Neutral Citation Number: [2020] EWHC 1491 (Ch)

Case No: FS-2019-000016

IN THE HIGH COURT OF JUSTICE
IN THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Financial Services and Regulatory

Royal Courts of Justice
7 Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 10/06/2020

Before :

MR JUSTICE TROWER

- -

Between :

A **Claimant**

- and -

(1) B
(2) The Financial Reporting Council Limited **Defendants**

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- -

Richard Lissack QC and Adam Sher (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimant**
Alexander Polley (instructed by **Taylor Wessing LLP**) for the **First Defendant**
Mark Simpson QC and Rebecca Loveridge (instructed by **The Financial Reporting Council Ltd)** for the **Second Defendant**

Hearing date: 28 April 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE TROWER

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Wednesday 10th June 2020 at 10:30am.

Mr Justice Trower:

Introduction

1. These Part 8 proceedings arise out of an investigation currently being conducted by the Second Defendant, The Financial Reporting Council Ltd ("the FRC") into the audit of the 2018 financial statements of a company carrying on business as a retailer ("A"). The investigation is being carried out under the FRC's Audit Enforcement Procedure ("AEP") and the subjects of the investigation are A's former auditor ("B") and an audit partner of B ("D"), who was the senior statutory auditor responsible for A's 2018 Audit. By an order made on 25 November 2019, Master Shuman directed that the parties be anonymised for the purposes of these proceedings and so I shall refer to them in that way throughout this judgment.

2. The FRC is the UK regulator for auditors and is the competent authority for the purposes of the Statutory Auditors and Third Country Auditors Regulations 2016 ("SATCAR"). Its functions include undertaking investigations into statutory auditors and audit work and imposing and enforcing sanctions. Schedule 2 to SATCAR provides the FRC with statutory powers of investigation.

3. In the course of the FRC's investigation into B and D, which began in June 2019, it issued notices to B requiring the provision of certain documents in exercise of its powers under paragraph 1(1) of Schedule 2 to SATCAR and Rule 9 of the AEP. It is entitled to issue a statutory notice "*for any purpose related to inspecting or investigating statutory audit work*". It was not suggested at the trial that the purpose for which the FRC issued the relevant statutory notices did not relate to inspecting or investigating statutory audit work.

4. Statutory notices are enforceable by the FRC making an application to the court under paragraph 2 of Schedule 2. It is there provided that:

> "*(1) If a person fails to comply with a notice under paragraph 1, the competent authority may make an application to the court.*
>
> *(2) If it appears to the court that the person has failed to comply with the notice, it may make an order requiring the person to do anything that the court thinks it is reasonable for the person to do, for any of the purposes for which the notice was given, to ensure that the notice is complied with"*

5. Non-compliance with a statutory notice may also be an offence under paragraph 5 of Schedule 2, the relevant parts of which are as follows:

> "*(1) A person commits an offence if the person—*
>
> *(a) intentionally obstructs the competent authority … in exercising or seeking to exercise a power under and in accordance with this Schedule,*
>
> *(b) intentionally fails to comply with a requirement properly imposed by the competent authority ... under this Schedule,*
>
> *(c) without reasonable excuse fails to give the competent authority ... any other assistance or information which the competent authority ... may reasonably require*

> *for a purpose for which the competent authority or officer may exercise a power under this Schedule.*"

6. However, there will be no failure to comply with a statutory notice if the document sought to be provided is protected from disclosure on the grounds of legal professional privilege. This is achieved by paragraph 1(8) of Schedule 2 to SATCAR, which provides that, where legal professional privilege is engaged the obligation to provide the relevant information or document does not arise at all under a statutory notice:

> "*A notice under sub-paragraph (1) ... does not require a person to provide any information or create any documents which the person would be entitled to refuse to provide or produce ... in proceedings in the High Court on the grounds of legal professional privilege.*"

This explicit preservation of legal professional privilege is reflected elsewhere in SATCAR. Thus, where an officer of the FRC requires the production of documents when exercising his power to enter relevant premises under paragraph 4 of Schedule 2 to SATCAR, paragraph 4(7) does not permit him to require a person to produce any document which that person would be entitled to refuse to produce in High Court proceedings on the grounds of legal professional privilege.

