



## PRIVILEGE AND THE REGULATOR, IS *FRC V SPORTS DIRECT* THE END OF THE STORY?

English legal professional privilege (LPP) is again in the limelight, this briefing looks at the recent Court of Appeal decision in *FRC v Sports Direct*<sup>1</sup>, which ruled on whether legal advice privilege (LAP), one of the two forms of LPP (the other being litigation privilege), will continue to apply to protected documents provided to the client's auditor under a limited waiver.

In what will be seen by many as confirmation of the fundamental protection afforded by LPP, and viewed as positive news by corporates, auditors, and more broadly financial institutions, the **Court of Appeal in its recent judgment** overturned the **Chancery Division's judgment**<sup>2</sup>, which held that privilege belonging to the client being audited would not be infringed, and held in favour of *Sports Direct* finding that correspondence exchanged with its lawyers and in relation to which LAP applied, and which under a limited waiver were then sent to its auditor for the purpose of the audit, remained protected by LAP, and were therefore not required to be disclosed to the auditor's regulator as part of the investigation being carried out by the regulator into the auditor.

### In Detail

The Financial Reporting Council (FRC) is the professional regulator for auditors, and in accordance with the Statutory Auditors and Third Country Auditors Regulations 2016 (SATCAR), is able to carry out investigations into the work of auditors. As part of its powers under SATCAR, the FRC is able to require certain information to be disclosed by an auditor or the corporate being audited, under a Rule 10 Notice. Disclosure is however not required where the party to whom the request is made would be able to refuse disclosure in High Court litigation on the grounds of LPP, for more information on LPP please see our **Privilege Client Guide**<sup>3</sup>.

FRC commenced an investigation into the conduct of *Sports Direct's* auditor, and served the notice requiring disclosure of emails and attachments provided to the auditor by *Sports Direct* for the purpose

of the audit. These documents contained legal advice given to *Sports Direct* by its lawyers, and as such were covered by LAP.

LPP has long been viewed as a fundamental human right, on the basis that a client should be free to confess all to its lawyer in the knowledge that its lawyer will not be able to disclose that information, with certain exceptions, including:

- LPP will not protect a criminal act between a client and its lawyer (the 'iniquity principle'); or where
- legislation limits the application of LPP, so long as it is clear that this was Parliament's intention (per the House of Lords decision in *Morgan Grenfell*)<sup>4</sup>.

In *FRC v Sports Direct*, the FRC sought to argue that a derivation of the limiting legislative rule applied, and contended that the House of Lords in *Morgan Grenfell* intended to create a 'no infringement exception'. The Court of Appeal was however clear in its rejection of this argument.

A second limb of the appeal concerned whether attaching a non-privileged document to a privileged email then created a single communication over which privilege applied. The court followed the principle set out on the *Ventouris v Mountain (Italia Express) (No 1)*<sup>5</sup>, and allowed the appeal in relation to the emails covered by LPP, but dismissed it in relation to attachments that were not in their own right privileged.

### What is the impact of this judgment?

This judgment will be welcomed by financial institutions and their clients.

It makes it clear that there is an LAP defence to a notice from regulators seeking production of documents

or correspondence, and that it extends equally to the regulated entity subject to the investigation and to their client, to whom the privilege belongs, unless one of the two exceptions mentioned apply ('inequitable principle' or a statute expressly limiting the scope of the privilege).

It should be noted however that both parties have appealed to the Supreme Court:

- the FRC on the no infringement principle; and
- *Sports Direct* on the applicability of privilege to non-privileged documents attached to a privileged document.

We will publish an update on the status of the applications for leave to appeal, and any subsequent Supreme Court judgment on the issues.

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<sup>2</sup> [2018] EWHC 2284 (Ch)

<sup>3</sup> <https://www.hfw.com/downloads/HFW-client-guide-privilege.pdf>

<sup>4</sup> Special Commissioner and Another, Ex P Morgan Grenfell & Co Ltd, R v. [2002] UKHL 21, <https://www.bailii.org/uk/cases/UKHL/2002/21.html>

<sup>5</sup> [1991] 1 WLR 607

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