring the interview notes to court as material evidence in the case.

7-095 Having arrived at this conclusion, Holroyde L.J. and Green J. nonetheless expressed real reservations as to the position adopted by the SFO. While acknowledging that they could not bind a Crown Court if AL pursued the matter afresh in that forum, they made clear that had they decided that the High Court had jurisdiction to deal with this dispute then it would have quashed the decision of the SFO and remitted the issue for reconsideration. It concluded that in several respects the SFO had failed to address relevant considerations, had taken into account irrelevant matters and had applied an incorrect approach to the law. The Court first held (but necessarily obiter) that the law as it stood in April 2018 was settled such that "[p]rivilege does not apply to first interview notes". For this it relied on *Three Rivers District Council v Governor and Company of the Bank of England (No.6)*[167] and the first instance decision in *Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd.*[168] The latter decision was substantially overturned five months later by the Court of Appeal in *Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd. (The Law Society intervening)*,[169] (see the detailed discussion of this in Chs 2 and 3), rendering the Administrative Court's ruling on first interview notes dubious to say the least.[170]

7-096 What is still of interest however is the Court's further observations on whether

167 [2005] 1 A.C. 610 per Lord Carswell at [102].

168 [2017] EWHC 1017 (QB); [2017] 1 W.L.R. 4205.

169 [2018] EWCA Civ 2006; [2019] 1 W.L.R. 791.

170 That said, on 2 April 2019, the current Serious Fraud Office Director gave a speech at the Royal United Services Institute that indicated that the SFO's policy in relation to the waiver of LPP over such accounts in the context of DPA negotiations would be updated and that this remains very much

the oral proffers made by XYZ's lawyer in respect of the interviews (being material which they had asserted was privileged) amounted to a limited waiver of that privilege. The Court was clear that the proffering of the summaries amounted to a waiver and that (prima facie) this opened the door to disclosure of the underlying interview notes. That led to the next question of whether it was arguable that any waiver is limited or partial, the only argument being envisaged that the waiver was for a limited purpose i.e. the exclusive use of the SFO only.[171]

7-097 That argument failed because there was no evidence that the SFO ever addressed the question of waiver and (it followed) none that the SFO considered whether any waiver was for a limited purpose. Had the SFO raised this argument, the Court made it clear that it would have had difficulties with it:

> "When the oral proffers were made XYZ Ltd (via [its lawyers]) knew (or must have known): (i) that it had already submitted a document to the SFO which was inculpatory of the defendants; (ii) that the oral proffers were being made to further the SFO's investigation into the defendants; (iii) that it was a very real possibility/likelihood that the defendants would be prosecuted; (iv) that there was a real possibility/likelihood that the summaries would be provided by way of disclosure to the defendants; and (v) that the proffers were of material that XYZ Ltd was asserting privilege over. Even if we were to accept that the waiver was for a limited purpose we do not see how that limited purpose would not have included transmission of the underlying documents to the defendants since this was squarely in contemplation and was an integral part of the process being undertaken. When the proffers were made … they were said to be without prejudice to privilege. The test for waiver is not subjective; it is objective. If objectively a client waives privilege it cannot then claim that the waiver did not exist simply because it (subjectively) asserts that there has been no waiver. We observe further that none of the objections raised to disclosure [by XYZ's lawyers] have been applied to the oral proffers. These were provided even though: (i) XYZ Ltd asserts privilege over this self-same material; (ii) the interview notes from which the summaries were prepared contained lawyers' notes, markings and advice but these have not been provided by way of proffer and were not an obstacle to the proffer being made; and (iii) the interview notes are said to contain advice relating to civil proceedings, but this has not prevented the proffers being advanced. In short none of the objections to disclosure have been applied to the summaries."[172]

7-098 This well illustrates the challenges that most suspects, and indeed others, such as the beneficiary of a DPA, would have in seeking to agree a limited waiver of privilege with agencies such as the SFO. Of course, *XYZ* does not discuss, let alone decide, what the status of the notes would be if sought by a third party in related civil proceedings, but as noted above, their use in open court in ensuing criminal proceedings would not, without more, prevent them entering the public domain: see s.17(3) CPIA. In that situation, the waiving party such as XYZ would need to apply for a restriction on use pursuant to CPR r.31.22 (as to which see *Serdar Mohammed v Ministry of Defence*,[173] discussed above). That is a far from easy restriction to secure, as that judgment makes clear.

a live issue. See the discussion on this and the current SFO approach in Ch.1.

171 [2018] EWHC 856 (Admin); [2018] 1 W.L.R. 4557 at [116].

172 [2018] EWHC 856 (Admin); [2018] 2 Cr. App. R. 13 at [117]–[119]. The Court went on to consider whether the SFO should have sought a waiver of privilege as part of XYZ's continuing duty of co-operation under its DPA. Having reviewed the SFO's many public statements in this regard, it said at [121]: "In our view there is evidence that the SFO does treat waiver (in so far as it exists) as relevant to the duty of disclosure under a DPA but there is no evidence that the SFO gave thought to whether or not it should require a waiver as part of the duty of cooperation. The evidence before the court inclines us to believe, not. Given that the SFO's position is that the privilege argument is, on balance, wrong, this was an issue it should have at least addressed itself to."

7-099 The current state of play appears to be then that (i) there is an absence of decisions in which a defendant has sought to disclose privileged materials to a criminal justice agency on an expressly limited basis, so that (ii) if disclosure of privileged material on terms were to occur then the courts would be presented with the challenge of seeking to reconcile (a) on the one hand the suspect's rights over his privileged materials and (b) the prosecution's statutory duties, on the other, for example, to make such materials available to co-defendants under the CPIA. Leaving aside the question of whether the agency would ever accept such a limitation, it is otherwise very likely, it is submitted, that the CPIA duties and the importance of securing a fair trial for the defendant would have to prevail despite any agreement between the parties, at which point the suspect would be left to argue that such materials only be used in closed session.[174] It is not obvious that a criminal court would accede to such an application.

7-100 There is one recent decision that has looked at the position where a limited waiver of privilege has been made to overseas criminal justice agencies, with particular reference to the question as to whether, in such circumstances, a limited waiver would still entitle the suspect to assert privilege as against a third party with whom they are engaged in parallel civil proceedings. As will be seen from the decision in *Property Alliance Group Ltd v Royal Bank of Scotland Plc*[175] discussed below, the English courts seem prepared to accept that a form of limited disclosure to criminal justice and regulatory agencies—in this case based in the United States—can be undertaken, notwithstanding the agencies' statutory gateway obligations, on the basis that the party being investigated can still assert privilege over the waived material as against third parties in parallel civil litigation where the privileged material continues to be confidential and not within the public domain. It has to be noted that the basis upon which this limited waiver of privilege was agreed with the overseas agencies in this case is not described in the report of this decision and nor is it clear how those agencies would have dealt with any decision to use the disclosed materials in a manner inconsistent with the disclosing bank's privilege.

7-101 **Other regulators and limited waiver** There is well-developed authority, including at Privy Council level and from other jurisdictions, that demonstrates the permissibility and acceptance of an enforceable limited waiver of privilege as against regulators: the cases below concern disclosure to financial services regulators, overseas criminal investigation agencies, as well as local law societies acting in their regulatory capacity. It is of interest that one UK regulator expressly recognises the practice of making a limited waiver, albeit while cautioning that the

173 [2013] EWHC 4478 (QB). See also, by way of example, *R. (on the application of British American Tobacco (UK) Ltd) v Secretary of State for Health* [2018] EWHC 3586 (Admin).

174 There may also be for the suspect a potentially bigger danger in sharing privileged materials with a criminal justice agency in that it could encourage the agency to mount a wider challenge to the privilege by using the crime-fraud exception discussed in Ch.8.

175 [2015] EWHC 1557 (Ch); [2016] 1 W.L.R. 361. It is interesting to note that although no waiver agreements can be reached with US authorities, this did not seem to happen in *United States Securities and Exchange Commission v Sandoval Herrera et al* (2017) Case No-17-20301-CIV - Lenard/Goodman. Here, the client's lawyers "orally downloaded" to the SEC the substance of 12 sets of interview notes without also sharing the notes themselves. That disclosure to their client's adversary was enough to waive privilege in the notes which became disclosable in later related proceedings, even though these did not involve the lawyer's clients.

practice cannot hinder its statutory functions. The English Financial Conduct Authority (FCA), for example, while recognising in its *FCA Handbook Enforcement Guide* at EG 3.11.1101/03/2016 that it is not able to require the production of privileged materials under its enabling legislation (the Financial Conduct and Markets Act 2000 as amended), goes on to say inter alia at EG 3.11.1301/03/2016 that it considers that English law does permit "limited waiver" and that legal privilege can still be asserted against third parties notwithstanding disclosure of a privileged report to the FCA. However, that same provision goes on to warn that the FCA:

> "...cannot accept any condition or stipulation which would purport to restrict its ability to use the information in the exercise of the FCA's statutory functions. In this sense, the FCA cannot 'close its eyes' to information received or accept that information should, say, be used only for the purposes of supervision but not for enforcement."[176]

7-102 In any event, a number of common law jurisdictions have examined this issue at a senior court level, including the Supreme Court of Ireland in *Fyffes Plc v DCC Plc*,[177] the Hong Kong Court of Appeal in *CITIC Pacific Ltd v Secretary for Justice and Commissioner of Police*,[178] and the Privy Council in the context of solicitors and their local law society in *B v Auckland District Law Society*.[179] These cases, which all demonstrate that partial waiver of privilege as against a regulator is possible and that the terms of the waiver will be enforced by the courts where these are clear, are now joined by the English first instance decision in *Property Alliance Group Ltd v Royal Bank of Scotland Plc*.[180] As will be seen when they are discussed below, they all demonstrate the benefits of the good practice of ensuring that (i) the terms and purpose of the partial disclosure—and the restrictions on wider disclosure—are reduced to writing and clearly accepted by the recipient of the privileged material and (ii) the disclosing party is ready to take immediate injunctive action to prevent any breach of the agreed terms and to seek the return of its privileged documents if the privilege comes under threat as a consequence of the limited waiver. They also demonstrate that, ultimately, all disclosure carries with it the risk of there being a wider dissemination than originally intended,[181] with the consequence the privilege may be undermined if not lost altogether.