7. The FRC has made clear that it does not require B to provide it with material which is subject to legal professional privilege. A asserts that some of the documents sought by the FRC from B are protected from disclosure on the grounds of privilege. It says that they were only in the possession of B because they had been provided on a limited waiver basis for the purposes of its 2018 audit.

8. It is not said by B or the FRC that any privilege that might have existed in relation to these documents was lost merely by reason of their provision by A to B. Furthermore, it is now established by the decision of the Court of Appeal in *Sports Direct International plc v. The Financial Reporting Council* [2020] EWCA Civ 177 at [44] ("*SDI*") that there is no "infringement exception" available to the FRC which might override A's claim to legal professional privilege even if otherwise well-founded.

9. In *SDI* the Court of Appeal held that the judge at first instance was wrong to conclude that there was any form of general principle that "*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*". Instead the Court of Appeal held that:

> "*The recipient of a notice given by the FRC under paragraph 1(1) or 1(3) is not required to hand over privileged documents, whether the person entitled to the privilege is the auditor under investigation or the auditor's clients*."

10. B does not agree that A's assertion that a number of documents are protected from disclosure to the FRC on the grounds of legal professional privilege is well-founded. The identity of the documents in respect of which A's claim to privilege is not agreed by B has changed and developed over the period of the dispute. By the time of the trial, there were six documents in respect of which A wished B to claim privilege, but where B considered that a claim could not properly be made.

The Proceedings

11. The investigation by the FRC began on 11 June 2019. B's solicitors then informed A's solicitors on 2 July 2019 that B was required to provide the FRC with a copy of the audit file in relation to the 2018 audit of A's financial statements. On 17 July 2019, A's solicitors told B's solicitors that A did not consent to the disclosure of any of its materials that were subject to legal professional privilege. The FRC then confirmed that, pending the outcome of the appeal in *SDI*, it would not seek to compel the production of documents subject to legal professional privilege.

12. There was then correspondence between the parties, which continued for several months, during which B made clear that it proposed to take its own view on whether a claim to privilege by A was one which B could properly assert as against the FRC. A objected to this approach on the grounds that it was the person to whom the privilege belonged and production should be withheld by B on the basis of A's assertion of privilege. The FRC says that, by the end of October 2019 it anticipated that A would bring matters to a head by seeking an injunction to restrain B from disclosing the documents in issue to the FRC. In that context the question of whether the particular documents over which A asserted privilege were indeed privileged would be brought before the court for resolution.

13. This did not happen immediately because the question which the court was asked to determine when the claim form was issued by A on 8 November 2019 was posed in a more generalised form. It is as follows:

> "*In circumstances where [the FRC] requests and/or issues a statutory notice requiring the production by [B] of documents or communications over which [A] has asserted legal professional privilege, whether in whole or in part:*
>
> *(a) Is [B] obliged to withhold production to [the FRC] of such documents or communications (or parts of documents or communications) on the grounds of [A's] assertion of its privilege? Or*
>
> *(b) Is [B] obliged and/or entitled to make its own assessment as to whether [A's] claim for privilege is valid and therefore to withhold from production to [the FRC] only those documents or communications (or parts of documents or communications) which [B] considers are subject to a valid claim for legal professional privilege on the part of [A]?*"

14. A contends that the answer to the question is (a) and seeks a declaration to that effect. B and the FRC both contend that the court should not grant any declaratory relief. B (but not the FRC) contends that, if the court is minded to grant declaratory relief at all, it should do so in a form which reflects in modified form the answer given in (b). The modified form of declaration for which it contends is:

> "*In circumstances where [the FRC] requests and/or issues a statutory notice requiring production by B of documents or communications over which A has asserted legal professional privilege, whether in whole or in part, B is entitled to make its own assessment as to whether A's claim to privilege is valid and therefore to withhold from production to [the FRC] only those documents or communications (or parts of documents or communications) which B considers are subject to a valid*

claim for legal professional privilege on the part of A in the context of responding to [the FRC] in line with its statutory obligations."

