

No third party production: FRC loses its demand for Sports Direct's privileged documents

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Authors: [Chris Brennan](#), [Zeena Saleh](#), [Emma Shields](#)

Summary

Court battles with regulators over privilege and the disclosure of documents are becoming increasingly common. However, it is not often that you see a regulator seeking to obtain the privileged documents of a third party who is not itself the subject of that regulator's investigation. In *Sports Direct International Plc ("Sports Direct") v The Financial Reporting Council ("FRC")*¹, Sports Direct found itself in this exact situation.

With the Court of Appeal overturning the High Court's decision that Sports Direct was required to hand over its privileged documents in response to a notice from the FRC (who was investigating its former auditor), this recent decision should provide welcome relief to financial institutions and reinforces the protection of privilege in the regulatory sphere.

Facts

The FRC is investigating the conduct of Grant Thornton UK LLP ("*Grant Thornton*"), Sports Direct's former auditor, as well as an individual who works (or at least at the relevant time worked) at Grant Thornton. The subject of the investigation relates to Grant Thornton's audit of Sports Direct's 2016 financial statements. While Sports Direct is not the subject of this investigation, it was accepted that the FRC has the power to request documents and information from a third party company under certain provisions of the Statutory Auditors and Third Country Auditors Regulations 2016 (SI 2016/649) ("*SATCAR*").

In reliance on the relevant provision of the SATCAR, the FRC issued a notice in 2017 requesting certain documents from Sports Direct (the "*Notice*"). Sports Direct provided a number of documents to the FRC in response to the Notice but withheld certain documents on the grounds that they were protected from production on the grounds of legal professional privilege. The withheld documents comprised emails and attachments to emails sent to or by Sports Direct's legal advisers.

The FRC did not accept Sports Direct's claim to privilege. The regulator argued that, while the emails may ordinarily be protected by privilege, there was a narrow exception recognised in case law that where a regulator has a statutory power to request documents there will be no infringement of privilege if Sports Direct produced these documents to it pursuant to that request. Alternatively, even if production would amount to an infringement of Sports Direct's privilege, this would be a 'technical infringement' and would be authorised by the SATCAR regime. This argument was referred to as the "*Infringement Issue*".

In addition to the Infringement Issue, in respect of those documents that were attachments to emails, FRC argued that even if the emails themselves were privileged, some of the attachments to those emails were pre-existing documents and were not themselves protected by the principle of legal professional privilege; simply

¹ [2020] EWCA Civ 177

attaching them to privileged emails did not afford them the protection of privilege. This argument referred to as the “*Communication Issue*”.

In the first instance decision, Mr Justice Arnold accepted the FRC’s arguments in respect of both the Infringement Issue and the Communication Issue, ordering Sports Direct to produce the documents that were responsive to the Notice but had been thus far withheld on the basis of privilege.

Sports Direct appealed on both counts. The Court of Appeal allowed the appeal in relation to the Infringement Issue but dismissed the appeal in relation to the Communication Issue.

The Court of Appeal’s Decision

The Infringement Issue

In her leading judgment, Lady Justice Rose provided a useful reminder of the modern law on legal professional privilege, namely:

- Subject to two exceptions, privilege is a fundamental human right, which, unless waived by the client, will always remain in place – “*Once privileged, always privileged*”.² The two exceptions are (i) the iniquity principle (privilege does not arise where the communication between a lawyer and a client is for criminal purposes); and (ii) where the right to rely on legal professional privilege has been modified or abrogated by statute.³
- An intention to override the fundamental human right of privilege must be expressly stated or appear by necessary implication. Where statute does not expressly modify or abrogate the right to privilege, the question as to whether the necessary implication arises follows from the express language in the statute construed in its context. – “*A necessary implication is a matter of express language and logic not interpretation*”⁴

Rose LJ commented, when considering the relevant provisions of the SATCAR, that “... *the wording is certainly not promising from the FRC’s point of view. There is no express provision overriding [legal professional privilege]. On the contrary, there is express provision dealing with LLP which appears to limit the FRC’s power and confirm the protection of LPP.*”⁵ The Court of Appeal therefore found that there was no justification for the FRC’s interpretation of the law both in respect of the existence of the no infringement exception to legal professional privilege, or by the application of some lower threshold for implying a statutory override on the grounds that any infringement of Sports Direct’s privilege would be merely “*technical*”. The High Court’s decision on the Infringement Issue was therefore overturned⁶.

The Communication Issue

In respect of the Communication Issue, the Court of Appeal disagreed with Sports Direct’s submission that an email and its attachment should be treated as a single communication, and that if the email is privileged, the whole communication (including the attachment) should be considered privileged. Rose LJ also disagreed with Sports Direct’s alternative argument that if the attachments were to be regarded as separate documents then they should individually meet the criteria set out in the Notice. If the email met the criteria set out in the Notice and fell to be produced, then attachment also needed to meet the same criteria if Sports Direct were obliged to produce it.

² At paragraph 9.

³ R v Derby Magistrates’ Court [1996] AC 487.

⁴ Per Lord Hobhouse in R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax and another [2002 UKHL 21 [2003] 1 AC 563 at 45.

⁵ At paragraph 18.

⁶ The FRC recognised that, if the no infringement exception or technical infringement exception applied, certain conditions in respect of the Notice would need to be met before determining whether documents needed to be produced. As a result of the Court of Appeal’s decision in respect of these exceptions, it was unnecessary for it to consider these conditions.

Comment

The most important aspect of this decision for financial institutions is the step taken by the Court of Appeal in overturning the High Court's decision in relation to the Infringement Issue. This is a helpful decision for all relying on privilege, but in particular those entities that are subject to any regulatory regime where there is a risk of a client's (or ex-client's) documents being requested by an investigating body.

The High Court decision left institutions in the uncomfortable position of possibly having to disclose privileged documents in circumstances where such documents should ordinarily be afforded the protection of privilege. While the circumstances of this case were such that Sports Direct was not the subject of the FRC's investigation, the Court did address the issue of safeguards being put in place for the onward use of privileged documents produced in this way. This gave rise to a number of real risks; could there be arguments that the documents lost their characteristic of confidence (and therefore privilege) on production to the regulator such that they could be used in respect of other matters, including against the producing entity? Could the documents be shared with other regulatory bodies via the usual information gateways?

The questions and risks left open by the first instance decision means that the Court of Appeal's decision to overturn it will be welcomed by many.

White & Case LLP
5 Old Broad Street
London
EC2N 1DW

T +44 20 7532 1000

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