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[176] EG 3.11.1401/03/2016 goes on to provide that information provided to the FCA is not unprotected, since the FCA is subject to strict statutory restrictions on the disclosure of confidential information. Accordingly, as per EG 3.11.1501/03/2016, the FCA recognises that even in circumstances where disclosure of information would be permitted under the "gateways" set out in the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (SI 2001/2188), the FCA will consider carefully whether it would be appropriate to disclose a report provided voluntarily by a firm (but even then subject to exceptions that include circumstances where disclosure is urgently needed, where notification might prejudice an investigation or defeat the purpose for which the information had been requested, or where notification would be inconsistent with the FCA's international obligations.

[177] [2005] IESC 3 discussed at para.7-091 below.

[178] [2012] HKCA 153; [2012] 2 HKLRD 701.

[179] [2003] UKPC 38; [2003] 2 A.C. 736.

[180] [2015] EWHC 1557 (Ch); [2016] 1 W.L.R. 361. The decision fulfils a prediction made in prior editions of this work that limited waiver to regulatory authorities is conceptually sound as a matter of English law.

[181] See Kirk and Woodcock, *Serious Fraud: Investigation and Trial* (London: Butterworths, 1991) which refers at p.38 to a ruling by Mackinnon J. in *R. v NatWest Investment Bank*, 23 January 1991, in which he held that the release of documents under a limited waiver of privilege to inspectors appointed by the Secretary of State for the Department of Trade and Industry could not be subject to a claim for privilege in criminal proceedings. Mackinnon J. ruled that the waiver to the inspectors could not be limited to the immediate purposes of their inspection under s.432 Companies Act 1985. The ruling appears to have been based on the fact that the scheme of Pt XIV of the Companies Act 1985 entitled the inspectors to pass documents to the Secretary of State who could pass them to the prosecuting authorities.

7-103 It should be said, for the sake of completeness, that the Australian High Court first examined these issues in *Goldberg v Ng*,[182] where it came to the contrary conclusion that limited waiver to a regulator could not be permitted. Subsequent Australian High Court decisions have rowed back from this position. A brief discussion of *Goldberg* will help to set the scene for developments of the case law in England, Ireland and Hong Kong just referred to. In *Goldberg*, the Ngs, who were two clients of G, a solicitor, sued him for monies had and received and in addition made a formal complaint about him to the Law Society of New South Wales. In the course of its investigation of the complaint, G was interviewed by the Law Society to which he made available privileged documents which he handed over under an express reservation of privilege, which the Law Society accepted. In the proceedings, the clients subpoenaed the Law Society for production of these documents and argued that their disclosure to the Law Society amounted to a waiver of the privilege. The High Court agreed that there was an imputed waiver by operation of law in the particular circumstances.[183] As to this, the majority in the High Court held that:

> "...where two or more distinct proceedings or procedures are related in the sense that there is general correspondence between the parties and they arise out of either the same dispute or closely connected disputes, conduct in relation to one proceeding or procedure, whether anticipated or already commenced, can found an imputed waiver for the purposes of all proceedings or procedures."[184]

7-104 The proceedings against G and the complaint to the Law Society were related, such that the critical question was whether the disclosure to the Law Society "gave rise to a situation where ordinary notions of fairness required that [G] be precluded from asserting that those documents were protected from production or inspection by the Ngs in the related equity proceedings between the Ngs and the Goldbergs".[185] Taking account of the fact that the disclosure of the documents was not restricted to perusal by the particular officer to whom they were given so that the Law Society could make whatever internal use of them it thought appropriate in dealing with the various aspects of the Ngs' complaint, that the provision of the documents to the Law Society was voluntary and for the calculated purpose of assisting the solicitor in having the complaint against him resolved adversely to the client, and the fact that Mr Goldberg was able to respond to the complaint by the use of privileged documents, instead of following usual procedures which would have required an unprivileged written response, the High Court held, by a majority, that it would be

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[182] *Goldberg v Ng* [1995] H.C.A. 39; (1995) 185 C.L.R. 83.

[183] The clients also advanced various other arguments concerning the privilege, including one to the effect that a solicitor who is a defendant in proceedings instituted against him by a former client in relation to matters arising from a former professional relationship is not entitled to privilege, even in respect of confidential communications made between the solicitor and his own legal representative retained for the purpose of these proceedings. The majority in the High Court of Australia, (Deane, Dawson and Gaudron JJ., at 93–94, [14]) rejected this argument, it being settled law in Australia that privilege had never been seen as subject to an exception depriving a solicitor of the benefit of privilege in relation to proceedings in which he is sued by a client.

[184] [1995] H.C.A. 39; (1995) 185 C.L.R. 83 at 98, [21].

[185] [1995] H.C.A. 39; (1995) 185 C.L.R. 83 at 98, [21] and [22].

advanced on behalf of his client in *Single Buoy Moorings Inc v Aspen Insurance UK Ltd*.[31] Here, the claimant insured settled a dispute with an entity Talisman over the construction of an oilrig. The construction was allegedly defective in certain respects, which resulted in it being left exposed for two winters in the North Sea, where further damage resulted. The insured sought indemnity from its insurers, all of whom settled save for one insurer, which maintained that in reality the cause of loss was the claimant's decision to bring the contract to an end and to decommission the rig for commercial reasons connected with delays in, and the unexpected expense of, the construction project. The defendant insurer sought disclosure of documents concerning the circumstances in which the contract was ended and the rig decommissioned. Amongst the documents sought were various documents generated by the claimant in connection with its prior proceedings against Talisman, now settled, which had been disclosed to the insurers without any accompanying claim to privilege. The insurers applied under CPR r.31.20 for permission to use them, while the claimant made a belated claim to privilege over certain sections of the documents.

9-031 Teare J. held against the claimant having regard to the unsatisfactory evidence it advanced to support its claim. As to this, in his evidence, their solicitor referred to "the wide-ranging disputes between SBM and Talisman", and noted that:

> "beyond the formal arbitrations, there was an ongoing dispute, liable to crystallise into proceedings, that went to the heart of the contractual relationship between the parties and threatened the continuation of the Project as a whole".

In relation to certain documents, the solicitor asserted that they evidenced internal analysis of the legal options and strategies being considered in the context of the arbitral proceedings and the wider dispute which he had already described. On that basis he claimed they were subject to (at least) litigation privilege. Teare J. noted that the claim to litigation privilege for one document was short and concise, that no assertion was made that the dominant purpose of the redacted pages was for use in the actual or anticipated proceedings or in settling the actual and anticipated disputes, and that no particulars were given of the "legal options and strategies being considered". Having then read the document, he noted that there was no reference in it to "legal options and strategies", and that the court was left to speculate what was meant by this. He concluded:

> "In the result it is difficult for the court to conclude on an objective basis that [the pages to be redacted] are the subject of litigation privilege. On an objective basis the purpose of all the options appears to have been to consider how costs could be reduced. That is not a purpose which would attract litigation privilege. If that was one purpose and 'an analysis of legal options and strategies' was another that would also not be enough to make [those pages] subject to litigation privilege unless the latter analysis was the dominant

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the witness had said, though the betrayal of further lines of inquiry would not in itself have been sufficient in any event. As in *In re RBS Rights Issue Litigation*, the evidence relied on by ENRC fails to show anything substantial of its legal team's analysis of the documents, and fails to give examples of the sort of legal input into the document that would justify a claim to privilege. The evidence consists of no more than conclusory statements that fell well short of what would suffice to make out a claim for working papers privilege." The Court of Appeal in *ENRC* did not address this part of Andrews J.'s ruling, holding that "...it would be better if it were considered in the context of the Supreme Court's future consideration of legal advice privilege" (*Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd* [2018] EWCA Civ 2006; [2019] 1 W.L.R. 791 at [142]).

31 [2018] EWHC 1763 (Comm).