15. The reason B and the FRC say that a declaration should not be granted at all is that it is unnecessary and would serve no useful purpose. They also contend that the declaration sought is drafted in general and hypothetical terms and raises what they characterise as an abstract issue which is not suitable for determination by a generalised declaration. They point out that the declaration sought is concerned with a procedural question – namely how it is that B should respond to a statutory notice issued by the FRC, where A asserts that the notice seeks disclosure of documents protected by legal professional privilege. More specifically, it does not raise the substantive question of whether or not legal professional privilege does in fact attach to any of the documents in respect of which A either said at the commencement of the proceedings or now says were protected from disclosure on the grounds of privilege.

16. The purpose and nature of the proceedings were considered when the claim came before Master Shuman at the first directions hearing. The Master was sympathetic to the objections advanced by B and the FRC. She considered that if and to the extent that the proceedings simply raised what she called "*an abstract declaration as a point of principle as to the appropriate treatment of general, generic materials in B's possession*" (which she was inclined to think was the position in light of the way the proceedings were then formulated), the claim made would not progress matters in a rational or sensible manner. However, she identified that there was a real but then unpleaded dispute between the parties, which was whether legal professional privilege did actually attach to particular documents falling within three specified categories. The difficulty which faced her was that A had not raised in the proceedings the resolution of the privileged status of those particular documents.

17. Master Shuman's solution to this problem was to give directions:

    i) requiring A to provide to B's solicitors a list of all documents in relation to which it asserted an obligation on the part of B to withhold production on the grounds of legal professional privilege; and

    ii) giving B permission to serve a counterclaim seeking a declaration as to the privileged status of those documents.

18. Following Master Shuman's order, A asserted an obligation on the part of B to withhold production (on the grounds of legal professional privilege) of one of the two working papers, disclosure of which was in issue at the time these proceedings were commenced. It also advanced a claim to privilege in respect of 21 other documents. B has accepted that many of those claims to privilege are respectable, and to that extent it is prepared to maintain a claim that it is not obliged to make disclosure to the FRC. However, B contends that five of those 21 documents, all of which emanated from A, together with a single working paper of B's containing what was said to be information protected by legal professional privilege, are documents in respect of which B considers that it cannot support or advance a claim to privilege. It has formed the view that, if it were to make such a claim, it would be wrongly made.

19. It follows that there are issues which arise in relation to those six documents, and they are now the subject of a counterclaim made by B for declaratory relief in relation to

their privileged status. The FRC is not a party to the counterclaim. It was heard and argued in private and in the FRC's absence, on the basis that the parties agreed that it was not possible for the FRC to be provided with the documents in issue while A's claim to privilege was being maintained. I agreed at the outset of the trial that this was an appropriate course to adopt. So far as the counterclaim was concerned, I was satisfied that publicity would defeat the object of the hearing (CPR 39.2(3)(a)) and that the hearing involved confidential information and that publicity would damage that confidentiality (CPR 39.2(3)(c)). The parties also asked that my judgment on the counterclaim should not be disclosed to the FRC, should not be published and should be in a separate document from my judgment on the claim. For similar reasons I am satisfied that that is an appropriate course to adopt.

20. Although the existence of the counterclaim is a factor that is highly relevant to the question of what if any relief the court should grant on the claim, the detail of the issues which actually arise on the counterclaim (i.e. the extent to which particular documents may or may not be privileged) is not. It is not, therefore, necessary for me to say anything further about that aspect of the dispute, and I shall deal with it in a separate judgment, disclosure of which will be limited to A and B. However, once the judgments on both claim and counterclaim have been handed down, I will hear further submissions on the extent to which non-disclosure of the counterclaim judgment and the anonymisation of the parties continue to be appropriate.

A's Submissions

21. Turning then to the parties' arguments, A started its submissions by reminding me of two basic principles relating to legal professional privilege:

    i) It is a fundamental substantive right on which the administration of justice as a whole rests.

    ii) It belongs exclusively to the client (in this case A) who is the only person who can assert it or waive it.

