

What the Court of Appeal gives, the High Court takes away: two major decisions on legal professional privilege with important ramifications for auditors and audit clients.

Legal professional privilege has long been recognised as a “fundamental human right”, which exists to ensure that individuals (and companies) can confidentially access legal services. However, whether privilege applies is not always clear. Hotly contested disputes can end up before the courts with the decisions in these cases creating a changing legal landscape and considerable uncertainty as to the scope of this fundamental legal protection.

Two recent decisions, the Court of Appeal in *ENRC v SFO*, and the High Court in the *Financial Reporting Council (FRC) v Sports Direct*, further complicate the position for auditors and audit clients. Legal professional privilege broadly divides into two heads: legal advice privilege, covering communications with a lawyer for the purpose of obtaining legal advice; and litigation privilege, covering material prepared for the purpose of litigation or anticipated litigation. Privilege has long been recognised as a necessary protection to ensure that clients are able to communicate frankly and confidentially with their lawyers, without risk of those frank communications getting into the hands of the state or an opposing party, or entering the public domain.

The Court of Appeal in *ENRC*, overturning an earlier decision in the same case, has widened the scope of litigation privilege by extending the circumstances in which litigation can be said to be ‘anticipated’. This will be of particular significance to any company conducting an internal investigation or forensic audit. Legal advice should be taken at an early stage to determine whether the product of the investigation may be protected by legal privilege.

Perhaps of more direct significance to auditors and their clients, the High Court in *Sports Direct* has somewhat surprisingly ruled that the fundamental protections afforded by legal privilege can be overridden by the FRC in the course of its regulatory investigations into auditors. Privilege is generally considered an absolute right which no court or public body can override without clear statutory authority (which is rarely given). It is for this reason that the decision of the High Court in this case comes as such a surprise.

As of 2016 the FRC has been granted statutory powers to demand that audit clients hand over documents which are relevant to an investigation into an auditor. However, these powers are subject to an important qualification: the audit client cannot be required to hand over any documents which are protected by privilege.

Sports Direct was required by the FRC to hand over documents relating to its auditor, Grant Thornton. The material requested included a document containing legal advice which *Sports Direct* had shown to Grant Thornton during the course of the audit, but which Grant Thornton had not retained. *Sports Direct* resisted the request on the grounds that the material was protected by privilege.

The High Court held that the fact that *Sports Direct* had shared the document with its auditor did *not* amount to a waiver of privilege vis-à-vis the FRC, or the world at large. However, it found that had the document been in the possession of Grant Thornton, the provision of it by Grant Thornton to the FRC would not have amounted to an infringement of *Sports Direct*’s privilege (or would merely have amounted to a ‘technical’ breach of privilege), as its provision would solely be for the purpose of the regulator’s confidential investigation into the auditor. The Court therefore concluded that, despite the clear wording of the statute, *Sports Direct* was not entitled to rely upon privilege as a reason for refusing to hand over the documents.

Even more surprisingly, as the auditor was only able to describe the document it saw in general terms, and Sports Direct was unable to identify precisely which document it was, Sports Direct was required to hand over all documents which were capable of being the one described.

This decision will be of significance to any auditor who needs to see material that may be subject to the audit client's legal privilege. Sports Direct have been granted permission to appeal the decision so it remains to be seen whether the High Court's 'technical breach' test will survive the Court of Appeal. However, whatever the eventual decision, audit clients may be more cautious about sharing such material than they have been in the past.

Over the course of just a few weeks, two court rulings have significantly altered the way legal professional privilege is understood. This is undoubtedly an area which will continue to develop; unfortunately, this will often be in somewhat contradictory directions.

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