> purpose...There is no evidence from [the solicitor] that that was the dominant purpose. It may be that the reason why there is no such evidence is that [the solicitor's] evidence is that the only purpose of [those pages] was to analyse legal options and strategies. But if so, such evidence would sit unhappily with the language of the document itself which suggests that the aim of the document was to consider options to mitigate costs."[32]

9-032 In rare cases, a failure to advance an adequate claim to privilege can have potential sanctions consequences, the most striking recent example of which is *JSC BTA Bank v Shalabayev*.[33] The background to this was a search and seizure order that resulted in the production of 14 boxes of documents that appeared to belong to clients of a solicitors firm, C. An initial review of the files by leading counsel for the supervising solicitors identified about 800 documents that were potentially privileged. In late July, an order was made that the defendants by 31 August put forward their claims to privilege over each of these documents and to "provide sufficient particularity of the claim to privilege so as to enable the Bank to decide whether to challenge such claim". The defendants failed to comply with this order, so an unless order was made in September that sought to debar the defendants from claiming privilege over such documents for which no claim to privilege had been advanced by 20 September.[34] The defendants then advanced claims to privilege over 2,000 documents but in such general terms that Henderson J. held that the unless order had not been complied with. In the meantime, the bank's criticisms of the claims to privilege had caused the defendants to revisit their claims and ultimately reduce the number down to 221 documents; additionally, the defendants continued to advance grounds for privilege that continued to be attacked by the bank as vague.

9-033 Henderson J., having held that the unless order had not been complied with, ordered a further hearing to enable the defendants to argue for relief against sanctions for their breach. Henderson J. said:

> "I have recounted the long and tortuous process which has finally led to the production of the 221 Schedule. It is a process which in my judgment reflects little credit on [C], and it is hard to avoid the conclusion that an insufficiently rigorous and professional approach was adopted to at least the initial phases of the review. ...the standard set by the July Order was, deliberately, not a very high one. The July Order did not envisage or require that the claims to privilege advanced should be definitive, or the last word on the subject by the defendants, but only that they should be sufficiently particularised to enable the Bank to decide whether or not to challenge them. ...Viewed in this light, it seems to me that the 221 Schedule, although it still suffers from some serious defects, nevertheless contains enough detail (when read in conjunction with [the solicitor's] evidence) to satisfy the relatively unexacting standard laid down by the July Order. ...I think I must therefore assume, in the absence of compelling evidence to the contrary, that the basic

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32 [2018] EWHC 1763 (Comm) at [28] and [29]. In reaching this conclusion, Teare J. gave the claim to litigation privilege "anxious scrutiny"; he kept in mind that a witness statement claiming privilege is normally conclusive and he noted that the solicitor was a most experienced solicitor. But the conclusion which he reached, bearing in mind (a) the objective indications that the pages to be redacted, like the rest of the document, were concerned with reducing costs, (b) the shortness of the explanation for claiming privilege, and (c) the absence of any assertion as to what the dominant purpose was, that something must have gone wrong with the claim to litigation privilege in this case.

33 [2011] EWHC 2915 (Ch).

34 "Unless the Fourteenth and Eighteenth Defendants comply with paragraphs 2(a) and (b) of the Order of Mr Justice Henderson dated July 25, 2011 ('the July Order') by 4 pm on September 20, 2011 they shall be debarred from claiming privilege over all those documents contained in the Boxes (as defined in the July Order) in respect of which there has been no claim to privilege in accordance with the July Order by that date."

requirements of legal advice privilege and litigation privilege were well understood by those who prepared the 221 Schedule, and that where (for example) the explanation given in the right-hand column for a claim to litigation privilege says that the document in question was prepared in contemplation of litigation or in connection with ongoing litigation, it should be understood that the 'sole or dominant purpose' test is thereby alleged to be satisfied. ...I think I must also assume that, where no date is given for a document on the 221 Schedule, or where no details are given of the parties to it or the sender or recipient, the reason is not that these particulars are being deliberately withheld, but simply that they cannot be discovered from the document itself and [C] are at present unable to supply them from any other source. ...Despite its prolonged and unhappy gestation, I think that the 221 Schedule does now satisfy the test, albeit by a fairly narrow margin."[35]

9-034 **Whose evidence?** An issue that occasionally crops up concerns who should advance the evidence needed to prove a claim to privilege. The English courts have avoided setting any hard and fast rules. The best that can be said is that there is a preference for evidence to be given by those—usually non-lawyers and representatives of the client asserting the privilege—who have direct knowledge of contemporary events relevant to the claim of privilege, whereas it is frequently the case that such evidence is provided by solicitors after the event and that such evidence is ultimately accepted by the courts.

9-035 One decision in which such issues arose is *Westminster International BV v Dornoch Ltd*[36] (discussed in Ch.3), where Etherton L.J. noted the appellants' criticism that the judge appealed from could not properly have reached the conclusion that the test for litigation privilege had been met because this concerned the state of mind of the person procuring the documents for which the privilege was asserted. In this case, that person was a lead underwriter who did not give any evidence. Instead, his solicitor did, but even then he did not state the source of his belief in his witness statement as to the purpose behind the generation of certain documents. The claimants thus submitted that the judge could not properly uphold the defendants' claim to privilege in the absence of any direct evidence from the underwriter and any explanation from the solicitor as to the basis on which he could speak as to his client's state of mind. Cooke J. at first instance had said:

"Where litigation privilege is being claimed, it seems to me that the person who is responsible ultimately for the creation of the document, and whose motivation and state of mind is in issue, is the person who ought to be making the statement in question. At the very least, if it is to be someone else, that person should in the statement give the source of the information as to the purpose, to which the statement refers, so that it is plain who it is that is being referred to and who it is that is said to have had the dominant, dual or single wider purpose in question."

9-036 Even so, the claim to privilege was upheld, notwithstanding further criticism in the Court of Appeal. Thus, in answer to the defendants' contention that it was obvious that what was contained in the solicitor's witness statement was on the instructions of the underwriters and therefore reflected their motivation and state of mind, Etherton L.J. said:

"I do not accept that this is a satisfactory answer to the just criticism of the judge. On the

[35] [2011] EWHC 2915 at [27]–[29]. Henderson J. went on to consider by reference to the factors set out in CPR r.3.9 whether it was appropriate to grant relief from the sanction imposed by the unless order, which in the event he did.

[36] [2009] EWCA Civ 1323.

other hand, I see no reason why the judge was bound to reject out of hand the defendants' claim to litigation privilege in the absence of a witness statement by [the underwriter] or a statement by [the solicitor] that [the underwriter] was the source of [the solicitor's] belief in...his witness statement. In a case such as this, it will be more difficult, and may be impossible, for insurers to satisfy the requirements for litigation privilege in the absence of direct evidence of the relevant representative of insurers as to his or her state of mind. Equally, of course, if such evidence is adduced it is not automatically conclusive. Each case must be considered in the light of the evidence as a whole. This was the exercise carried out by the judge."[37]

9-037 In the event, the defendants' evidence was accepted, but the decision provides a salutary warning especially given the Court of Appeal's concluding words:

"In the present case it is reasonable to assume that the evidence of [the solicitor], an officer of the court, including his statement of belief in...his witness statement, was based on what he had heard and read as a result of the retainer of his firm, and his own involvement, since 27 March 2007. That is of some evidential value. Whether or not it was correct has to be considered in the light of the other relevant and admissible evidence."[38]

9-038 One decision where the court rejected a solicitor's evidence is *Starbev GP Ltd v Interbrew Central European Holding BV*, where Hamblen J. described the defendant's solicitor's attempt to provide corroborating evidence as "second hand evidence", as he was not instructed or involved at the material time.[39] [40] But if this raises a concern that a solicitor's evidence in which he/she seeks to recreate the relevant background for the court is unlikely to carry little weight, then the *ENRC* litigation, discussed in detail in Chs 2 and 3, demonstrates otherwise, as well as some difference in approach as between the High Court and the Court of Appeal.

[37] [2009] EWCA Civ 1323 at [22].

[38] [2009] EWCA Civ 1323 at [23].

[39] [2013] EWHC 4038 (Comm) at [40]. As for the suggestion that he should inspect the disputed document, Hamblen J. added: "However, as the authorities make clear, that is a matter of last resort. It is generally undesirable for the Court to consider material which is not to be shown to one of the parties and I am not persuaded that it would be appropriate for me to do so in this case. If ICEH has a good claim for litigation privilege, it should have been able to make it good without reference to privileged material."