22. A also submitted that a lawyer is obliged to resist any application for production of documents where there is any arguable claim to privilege by a client. In making that submission, A relied on the decision of Blackburne J in *Nationwide Building Society v Various Solicitors* [1999] PNLR 52 and the decision of the Court of Appeal in *Addlesee v Dentons Europe* [2019] EWCA Civ 1600, in which it was clearly established that the lawyer has a continuing duty to assert the privilege even where the client is no longer actively asserting it and even where it appears that the client no longer has any recognisable interest to protect. As A accepted, however, part of the explanation for the continuing nature of this duty is the fact that solicitors are officers of the court. In the present case, B is not a solicitor and it came into possession of and/or created the relevant documents in the context of a limited waiver, so different considerations may apply.

23. Against this background A submitted that, if a document is privileged:

i) B has no right to disclose it to any third party (including the FRC) without A's consent.

ii) It is A who has an exclusive interest in arguing for the existence of the privilege, consistent with the fact that A is the party who will possess the information necessary to justify the assertion of the privilege.

iii) B has no interest in A's right to the privilege. If the FRC disputes the right, the dispute is one between A and the FRC.

iv) B's only role is to report to the FRC the fact of A's claim to privilege and thereafter to adopt a neutral stance.

v) If the FRC wishes to challenge A's assertion of the privilege, it can do so by issuing a statutory notice for production under SATCAR against A, or an application against B to which A could be joined as party, in respect of which B should then be able to adopt a neutral stance.

24. This approach would mean that B's role would then be what A described as essentially ministerial, i.e. passing on to the FRC the claim to privilege made by A. A says that B would be able to make clear that its withholding of the relevant document was simply because of A's assertion of a privilege, and that its own position is neutral. It submits that, in taking that course, B would not expose itself to criminal liability under paragraph 5 of Schedule 2 to SATCAR (as cited above) because its conduct could not possibly be described as intentional obstruction or failure to comply and it would have a reasonable excuse for not complying with the statutory notice. A then submitted that, if the FRC were to criticise B for withholding the relevant documents on the basis of A's assertions of privilege, the proper course would be for B to "interplead", applying to court joining A and the FRC and indicating that it would abide by the result.

25. At the heart of A's submissions was its contention that, until such time as any dispute between A and the FRC is determined, B is duty bound to preserve the right asserted by A, a particularly important principle because once privilege is lost it cannot easily be restored. A also maintains that its approach accords with principle and common sense, because any dispute as to the status of the relevant documents should be determined as between the party seeking their disclosure and the party asserting a right of privilege over them, with the third party in the middle of the dispute (in this case B) not having to reach a view one way or the other on the validity of A's assertions. It confesses surprise that B does not wish to adopt this course because it is not in its interests to be obliged to fulfill any adjudicatory role in relation to the issue of whether or not A's claim to privilege is or is not well-made.

26. A then argued that the approach reflected in the alternative declaration suggested by B (without prejudice to its position that no declaration should be granted) was open to a number of serious objections. It says that it cannot be right that B has no obligation even to consult with A, a suggestion made in B's evidence, not least because the material necessary to assert the privilege will very often not be within B's knowledge such that B will not be in a position to assert the right and, if there is not any consultation, A cannot take any steps to protect its position by (e.g.) seeking an injunction to protect its right.

27. It is then said that B's alternative declaration gives rise to many important and as yet unanswered questions when carrying out the exercise of what A characterises as "sitting in judgment" on its client's (A's) claim to privilege:

    i) What is the standard? A points to the fact that B has variously described the standard as being that B has no duty to advance a claim to privilege which it does not consider to be "*properly arguable on the merits*" or which it does not consider to be "*a valid claim*".

    ii) What procedure should B adopt? In particular, is it open to B to dispute factual assertions made by A or only legal ones? Does it have a quasi-judicial role in evaluating whether it is satisfied that A's assertions are correct? How does it carry out its investigation, what witnesses can it speak to and how, and who is to be the "judge"? Is it to be B or is it B's lawyers? A also gives examples of how it is that questions of privilege can give rise to many difficult points of law, and queries why the determination of those questions should be left in the hands of B which is not a court.

28. A also said that it accepts that the ultimate arbiter of whether or not privilege is established is the court. The question with which its declaration was concerned is said to be (a) the default position before determination by the court and (b) who should argue the matter when it comes before the court.

29. These points are said to illustrate another real practical difficulty with B's approach, which is that B has no real interest in A's right and may have no particular incentive to protect that right. Indeed, it is suggested that, because the FRC is B's regulator, it would not be at all surprising if B's assessment as to which side of the line to come down on when considering a difficult question of privilege, were to be influenced by a desire to keep its regulator happy, particularly in the context of an investigation by the FRC into B's possible misconduct.

30. A then submits that there are certain anomalous results which flow from the alternative declaration sought by B:

    i) It says that B may decide to disclose a document over which A asserts privilege (an assertion with which B disagrees) and it then transpires that the FRC would have been satisfied with the claim. It cannot be correct, so it is said, that B's intermeddling leads to the disclosure of a document which both A and the FRC would have accepted to be privileged.

    ii) It would make it easier for the FRC to circumvent A's claim to privilege where the same document is held by both A and B.

    iii) Come what may, the FRC is not obliged to accept B's conclusion that a document is indeed privileged. If the FRC were to then challenge B's determination by making an application to court, A then says that it is not clear what approach B should take on that application. If it were simply to leave it to A and the FRC to fight it out, then A asks rhetorically what the point was of B "intermeddling" and creating an unnecessary step in the middle of the process.

31. Finally, A submits that the notion that any dispute is best resolved between A and B (whether on an application by A for an injunction or otherwise) is misguided. It says this partly because B has disavowed any obligation to inform A prior to disclosing any documents over which B knows that A asserts privilege, and so the protection for A would be limited because it may not know that disclosure is about to take place. But it also says that having the dispute decided as between two parties both of whom have seen the documents, rather than having only one party to the dispute being able to see the documents is not as advantageous as it may appear to be. It says that the courts are used to determining privilege disputes without one party seeing the documents, and without it seeing the documents itself. It also reiterates that, unless the argument is fully aired with B taking an unattractively hostile position as against its own client (A), there is an obvious possibility that the FRC will wish to reargue the point if A is successful in maintaining its privilege in proceedings in which the only other party (B) adopts a broadly neutral stance.

B's Submissions

32. At the core of B's case is its submission that A's Part 8 claim seeks an inappropriate abstract declaration as to whether B is entitled to form its own view on privilege or whether B is obliged to assert any claim to privilege that A wishes to advance no matter how ill-founded it may be. It says that, in seeking that relief, A does not engage with the real issue in dispute which is whether or not the relevant documents are in fact privileged. It contends that this is symptomatic of A's approach, which is having the effect of inhibiting the FRC's investigation, which B is keen for the FRC to be able to progress. It also has a more general complaint that A has been adopting an approach to the dispute which is marked by delay and obfuscation.

33. B submits that, now it has made its counterclaim, the only issue which needs to be determined is raised in that context. It says that there is no need for an answer to the abstract question raised by the declaration sought in A's claim form.

34. If it is wrong about that, B then submits that the declaration sought by A should not be made because the answer to the question of who should determine what documents should be withheld from production to the FRC on the grounds of legal professional privilege, is B. This is because it is B who is obliged by the provisions of SATCAR to give disclosure to the FRC. B says that it is plain that it would not be entitled to refuse to produce documents in High Court proceedings "*on the grounds of A's legal professional privilege*" merely on the basis of an assertion of privilege by A, even where that assertion has no merit.

35. In support of that submission, B says that issues of privilege often arise in a tripartite context as between the holder of the privilege, an advisor to the holder (normally a solicitor) and a third party. Sometimes the issue will arise where a solicitor is simply acting for the privilege holder in litigation between the holder and the third party. Sometimes it will arise when the solicitor is sued by a third party and, in that capacity, owes a duty in his own right to disclose a document to the third party.