[40] Australian courts tend to prefer evidence from the client. Thus, *In the matter of Southland Coal Pty Ltd (rec and mgrs apptd) (in liquidation)* [2006] NSWSC 899, where Austin J. said at [28]: "In my opinion, evidence by a lawyer on information and belief about his or her client's motivation in causing a communication to occur, if allowed, will not of itself be sufficient to establish that the dominant purpose of the communication attracts legal advice or litigation privilege. But the lawyer may be in a position to give admissible evidence about the circumstances surrounding the communication, which will suffice, perhaps together with inferences from the document itself, to establish the privilege. Further, the purpose of a communication between a client and a lawyer can in some circumstances be inferred from the purpose of the lawyer's retainer (*General Manager, WorkCover Authority of NSW v Law Society of NSW* [2006] NSWCA 84 at [85] and [88] per McColl J.A., quoting from *The Sagheera* [1997] 1 Lloyd's Rep. 160 at 168, per Rix J.); *DSE (Holdings) Pty Ltd v InterTAN Inc* [2003] FCA 1191; (2003) 135 F.C.R. 151 at [52] and [58], per Allsop J.)." In *Asahi Holdings (Australia) Pty Limited v Pacific Equity Partners Pty Limited (No.4)* [2014] FCA 796, Beach J. was critical of the fact that the main deponent advancing the claim for privilege was a solicitor acting in the litigation, but not one whose firm had acted on the original transaction the subject of the litigation. The deponent was criticised for having no direct knowledge of the purpose for the creation of the various communications. He was at best several steps removed from the authors of the communications. As a result he could not speak directly to the direct knowledge of the client in relation to the purpose of the relevant communications. Nor could he directly speak to the direct knowledge of any of the third party advisors in relation to the purpose of the communications to which they were party.

While the lessons to be learned from this litigation are highly fact specific, it is worth looking at them in a little detail.

9-039 At first instance in *Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd*,[41] Andrews J. accepted that ENRC had been unable to call evidence from its officers because the group of individuals within ENRC responsible for directing the various investigations in which the claims to privilege arose had changed over time, with most of its directors or senior employees having left ENRC's employ or refusing to speak to ENRC's present solicitors.[42] Andrews J. was sympathetic to these difficulties. She also noted some senior officers had only taken up their appointments after the latest date from which, on ENRC's case, it contemplated adversarial litigation, and so considered their evidence of less value (but not wholly irrelevant) than the evidence of those who could speak to the prior events leading up to the instruction of the lawyers and forensic accountants. In consequence of these difficulties, ENRC's evidence was inevitably advanced in witness statements made principally by its solicitor, S. Andrews J. made a number of interesting comments and criticisms about S's evidence, few of which had any influence when the matter went to the Court of Appeal. First, she commented:

> "I accept that [S] has reflected in his evidence what he was told by others, though he has obviously put what they told him in his own words. Whilst the absence of direct witness evidence is regrettable, and I am not persuaded that the reluctance of those witnesses to provide it…was necessarily justified, I do have a degree of sympathy with the position in which ENRC has found itself. Even if that evidence had been given by the witnesses themselves instead of via [S], the court would still be faced with evaluating its quality and reliability in the light of all the other evidence, bearing in mind such matters as the effects of the passage of time on memories; hindsight; wishful thinking; and a natural tendency on the part of even the most honest witness to put a subconscious gloss on their version of history that supports the position they are now adopting."[43]

9-040 Next, the judge noted that, in any case:

> "The best evidence of what ENRC's senior management foresaw at the time and what impelled them to instruct lawyers and forensic accountants was always going to be the contemporaneous documents, against which their recollections could be tested. [S] has stated…that he and his colleagues reviewed 'tens of thousands of documents…'. Despite this, I have not been taken by [Counsel] to any record of discussions either at Board level or within any group within ENRC which was responsible for giving instructions to the lawyers and forensic accountants, which might have shed light on what ENRC contemplated, and why, in the key period up to and including 19 August 2011. Most of the relevant contemporaneous documents in respect of that crucial period that have been adduced in evidence are internal e-mails, and a handful of newspaper reports."[44]

9-041 Having declined to allow ENRC to file further evidence that might have corrected some of these deficiencies, and noting that she had no choice but to decide

[41] [2017] EWHC 1017 (QB) [2017] 1 W.L.R. 4205. Note that Hildyard J. expressed no concern in *Re RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch); [2017] 1 W.L.R. 1991 with the fact that RBS's primary evidence was given by its current solicitor.

[42] The judge also noted ([2017] EWHC 1017 (QB); [2017] 1 W.L.R. 4205 at [46]) that ENRC had also been unable to adduce any evidence from its former solicitors with whom they had fallen out, there being "no love lost between them".

[43] [2017] EWHC 1017 (QB); [2017] 1 W.L.R. 4205 at [44].

[44] [2017] EWHC 1017 (QB); [2017] 1 W.L.R. 4205 at [45].

the claims to privilege on the basis of the evidence before her, in relation to which she could draw reasonable inferences, but not supply evidence to make up any deficiencies in the evidence that had been adduced, it was clear that she found S's evidence less than compelling. In particular, Andrews J. noted:

> "[S's] evidence about the contemplation of criminal proceedings amounts to little more than generalised assertions with no substantive evidence to back them up, and that is not good enough. The totality of the evidence establishes that criminal proceedings were not in the reasonable contemplation of ENRC at any material time, and for the avoidance of doubt that includes the whole period of dialogue between ENRC and the SFO."[45]

9-042 When the matter came before the Court of Appeal,[46] the impact of S's evidence was rather different. The Court noted that:

1. ENRC's main challenge to the judge's conclusion was that she placed too little weight on the evidence of S;
2. Andrews J. did not see ENRC's witnesses (including S) being cross examined (such that the Court of Appeal was in as good a position as Andrews J. to evaluate the facts[47]);
3. the whole sub-text of the relationship between ENRC and the SFO was the possibility, if not the likelihood, of prosecution if the self-reporting process did not result in a civil settlement, a sub-text supported by S's evidence, which, whilst hearsay, was not suggested as being untruthful[48];
4. S's statement that senior executives had told him that ENRC's lawyers had advised that criminal proceedings could be reasonably said to be in contemplation was supported by contemporaneous documents; and that that view, according to S, had reflected their understanding of the effect of the oft-repeated advice of their lawyers, which it was not open to the judge to disregard[49];
5. the judge's conclusion that the dominant purpose of the review was compliance and remediation (which itself might have been intended to avoid or deal with litigation) sat uncomfortably with that background, and was also in stark contrast to ENRC's evidence including that from S.

9-043 As discussed in the earlier chapters, the thrust of this evidence was a major factor in the Court of Appeal's decisive overturning of the first instance ruling. It is difficult to suggest clear lessons from its ruling, save that in the absence of cogent challenge, for example via cross examination (even assuming this is available—see further below), even a solicitor's hearsay evidence can have a direct and positive impact on the court's determination that a claim to privilege is successfully made.[50]

[45] [2017] EWHC 1017 (QB); [2017] 1 W.L.R. 4205 at [163].

[46] *Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd* [2018] EWCA Civ 2006.

[47] [2018] EWCA Civ 2006 at [88], relying on *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2002] EWCA Civ 1642 per Clarke L.J. at [14]–[16], and *Datec Electronic Holdings Ltd v UPS Ltd* [2007] UKHL 23 per Lord Mance at [45]–[50].

[48] [2018] EWCA Civ 2006 at [93] and [111].

[49] [2018] EWCA Civ 2006 at [93].

[50] It is also worthy of note in this case how much impact an early advice from ENRC's solicitors had on the court's ruling. At a very early stage of the underlying investigation, they had advised ENRC that an internal investigation related to conduct that was potentially criminal in nature, such that adversarial proceedings might occur and both criminal and civil proceedings could be reasonably

2. CHALLENGING PRIVILEGE

9-044 In many of the decisions just considered, the focus on the detail of the claims to privilege arose because claims to privilege were challenged and tested in contested interlocutory hearings. Section 2 examines the basis on which such challenges arise and the powers available to the courts to resolve them.

9-045 There is a short history to mention here as some of the decisions stem from the 19th century. Following the Court of Appeal decisions in *Taylor v Batten*,[51] *Jones v Montevideo Gas Co*[52] and *Bewicke v Graham*,[53] disputes over the adequacy of claims to privilege became increasingly uncommon as, together, these decisions both established the near conclusiveness of an affidavit verifying the basis of the claim to privilege[54] where the claim was good on its face, and endorsed the practice of the party resisting disclosure giving a generalised description of the documents concerned. As a result, challenges to claims for privilege, based upon the adequacy of the claim, rather than the legal scope of the privilege, became increasingly more difficult to sustain unless it was apparent—whether from the list of documents or verifying affidavit, or the documents they referred to, or from an admission in the pleadings of the party from whom disclosure was sought—that the claim to privilege was insufficiently made out.[55]

9-046 In consequence, the court would normally accept a claim to privilege on oath at face value, would rarely exercise its power to inspect documents to check that claim and would discourage an opposing party from challenging a claim to privilege by the use of a contentious affidavit of his own. This is notwithstanding that under the former RSC, and subsequently the CPR, provision was made for a party to challenge a claim to privilege.[56] So, CPR r.31.19(5) entitled a party to apply to the court to decide whether a claim to withhold inspection made under CPR r.31.19(3) should be upheld. CPR r.31.19(6) then provided:

> "For the purpose of deciding an application under…paragraph (3) (claim to withhold inspection) the court may—
>
> (a) require the person seeking to withhold disclosure or inspection of a document to produce that document to the court; and

said to be in contemplation. The Court of Appeal noted ([2018] EWCA Civ 2006 at [95]): "We accept also that [this] view was not conclusive, and [the solicitors] may have wanted to create a situation where legal professional privilege covered what [they were] doing, but that again does not mean that a criminal prosecution was not actually in contemplation." And again, at ibid [111], it noted: "We have already observed…that…the solicitors advised ENRC that 'both criminal and civil proceedings can be reasonably said to be in contemplation' so that documents arising out of the investigation were covered by litigation privilege…[S's] evidence, which as we have said has never been suggested to be untruthful, is that ENRC took that advice on board."