36. In the former context, the solicitor will owe an independent duty to give his own independent consideration to the claim for privilege and is obliged to at least alert the

other side to the problem. In support of its submissions on the course that a solicitor is obliged to take in circumstances where the solicitor disagrees with his client's view on privilege, B cites the following passages from Hollander *Documentary Evidence* (13th edn 2018) para 15-02:

> "*The lawyer should consider whether he is satisfied in good faith that it is more probable than not that the claim for privilege can be made out. If so, it is proper to make a claim to privilege. If he is not so satisfied, he cannot make a claim to privilege without at least alerting the other side to the problem. He can decide the claim is a bad claim for privilege and disclose, make an application to the court for guidance under CPR r.31.19(5), or write to the other side, giving details as to the nature of the document, explaining the claim for privilege but pointing out that he accepts the point is debatable and giving them an opportunity to dispute the point and apply to the court if necessary. This way he deals with the matter in a manner that is transparent yet does not give up the argument in favour of privilege.*"

37. This description of the pragmatic way in which privilege issues ought to be dealt with where lawyer and client disagree has much to commend it, although I would add that circumstances might arise in which the nature of the disagreement between solicitor and client is such that the solicitor has no option but to refuse to continue to act. It is also of note that this passage from Hollander was preceded by an explanation that the nature of the solicitor's duty to reach his own view and proceed accordingly is informed by his status as an officer of the court.

38. B submits that the analysis is different in the latter category of case, where the advisor is under an independent duty to disclose in his own right, which is the situation in the present case. It accepts that B still has a duty to maintain a good claim to privilege on the client's behalf but submits that it must make its own assessment of the position. It is clear from the authorities which it cites in support of this submission (*Nationwide Building Society v Various Solicitors* [1999] PNLR 52 and *Raiffeisen Bank International AG v Asia Coal Energy Ventures Ltd and Ashurst LLP* [2020] EWCA Civ 11 at [32]) that the underlying duty is to maintain a properly arguable claim to privilege (and that is what a *good* claim means), but it does at least have to be able to make that assessment.

39. It is said by B that it follows from this analysis that the declaration sought by A is simplistic and wrong. The mere assertion of a privilege by A is insufficient. B is entitled and obliged to withhold only documents that are privileged or at least arguably so.

40. B then identified four factors which it submitted pointed in favour of its submissions:

    i) The assessment of whether or not a document should be disclosed should always ultimately be a matter for the person on whom the obligation to disclose falls.

    ii) The reason for this is that the consequences of an incorrect assessment fall on the person who is under the obligation to disclose. The consequences may extend to the commission of a criminal offence, but in any event a person in the position of B has a clear interest in complying with its statutory obligations under SATCAR.

iii) A has remedies against B, if B makes or proposes to make the wrong decision. They include an application for injunctive relief if B evinces an intention to interfere with A's right to maintain its privilege and a claim for damages if it does so.

iv) It is impractical for the assessment always to remain with the client to whom the privilege belongs, because there will be occasions on which B is required to respond to a statutory notice where the client refuses to engage with the process and may even be unable to do so because it has ceased to exist or cannot be located. It is also impractical, because it would require all documents to be disclosed by B to be passed to A for a further privilege review and this might extend to documents (such as working papers) which A had no entitlement as against B to see.

The FRC's Submissions

41. The emphasis of the FRC's submissions was slightly different to those advanced by B, but it still argued for the same result as against A, namely that the court should not grant any declaration in the generalised form sought. In short it submitted that the effect of the declaration sought by A would be that B would be required to withhold documents from the FRC on the basis of any assertion of legal professional privilege by A, even where that assertion was made without providing any explanation or justification. It also said that the declaration sought by B as its fallback position was inappropriate, albeit for different reasons

42. Like B, the FRC also submitted that the declaration sought by A would not assist in resolving the dispute which mattered, namely the substantive dispute as to whether any particular document is or is not privileged. It submitted that the importance of the issue which arises in these proceedings lies in the fact that the answer in this case is likely to inform the conduct of such privilege disputes in the future.

43. The first point made by the FRC is that the declaration sought by A is inconsistent with the SATCAR statutory regime. It would have the effect of introducing a further qualification into Schedule 2 of SATCAR entitling a person in the position of B to refuse to produce a document in respect of which a statutory notice has been given merely because a person in the position of A asserts an entitlement to privilege. This, the FRC says, is inconsistent with the regime which only releases a recipient from the obligation to disclose where the document is privileged, not where the privilege holder merely asserts that it is.