51 (1878) 4 Q.B.D. 85.

52 (1880) 5 Q.B.D. 556.

53 (1881) 7 Q.B.D. 400. As to this case, see the Law Reform Committee's 16th Report "Privilege in Civil Proceedings", Cmnd 3472, para.28.

54 Under the former RSC, a party serving a list of documents could be required to verify his list on oath: see the former RSC O.24.2(7) and 3.

55 Thus, leading counsel for Mrs Waugh in *Waugh v British Railways Board* [1980] A.C. 521 at 539 (discussed in Ch.3) accepted he could not challenge the assertion made on oath on behalf of the Board that litigation was anticipated when the report in issue in that case was prepared.

56 For a decision under the RSC, see *Fayed v Lonhro Plc*, *The Times*, 24 June 1993. See also Hoffmann L.J. in *GE Capital Corporate Finance Group v Bankers Trust Co* [1995] 1 W.L.R. 172 at 175, a passage that was cited in a post-CPR decision, *Paddick v Associated Newspapers Ltd* [2003] EWCH 2991 (QB) at [15].

> (b) invite any person, whether or not a party, to make representations.[57]"

CPR r.31.19(7) then provided that an application under paragraph (5) "must be supported by evidence".

9-047 Despite these provisions, recent case law continues to show an unwillingness by the courts to exercise its power of inspection, save in rare cases. This may well change, however, as a result of the pilot disclosure scheme outlined above where the Practice Direction at para.14 now provides:

> **"14.2** A party who wishes to challenge the exercise of a right or duty to withhold disclosure or production must apply to the court by application notice supported where necessary by a witness statement.
>
> **14.3** The court may inspect the document or samples of the class of documents if that is necessary to determine whether the claimed right or duty exists or the scope of that right or duty."

9-048 Before examining the potential impact of this provision, the most modern and comprehensive analysis of the law in this area was contained in Beatson J.'s judgment in *West London Pipeline and Storage Ltd v Total UK Ltd*,[58] (albeit the decision was slightly refined by the Court of Appeal in 2018, as will be discussed below). Although *West London Pipeline* was decided by reference to the provisions of the CPR mentioned above, it is suggested that it is likely still to influence how such matters are now addressed under the pilot scheme, albeit one senses that under the pilot judges will be encouraged to exercise more frequently their powers of inspection. In *West London Pipeline*, Beatson J. examined whether a court can go behind an affidavit sworn by a person claiming litigation privilege, and, if so, in what circumstances and by what means. The facts of this case are discussed below, but what is interesting is Beatson J.'s categorisation of the court's four possible responses when minded to go behind an affidavit (or now a witness statement). These four options are as follows:

(1) The court may conclude that the evidence in the affidavit does not establish that which it seeks to establish, i.e. that the person claiming privilege has not discharged the burden that lies on him to do so, and so orders disclosure or inspection.
(2) It may order a further affidavit to be made to deal with matters the earlier affidavit did not cover or on which it is unsatisfactory. Beatson J. said that this response was seen in cases of inadequate affidavits disclosing assets in response to freezing orders, but also in the case of an affidavit as to disclosure or inspection.
(3) The court may inspect the disputed documents.
(4) The court may order cross-examination of the deponent.[59]

These options provide a convenient starting point for the detailed analysis that now follows.[60]

57 The procedure set out in this rule also applies to claims to public interest immunity, hence no doubt the reference to inviting persons not party to the proceedings to make representations.

58 [2008] EWHC 1729 (Comm); [2008] 2 C.L.C. 258.

59 See Beatson J. at [2008] EWHC 1729 (Comm); [2008] 2 C.L.C. 258 at 284–285, [74] and [86(4)].

60 There is an extreme, fifth option, which is to debar the beneficiary of the privilege from asserting it: *JSC BTA Bank v Shalabayev* [2011] EWHC 2915 (Ch), discussed above. But as Henderson J.

9-049 **Rejecting the claim to privilege/going behind an affidavit** As noted, if the claim to privilege does not establish that which it seeks to establish, then its adequacy is likely to be challenged. Some relevant decisions in this regard were considered in Section 1 of this Chapter. Additional decisions include *Gardner v Irvin*,[61] where a challenge to privilege was entertained because the affidavit stated merely that certain documents "are privileged", a claim which was highly dubious having regard to the fact that the documents concerned were described merely as "correspondence between ourselves and our solicitors; correspondence between our solicitors and their agents; cash books, ledgers and accounts". Cotton L.J. held:

> "How can it be said that this affidavit is sufficient; in the body of the affidavit the defendants simply say 'that the same are privileged', and in the schedule they set out the documents, some of which clearly are not privileged. They ought to say not only that the documents are privileged, which is a statement of law, but they ought to set out the facts from which we can see that the defendants' view of the law is right. Cash books and ledgers prima facie are not privileged."[62]

9-050 In *Standrin v Yenton Minster Homes*,[63] the Court of Appeal refused to accept the conclusiveness of a deponent's assertion that certain documents were privileged from production on the grounds of the "without prejudice" privilege. Here, the claim to privilege was bad on its face since it was made in respect of documents which post-dated the successful conclusion of the without prejudice negotiations of which it was wrongly asserted they formed part.

9-051 On the other side of the coin, in *Derby & Co Ltd v Weldon (No.7)*,[64] Vinelott J. was prepared to accept assurances given by solicitors in correspondence as to the validity of the claim to privilege (despite challenges to the "pleonastic" formulae by which the claim to privilege was made).

9-052 In *Neilson v Laugharne*,[65] the Court of Appeal refused to accept the assertion on oath by a "common law clerk" that the dominant purpose for which the police took statements in connection with an investigation under s.49 Police Act 1964 was in respect of threatened litigation. This refusal was based on a consideration of the contemporary correspondence and the direct evidence of the person responsible for

noted in that case at [29]: "I find it hard, if not impossible, to envisage any circumstances where legal professional privilege could properly be directly overridden by an order of the court made in exercise of its case management powers: compare *R (Kelly) v Warley Magistrates' Court* [2007] EWHC 1836 (Admin); [2008] 1 WLR 2001. Since, however, privilege has to be claimed, and since the onus is on the person claiming it to make good the claim, the possibility clearly exists that, without waiving privilege, a person may nevertheless indirectly forfeit the right to claim it (if, for example, having been given every opportunity to do so within a reasonable period, he fails to do so). Similarly, a potentially valid claim may fail because it is not made with sufficient particularity, or because the evidence to support it is for some reason not available. Nevertheless, the court should in my view be very wary of allowing a potentially valid claim to privilege, however late it is made, to be indirectly overridden by exercise of a case management power. Otherwise there is a danger of a litigant's substantive right to legal privilege being forced to yield, indirectly, to just the kind of balancing exercise that the highest authority says is impermissible. Such an approach was in my judgment appropriately reflected in the wording of the Unless Order itself, and the same approach should in my view guide the court in deciding whether to grant relief for the privilege claims now belatedly made in the 221 Schedule."

61 (1878) 4 Ex D 49.

62 (1878) 4 Ex D 49.at 53.

63 (1991) *The Times*, 22 July 1991.

64 [1990] 1 W.L.R. 1156.

65 [1981] 1 Q.B. 736. See also *Lask v Gloucester Health Authority*, 6 December 1985, discussed below.

instituting the investigation.[66] *Re Highgrade Traders*[67] was also concerned with the adequacy of the evidence that had been sworn in support of a claim to litigation privilege. For the appellant, it was argued that in the light of the uncontradicted affidavit evidence it was not open to the judge at first instance to conclude that the dominant purpose for which the reports which featured in that decision had been obtained was to use them to obtain advice in relation to litigation then reasonably in prospect. In response, it was argued that the court could "go behind" the affidavit evidence in the same way as the court had done in *Neilson v Laugharne*. Oliver L.J. agreed, noting that if there is something in the circumstances of the case which shows that the affidavit evidence is wrong, then the court is entitled to do that. Furthermore, he did not feel able:

> "...to subscribe to the view that the court is necessarily bound to accept a bare assertion as to the dominant motive of a deponent, unaccompanied by some explanation of the circumstances, at any rate in a case where more than one motive is possible."[68] [69]

9-053 In *Lask v Gloucester Health Authority*,[70] the Court of Appeal went behind affidavits sworn by the defendant's solicitor and one of its administrators concerning an accident report prepared on a report form which the defendant asserted was prepared for submission to solicitors in the event of a claim and so was subject to litigation privilege. The administrator's affidavit stated that the only reason for requiring accident report forms to be completed was to enable them to be given to solicitors in the event of a claim; the solicitor's affidavit stated that he had approved a standard form for use in accident cases in the 1950s, the form in that case was virtually identical to the standard form, and privilege had always been maintained for such forms. The Court also considered an in-force 1955 National Health Service Circular exhibited by the solicitor which stated:

> "from time to time accidents or other untoward occurrences arise at hospitals which may give rise to complaints followed by claims for compensation or legal proceedings, and which may also call for immediate enquiry and action to prevent a repetition."

In contrast, the report form stated that the report was prepared for the use of solicitors in the event of a complaint or legal proceedings and it was to be submitted to the head of department, who should forward it to the unit administrator for onward transmission to the sector and district administrators. Noting that the circular differed from the report form because the former stated in terms that the report had a double function (namely to assist in dealing with claims, and to consider whether action was necessary to prevent a repetition), O'Connor L.J. concluded that it was plain from the circular that the report was prepared for a dual purpose, and from the form itself because there was no legal professional purpose in submitting the form to the head of department and the other administrators before sending it to the person who was to hold it for submission to the solicitor unless there was a second purpose as envisaged in the circular. Accordingly, the deponents'

66 Per Oliver L.J. [1981] 1 Q.B. 736 at 750. See also Lord Denning MR, [1981] 1 Q.B. 736 at 745.

67 [1984] B.C.L.C. 151. The decision is discussed in detail in Ch.3.

68 In the event, in the *Highgrade* case, there was no need to do so because the challenge to the appellant's evidence came at a very late stage and in fact the Court of Appeal allowed further evidence to be introduced. Compare the Court of Appeal's approach in *Westminster Airways Ltd v Kuwait Oil Co Ltd* [1951] 1 K.B. 134, discussed in the text next.

69 [1984] B.C.L.C. 151 at 166.

70 6 December 1985.

by Beatson J. in the *West London Pipeline and Storage Ltd* case) of ordering inspection of the document (by the chief master or another judge). In the circumstances, I do not consider that fairness requires this, nor that it would be proportionate and appropriate. The matter has been argued out; RBS has been prompted by close questioning in the correspondence and had every opportunity to advance its case; and implicit in its general submissions is that it has carefully considered the position and what is required to substantiate it at the highest legal level."[79]

9-058 Similarly, Andrews J. in *Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd*, noted:

"In *West London Pipeline* Beatson J referred to the options open to the court (other than concluding that the claim to privilege fails) where it is not satisfied on the basis of the evidence before it that the claim to privilege has been made out. These include ordering a further affidavit to deal with matters which the earlier affidavit does not cover, or on which it is unsatisfactory; ordering cross-examination of the deponent; or (as a last resort) inspecting the 'privileged' documents itself. Beatson J indicated that inspection should not be undertaken unless either there is credible evidence that those claiming privilege have either misunderstood their duty or are not to be trusted with the decision-making, or there is no reasonably practical alternative. At one point [counsel] floated the possibility that, if the court were to conclude that the evidence fell short of establishing the claim to privilege, it might take the first of these options, but I was not satisfied that an order of the court for the provision of further evidence would make any difference to the attitude of the prospective witnesses over whom ENRC has no powers of compulsion. At an earlier stage of these proceedings I invited the parties to consider whether they wished me to give directions for the claim to continue as a Part 7 claim, which might have enabled witness summonses to be issued; but neither party was attracted by that course. There is nothing that could be gained by cross-examining [the witnesses] and [counsel] on behalf of the SFO did not seek to do so. Nor do I consider that looking at the Disputed Documents themselves (apart from those that I was specifically invited to read by counsel) would shed any further light on the purposes for which they came into existence."[80]

9-059 Where the court does allow further evidence to be adduced, it will require greater specificity around the claims to privilege, including details of the parties between whom the privilege correspondence is said to have passed—this is in contrast to the position in relation to the practice of claiming privilege by class of documents when disclosure is first given. In *Astex Therapeutics Ltd v Astrazeneca AB*[81] the evidence in support of a claim to litigation privilege was "not plentiful", such that Chief Master Marsh was unable to accept on the evidence before him an assertion that the party concerned had contemplated a dispute or potential litigation by a certain date. However, this was an exceptional case in which further evidence about the claim to privilege was essential, albeit such further evidence about the scope of its claim to privilege, as expanded and explained, had to be given by a proper officer of the company, not by its solicitors. The Chief Master said:

"I therefore propose to make an order, the detail of which is to be agreed between the parties, or subject to further submissions. A witness statement must be made by a proper officer of AZ which supports and explains in more detail the claim to privilege. The witness statement should include the following elements: i) A list of the documents over which privilege is now claimed, taking account of the limited nature of legal advice privilege, and the date when each document was created. In the unlikely event that the description of a document or its date is said to reveal privileged information, in the first instance such a document may be described in general terms or included within a class of similar documents. ii) Each employee and ex-employee must be identified and date or dates of interviews specified. iii) Each document listed must be marked showing whether legal advice privilege, litigation privilege or both is claimed. iv) Further evidence about how the claim to litigation privilege arises and when it is said to arise."[82]

[79] [2016] EWHC 3161 (Ch); [2017] 1 W.L.R. 1991.
[80] [2017] EWHC 1017 (QB); [2017] 1 W.L.R. 4205 at [48]. Of course, Andrews J.'s decision was comprehensively overturned generally by the Court of Appeal, as discussed above.
[81] [2016] EWHC 2759 (Ch).

Inspection by the court Just as disputes in the 19th century over the sufficiency of the claim to privilege were common, so the courts were more willing to inspect the underlying documents in order to reach the right result, at least where the claim to privilege was not convincingly made out. As to this, Sir George Jessel MR referred in 1876 in *Bustros v White* to the then prevailing chambers practice: **9-060**

"...in cases where affidavits have been produced to the judge which appeared to be defective; and where at the desire of both parties, and with a view of avoiding...delay and expense...the judge has taken upon himself the trouble and responsibility of looking into the documents and deciding whether they ought to be produced."[83]

The practice at this time was voluntary, there being no rules of court that provided for a power of inspection. Even when inspection rules were introduced shortly afterwards, the courts did not avail themselves of the opportunity to inspect very often. Although one can point to occasional examples of inspection, such as *Williams v Quebrada Railway Land & Copper Co*[84]; and *Ainsworth v Wilding*,[85] in 1951 the Court of Appeal in *Westminster Airways v Kuwait Oil Co*[86] made it clear that where the claim to privilege is formally correct, then inspection was to be discouraged. As it was put by Jenkins L.J. in the *Westminster Airways* case: **9-061**

"The question whether the court should inspect the documents is one which is a matter for the discretion of the court, and primarily for the judge of first instance. Each case must depend on its own circumstances; but if, looking at the affidavit, the court finds that the claim to privilege is formally correct, and that the documents in respect of which it is made are sufficiently identified and are such that, prima facie, the claim to privilege would appear to be properly made in respect of them...the court should, generally speaking, accept the affidavit as sufficiently justifying the claim without going further and inspecting the documents."[87]

In the *Westminster Airways* case the defendant, which was sued when its truck ran into and damaged an aeroplane owned by the plaintiff, wrote to its insurers about the matter and claimed privilege for this correspondence. The court was clear that this was an obvious case in which a claim could be anticipated following the accident and that the privilege was properly claimed in respect of documents coming into existence at a date considerably after the date of the accident. As Jenkins L.J. noted, the appellant did not argue that the privilege was "wholly bad on the face **9-062**

[82] [2016] EWHC 2759 (Ch) at [55].
[83] 1 Q.B.D. 423 at 427.
[84] [1895] 2 Ch. 751.
[85] [1900] 2 Ch. 315.
[86] [1951] 1 K.B. 134.
[87] [1951] 1 K.B. 134 at 146.

claim in relation to these documents, albeit it did not seek to intervene in the proceedings.

10-043 Hitherto, there had been no reported case in which a party subject to an investigation by the FSA/FCA (nor indeed any other regulator) which resulted in the issue of a decision or final notice had sought to invoke the without prejudice privilege, even though, the author would suggest, the practice has been widespread in the UK. Birss J. found it necessary to undertake a full analysis of the privilege's availability in such circumstances.[60] Accordingly, in order to decide the issue, he undertook a full examination of the FCA's enforcement process and its use of the "without prejudice" tag. Space considerations do not allow a summary of his very detailed analysis.[61] It suffices to say here that while the FSA's Decision Procedure and Penalties Manual (DEPP) and the FCA Enforcement Guide do not mention the words "without prejudice", the *Enforcement Guide* at para.5.9 provided that the FCA would expect to hold any settlement discussions on the basis that neither FCA staff nor the person concerned would seek to rely against the other on any admissions or statements made if the matter was considered subsequently by the FCA's Regulatory Decisions Committee ("RDC") or the Upper Tribunal. Further, the FCA's evidence (given by letter) at the *PAG* hearing was that it marked communications that way and accepted communications marked that way from a regulated entity. In addition, the expectation of both parties was that the basis of settlement discussions was such that admissions would not be used later by the RDC or before the Tribunal and that therefore the FCA purported to conduct a form of without prejudice settlement discussion with subject firms: indeed, the FCA considered that its ability to conduct settlement negotiations on a without prejudice basis was vitally important to the success of any settlement discussions and it was concerned that firms might choose not to enter into settlement discussions with them if they thought that there was a risk that admissions made in such discussions could be disclosed or inspected in separate proceedings.