44. The FRC then says that, because SATCAR provides that there is no requirement to disclose documents which the recipient would be entitled to refuse to produce in High Court proceedings on the grounds of legal professional privilege, the question is one of B's entitlement where the ultimate arbiter is the court. The FRC accepts that this entitlement means that a statutory notice given under SATCAR cannot require B to provide it with privileged documents whether the privilege belongs to A or B and it also accepts that, pending a determination by the court, B would not be expected to disclose because that would pre-determine the dispute. If, however, B decides that the document

is not privileged, the document must ultimately be disclosed unless the court determines that it is. The FRC says that the parties to that issue are A and B, not A and the FRC.

45. The FRC also points out that A's declaration is inconsistent with that part of the statutory regime which entitles the FRC to make an application to the court for an order under paragraph 2 of Schedule 2 requiring compliance where there is non-compliance with a statutory notice. It says that, if A is entitled to the declaration it seeks, that means that B will not have failed to comply with the statutory notice (because it will not have been under an obligation to do so), and so the statutory mechanism by which the legislator intended to enable the FRC to bring matters to a head when there is a failure to comply with a statutory notice will not be available.

46. It is also said by the FRC that B will commit an offence under paragraph 5(1)(b) of Schedule 2 to SATCAR if it intentionally fails to provide a document sought by a statutory notice which it does not believe to be privileged, but which A asserts is privileged.

47. The second point made by the FRC is that there are practical problems with A's proposed procedure, necessitating as it does the resolution of the underlying dispute between A and the FRC, rather than between A and B. It submits that it is no solution for the FRC to be required in practice to give a statutory notice to A, because, even where A also has copies of the relevant documents (which will not always be the case), the FRC normally needs to see the copies as they appear on the auditor's file. In that situation, it says that A's declaration would mean that A will simply be able to assert a privilege and wait until the FRC chooses to engage with it, even though the document which it wishes to see is the one in the possession of B.

48. It then says that, in any court proceedings for the determination of the question of privilege between A and the FRC, the issue would have to be determined without the FRC being able to see the document. It is much more satisfactory for the issue of privilege to be determined as between the parties (A and B) who are able to see the document, and can therefore make informed submissions on the question of whether a claim to privilege is justified. If proceedings are between A and the FRC, the findings to be made by the court would be at some danger of being wrong, because they would rest on an incomplete picture. One party would not have been able to inspect the documents for the purposes of making their submissions as to why legal professional privilege is not established. It points out that the counterclaim is being conducted as a dispute between A and B and that this is the most practical way in which the matter can and should be determined.

49. The FRC also says that it is wrong for A to say that the circumstances of the claim to privilege are such that the justification for the claim will be within the knowledge of A and not B and that a proper privilege review which takes account of the purpose and circumstances of the creation of the document can only be carried out by A. The flaw in this argument, so it is said by the FRC, is that some documents in respect of which A claims privilege will have been created by B and as such B will be able to argue the case as well as A. The working paper is one such example, but the underlying point made by the FRC is that, if the dispute is resolved as between A and B, both parties will be able to argue the matter out with the benefit of having seen the document.

50. The FRC also contends that its history of dealings with A is such that it has no confidence that A will adopt a cooperative attitude to dealing with statutory notices and issues of privilege, so any assertion by A that it is more than willing to provide proper explanations of its position on privilege on request, is illusory. It included schedules to its written submissions which sought to illustrate why it was that it contended that the history of A's engagement demonstrated delay bordering on obstruction.

51. I have looked at those schedules, but I do not think that they help very much on the question which I am asked to decide, which is of a general nature as to the procedure which should be adopted in a case of this sort. The only respect in which the schedules are of some marginal assistance is that they illustrate the types of difficulty with which the FRC may be faced in obtaining information from a cooperative auditor where a client determines that it wishes to adopt delaying tactics. That is not to say that I draw any particular conclusions in this case as against A – in my view there is no need for me to do so. However, the kind of conduct alleged in the schedules should as a matter of principle be strongly discouraged. SATCAR should be construed in such a way that the procedures adopted can be implemented in a manner which facilitates rather than obstructs the proper conduct of the FRC's statutory investigation, recognising all the while that A is entitled to have its right to maintain its legal professional privilege properly preserved and protected.