10-044 Birss J. broadly agreed with the FCA's position and rejected PAG's submissions inter alia that an early agreement was not a true negotiated compromise, and that the underlying public policy rationale was inapplicable in this context. Ruling in favour of the bank, he accepted:

> "… the FCA's submission that the public policy justification for facilitating settlement is a powerful one. As the FCA's [evidence] explained, a beneficial effect of an early final notice arrived at following settlement is in notifying consumers of the possibility of a civil claim, perhaps before any limitation period might have expired. …The implied contract basis for a form of without prejudice rule is also relevant. The FCA made and accepted communications marked in that way and in such a case a firm would be entitled to expect that the label meant at least what the words of para 5.9 of the Guide provide for. Although para 5.9 does not refer to use in other civil proceedings with third parties, the protection would be undermined if it was not covered: see *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280, 1301D. The settlement discussions with the FCA which are labelled without prejudice take place alongside the investigation process and alongside the production to the FCA of documents and other material as part of its investigation process. In that sense there is an analogy between those discussions and normal without prejudice discussions in civil court proceedings, which also take place alongside the exchange of pleadings and argument in court. The nature and extent of a without prejudice rule as it would apply to settlement discussions with the FCA is not exactly the same as the way the rule applies in court proceedings given the FCA's position as a regulator and its obligations but that is not a reason not to apply the same principles by analogy. In my judgment the public policy on which the without prejudice rule is based is capable of applying in order to promote settlement of FCA investigations."[62]

[60] Although this decision was discussed in respect of other aspects of its holding in the Irish Court of Appeal in *Purcell v Central Bank of Ireland* [2016] IECA 50, the Irish Court did not discuss the question of whether the privilege should be available in relation to an inquiry undertaken by the Central Bank pursuant to Part IIIC Central Bank Act 1942, argument in the case proceeding on the assumption that it was available.

[61] [2015] EWHC 1557 (Ch); [2016] 1 W.L.R. 361 at [62ff].

10-045 Having thus ruled, it would appear that the privilege was effective in favour of the bank in the subsequent civil proceedings, save for the fact that Birss J. held that RBS had waived the availability of the protection. This part of his decision is discussed in the context of the wider consideration of waiver issues in Section 5 below.

10-046 It is of small note that in another decision involving regulators the court was seemingly content to accept that the privilege applied to settlement discussions. Thus, in *Nicholas Taylor v Commissioners for Her Majesty's Revenue & Customs*,[63] HMRC successfully sought to exclude certain documents from a hearing bundle on the basis that they were subject to without prejudice privilege and so should not be admitted in evidence.

Scope of the rule

10-047 The quotations from the authorities set out above indicate that, while the purpose behind the without prejudice rule is to prevent admissions against interest being used in disputes on questions of liability, damages and remedies, the scope of the without prejudice protection under the public policy basis for the rule is wide enough to exclude evidence of the entirety of the settlement negotiations in which the admissions are made, irrespective of whether everything said or communicated in such negotiations amounts to an admission against interests.[64] As will be seen, that principle is subject to the recognised category of exceptions to the

[62] [2015] EWHC 1557 (Ch); [2016] 1 W.L.R. 361 at [85]–[87ff].

[63] [2017] UKFTT 0769 (TC).

[64] In *Portnykh v Nomura International Plc* Appeal No. UKEAT/0448/13/LA, HH Judge Hands QC referred at [39] to a debate as to whether there is any distinction for the purposes of the privilege between "a dispute" and "negotiations". Of Lord Hope's observations in *Ofulue* to "a letter written 'without prejudice' during negotiations with a view to a compromise", the judge said: "This describes not only the factual situation at issue in *Ofulue* but also, as it seems to me, the factual matrix that is most likely to be encountered, namely negotiations about a disagreement likely to lead to litigation if not otherwise compromised. Such 'negotiations' obviously take place in the context of a 'dispute'. Some authorities, however, contain the alternative formulation 'dispute or negotiation'. …This has encouraged [Counsel] to submit that 'negotiation' represents a pure alternative to 'dispute' so that even if there is no dispute the 'without prejudice' exclusion can apply so long as it arises in the course of a 'negotiation'. That this is theoretically possible is supported by the fact that the authorities recognise two different explanations of the basis of the concept, namely the public policy of encouraging settlement so as to avoid litigation and an express or implied agreement. 'Dispute', in the sense of a potential for litigation, is obviously essential to the public policy explanation but there is no reason why a 'dispute' should be necessary if there is a freestanding alternative of express or implied agreement. Whilst many contractual negotiations might be thought to contain, at least, the germ of the possibility of future litigation, it would be stretching things very far to imply a 'dispute' in every set of 'negotiations'." After referring to Lord Neuburger's opinion in *Ofulue*, he added at [40]: "In the event, I need not reach any such conclusion on it. Whether or not there is a species of 'without prejudice' exclusion that can apply in circumstances where there are 'negotiations' but no 'dispute' is a difficult question best left to a case in which that issue might be crucial and it is not

privilege discussed in Section 4 below, the question (canvassed in a recent House of Lords' decision, discussed at para.10-297 below) as to whether the privilege applies in its entirety where the privileged communication is relevant in some way to other, unconnected proceedings, and finally the ability of parties to use the contractual basis for the privilege in order to agree between themselves modifications to the parameters of the protection afforded by the public policy basis alone.[65]

10-048 So, in *Cutts v Head*, Oliver L.J. said that parties should not be discouraged from undertaking settlement negotiations by the knowledge that "anything that is said in the course of such negotiations … may be used to their prejudice in the course of proceedings."[66] In similar vein, Lord Griffiths in *Rush & Tompkins* said that "evidence of the content of [without prejudice] negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission".[67] On the other hand, Hoffmann L.J. in *Muller v Linsley & Mortimer* referred to other statements of both Oliver L.J. and Lord Griffiths in those cases that seemingly supported the narrower view that the rule is aimed only at the use of 'pure' admissions.[68]

10-049 This debate, as to the width of the without prejudice protection, was comprehensively resolved in favour of the wide view which prevents elements of without prejudice discussions or communications being dissected out and used in evidence where these are not confined to admissions. This was the central issue in the Court of Appeal's important decision in *Unilever Plc v Proctor & Gamble Co*,[69] the reasoning in which has been adopted in two subsequent House of Lords' decisions, *Bradford & Bingley Plc v Rashid*[70] and *Ofulue v Bossert*,[71] discussed below, which were concerned with the admissibility of acknowledgements of debt and of title made in the course of without prejudice correspondence.

10-050 In *Unilever*, senior executives of both parties met in Frankfurt in the context of on-going discussions with a view to settling a number of issues between the two organisations. There was no dispute that both parties had agreed to those discussions being conducted on a without prejudice basis. Unilever alleged that, during the meeting, P&G's representatives stated that the marketing of a Unilever product infringed a P&G patent, and threatened to bring an action for infringement. Relying on those statements, Unilever brought proceedings against P&G under s.70

necessary here for me to consider what might be described as the 'outer limits' of the 'without prejudice' doctrine. In most cases, and in my judgment this is clearly one of them, the negotiations will be connected to a dispute."

65 As to which see Robert Walker L.J.'s comments in *Unilever Plc v Proctor & Gamble Co* [2000] 1 W.L.R. 2436 at 2449–2450 quoted at fn.76 below.

66 [1984] 1 Ch. 290 at 306.

67 [1989] A.C. 1280 at 1299–1300.

68 [1996] P.N.L.R. 74 at 78 where he referred to Lord Griffiths [1989] A.C. 1280 at 1290 who said that "the underlying purpose of the rule…is to protect a litigant from…any admission made purely in an attempt to reach settlement".

69 [2000] 1 W.L.R. 2436. In *Briggs v Clay* [2019] EWHC 102 (Ch), Fancourt J. noted at [58] that *Unilever* "marks the start of the retreat from the notion that only admissions are protected by the without prejudice rule. The public policy underlying the rule necessitates a wider application and would be undermined by seeking to remove parts only of the communications in the nature of admissions from the rest of the text."

70 [2006] UKHL 37; [2006] 1 W.L.R. 2066.

71 [2009] UKHL 16; [2009] 1 A.C. 990. The *Unilever* decision has been applied in a number of Hong Kong cases: *Re Jinro (HK) International Ltd*, HCCW1352/2001 unreported 26 July 2002, Kwan J. at [17]; *Dynamic Creations Ltd v Mint Gem & Jewellry Manufacturing Co Ltd*, HCA378/2007 unreported 12 April 2006, Chu J., at [27]; and *Ninh Diep v Luigi Ferrini*, DCPI1152/2006 unreported 27 July 2007, HHJ Au at [20].

Patents Act 1977.[72] P&G responded by seeking to strike out the claim as an abuse of process since it was based on an alleged threat made during the course of a without prejudice meeting on which Unilever was not entitled to rely. The question arose as to the scope of the without prejudice rule.

In determining the appeal, Robert Walker L.J., who gave the leading judgment, observed that the court should: **10-051**

> "…give effect to the principle stated in the modern cases, especially *Cutts v Head*, *Rush & Tompkins* and *Muller*. Whatever difficulties there are in a complete reconciliation of those cases, they make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in the *Rush & Tompkins* case [1989] AC 1280, 1300: 'to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts'. Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders."[73]

Earlier, Robert Walker L.J. had observed that, without in any way underestimating the need for proper analysis of the rule: **10-052**

> "I have no doubt that busy practitioners are acting prudently in making the general working assumption that the rule, if not 'sacred' (*Hoghton v Hoghton* (1852) 15 Beav 278, 321) has a wide and compelling effect. That is particularly true where the 'without prejudice' communications in question consist not of letters or other written documents but a wide-ranging unscripted discussion during a meeting which may have lasted several hours. At a meeting of that sort the discussions between the parties' representatives may contain a mixture of admissions and half admissions against a party's interest, more or less confident assertions of a party's case, offers, counter-offers, and statements (which might be characterised as threats or thinking aloud) about future plans and possibilities. As Simon Brown L.J. put it in the course of argument, a threat of infringement proceedings may be deeply embedded in negotiations for a compromise solution. Partial disclosure of the minutes of such a meeting may be, as Leggatt L.J. put it in *Muller v Linsley & Mortimer* [1996] PNLR 74, 81, a concept as implausible as the curate's egg (which was good in parts)."[74]

Having doubted whether the large residue of communications which remain **10-053**

72 This is not the place to examine an action for threats. Fortunately, Robert Walker L.J. does so in his judgment in *Unilever* at [2000] 1 W.L.R. 2436 at 2439.

73 [2000] 1 W.L.R. 2436 at 2448–2449. See *RMC Building & Civil Engineering Ltd v UK Construction Ltd* [2016] EWHC 241 (TCC) where Edwards-Stuart J. refused to carry out such a dissection. Note also *Briggs v Clay* [2019] EWHC 102 (Ch) noted at para.10-249 below.

74 [2000] 1 W.L.R. 2436 at 2443–2444. See also *Alan Ramsay Sales & Marketing Ltd v Typhoo Tea Ltd* [2016] EWHC 486 (Comm) where the argument was run that even if the other correspondence was protected by "without prejudice" privilege, two particular e-mails were not, because they could not be construed as part of a chain of correspondence which was seeking to resolve the dispute, rather they were statements of intention in mandatory terms. Flaux J. noted ([at 24]): "That point was not pressed in closing, which is just as well, since it seems to me that it runs counter to the principle recognised by Robert Walker L.J.…that it is not appropriate to fillet out, from a continuum of without prejudice negotiations, particular pieces of correspondence as constituting identifiable admissions which would be admissible in evidence." Later, he added at [65]: "Whilst, if the two e-mails are viewed in isolation, they can be seen as somewhat mandatory or peremptory, when they are seen as

testimonial and non-testimonial use, but on a more elusive distinction between different types of testimonial use."[81]

10-058 A further objection to the Lord Hoffmann approach is that it is inconsistent with the implied contractual basis for the privilege (albeit on the majority's reasoning this did not arise in *Bradford & Bingley*—see below). But quickly afterwards, the House of Lords was forced to address this point, and Lord Hoffmann's reasoning, head-on, in *Ofulue*. Here, the case turned on whether the court could take note of an acknowledgement of title made in correspondence that was expressly undertaken on a without prejudice basis—in effect, the House of Lords had to decide whether acknowledgements of a title so made were within the scope of the protection or otherwise might be carved out, either because not an admission or as a new exception to the rule.

10-059 The facts of *Ofulue* can be summarised by reference to a time line, as follows:

1976: the appellants (the "Os") were registered as the proprietors of the freehold of a London property. Thereafter, they went to Nigeria, and let the property to tenants.
1981: the respondent ("B") and his daughter (together, the "Bs") were permitted to occupy the property by one of those tenants.
1989: the Os began possession proceedings against the Bs in the High Court. In their statement of claim, the Os asserted that they were "the owners and entitled to possession of the property", and that the Bs were trespassers.
July 1990: the Bs' defence and counterclaim admitted the Os' title, but denied their right to possession, on two alternative grounds, that they had taken an assignment of the tenancy; additionally, that they had carried out substantial work to the property on the understanding that they would be granted a 14-year lease. Accordingly, the Bs contended either that they had a protected tenancy, or that they were entitled to a 14-year lease of the property.
December 1990: the Os served a reply and defence to counterclaim.
1991: further and better particulars of the case of each of the parties were provided, and lists of documents were exchanged.
August 1991: by letter headed "without prejudice", the Bs' solicitors wrote to the Os' solicitors. Referring to earlier correspondence, the Bs stated that they were prepared to buy the property for £20,000. This offer was rejected, and further correspondence ensued.
January 1992 ("the January letter"): with the same heading, the Bs' solicitors stated that the Os would "at the most … be entitled to six years arrears of rent", and they then set out their assessment of the value of the property, and of the work carried out to it. The letter concluded with this sentence: "In these circumstances, our client would be willing to make an offer of £35,000 to your client for the purchase of the property." This offer was promptly rejected by the Os' solicitors.
1996: Mr B died.
2000: Nothing having happened for many years, the proceedings were automatically stayed under the CPR. The Os applied to lift the stay but the district judge refused their application and in April 2002 the proceedings were struck out.
September 2003: the Os issued fresh possession proceedings against Ms B; and statements of case were exchanged in the normal way.

[81] [2006] UKHL 37; [2006] 1 W.L.R. 2066 at 2080–2081, [41]–[42]. As for Lord Brown, he said at [2006] UKHL 37; [2006] 1 W.L.R. 2066 at 2087, [66]: "If without prejudice admissions of liability are not admissible at trial as evidence of their truth, no more in my opinion can they be admitted as acknowledgments for the purpose of setting time running afresh under the 1980 Act. I do not see the position here as analogous to that arising in *Muller v Linsey* where…Lord Hoffmann said: 'The public policy aspect of the rule is not in my judgment concerned with the admissibility of statements which are relevant otherwise than as admissions, i e independently of the truth of the facts alleged to have been admitted.' In acknowledgment cases, by contrast, the statements are sought to be adduced in evidence as admissions. Indeed, it is only as admissions that they are relevant as acknowledgments." Lord Hope also expressed doubts and Lord Mance reserved his opinion.

10-060 Although other points were ventilated in her defence and counterclaim, Ms B's only relevant contention was her claim that she had obtained title to the freehold of the property by adverse possession. The only relevant answer to this was that Ms B had acknowledged the Os title during that 12-year period in the defence in the earlier proceedings[82] and/or in the January letter (s.29(2)(a) Limitation Act 1980 provides that "if the person in possession of the land…acknowledges the title of the person to whom the right of action has accrued…the right shall be treated as having accrued on and not before the date of the acknowledgement").

10-061 Lord Walker picked up the threads of his speech in *Bradford & Bingley* and said:

> "In this appeal…your Lordships cannot avoid the issue of whether a written statement, expressly made without prejudice, can be admissible as an acknowledgement within s.29(2) of the Limitation Act 1980, even though it is or may be inadmissible as an admission against interest. In [*Bradford & Bingley*] … I felt considerable difficulty about this proposition ([42]), as did Lord Hope ([35]) and Lord Brown of Eaton-under-Heywood: paras 66–68. Lord Mance (para 93) reserved his opinion. Having given the matter further thought, I still feel the same difficulty. To my mind there is no great difference between the natural meaning of 'admission' and the natural meaning of 'acknowledgement'. The former expression naturally conveys the sense of accepting the truth of something which is or may be detrimental to the interest of the person making the communication, whereas the latter expression is (in this context) concerned with recognising the rights or status of the party addressed. But if the two parties are debtor and creditor, or tenant and landlord, that may be a distinction without much of a difference. By one and the same form of words the debtor (or tenant) may admit his disadvantaged or inferior position and acknowledge the superiority of the position of his creditor (or landlord). Lord Hoffmann observed (in para 16 of his opinion in [*Bradford & Bingley*])…that an acknowledgement is not *evidence* of anything; it simply is an acknowledgement (his emphasis). That is no doubt correct. But equally an admission can, it seems to me, be made in a way that is not evidence of anything; it is simply an admission (for instance a litigant might write, either in an open or in a without prejudice letter, 'I do not dispute your version of our oral agreement'). The truth of an admitted fact is often presumed rather than proved."[83]

10-062 Lord Walker concluded that as a matter of principle the without prejudice rule should not be restricted unless justice clearly demanded it. Noting that the rule has developed vigorously in England (and more vigorously, probably, than in other common law jurisdictions), he held that the recognition of an exception for an

[82] The acknowledgement in the defence proved ineffective, however, as served more than 12 years before the later proceedings were brought, and the House rejected the contention that it operated as a continuing acknowledgement which prevented time running for the period up to the time the proceedings in which it was served were dismissed. Ms O therefore needed to establish that she was entitled to rely on the offer in the letter, notwithstanding that it was written expressly "without prejudice", with a view to settling the earlier proceedings.

[83] [2009] UKHL 16; [2009] 1 A.C. 990 at [49]–[52].