52. The FRC's third point related to B's interest in the documents, which A had said was purely ministerial. It submitted that this is wrong and ignores the fact that B and D both have an interest in ensuring that non-privileged (and potentially exculpatory) documents are provided to the FRC. It illustrated this by reference to the working paper which it says may be an example of a document in respect of which both B and D would have an interest in demonstrating to the FRC that they have given due consideration to relevant material during the course of the audit. The FRC also says that, where a working paper has been created by an auditor, his role in relation to that particular document cannot be dismissed as purely ministerial, not least because he will have an important role in establishing the circumstances of its creation for the purposes of assessing the validity of the claim to privilege.

53. The FRC then says that, because B has this type of interest in the documents which it holds, it can always seek declaratory relief for the determination of the document's status. These are proceedings to which A and B would be party in any event. It would be wasteful of resources for a question to be decided between A and the FRC if there were to be any risk that B was then sufficiently dissatisfied by the fact that the court had determined that privilege was established for it then to issue its own proceedings against A seeking a resolution of the same question but this time with both parties having the benefit of being able to make informed submissions on the relevant documents.

54. The FRC's fourth point was that the declaration is unnecessary for the protection of A's right to legal professional privilege. It says that the proper course where there is disagreement between A and B as to whether A has a sustainable claim to privilege is that A can simply seek an injunction to restrain B from providing the document to the FRC. This would place the burden on A to establish its entitlement to the right that it claims and would bring the dispute before the court in an effective and expeditious manner.

55. The FRC points out that A's assertion that its ability to seek an injunction is an incomplete answer, because it may not be aware of the dispute, goes nowhere, as the declaration sought itself presupposes that A knows of the proposal to disclose. The argument is that, without that knowledge A cannot make an assertion of privilege, because an assertion of the right pre-supposes that the person asserting the right knows that it is under challenge. Thus, it is said that the declaration actually sought does not solve the problem which A says exists.

56. The FRC also says that A, as the party alleging the privilege, should have the burden of establishing it. The FRC relies on the statement of principle by Lord Edmund- Davies in *Waugh v British Railways Board* [1980] AC 521, 541G that "*It is for the party refusing disclosure to establish his right to refuse*". It contends that it is wrong to allege (as A does in its evidence) that the FRC is seeking to infringe A's right and so bears the burden of proof, because that presupposes that A has the right in the first place and ignores the statutory right of the FRC to obtain disclosure under paragraph 1(1) of Schedule 2 if A's right does not exist.

57. The FRC also made submissions on why, as a matter of principle, it would be inappropriate for the court to make a declaration at all. It points out that the grant of declaratory relief is discretionary and that two of the principles summarised by Aikens LJ in *Rolls-Royce plc v Unite the Union* [2010] 1 WLR 318 at [120] point against its grant in the present case. They are:

    i) principle (2): the need for a real and present dispute between the parties as to the existence or extent of a legal right between the parties; and

    ii) principle (7): whether the grant of declaratory relief is the most effective way of resolving the issues that are raised, having regard to the other options.

58. The FRC submits that the only real and present dispute concerning the existence or extent of a legal right is the question of whether or not the documents are privileged, and that matter is being determined in the counterclaim. It says that the declaration sought is all about process and not the substantive question in dispute. For that reason, it does not consider that the alternative declaration is appropriate either.

59. It also submits that the alternative declaration put forward by B would not be correct in any event. It points out that the concept of B being entitled to make its own assessment as to whether A's claim to privilege is valid (which is at the heart of B's alternative declaration) makes B an arbiter as to its entitlement to refuse to disclose. The FRC submits that that itself is objectionable, because the entitlement to refuse to disclose only arises where a document is in fact privileged not when B assesses that it is.

Conclusions

60. I do not consider that it is appropriate to make the declaration sought by A for a number of reasons.

61. Although there is plainly a real and present dispute as to the status of the six documents, and to that extent the second principle listed by Aikens LJ in *Rolls-Royce plc v Unite*

the Union [2010] 1 WLR 318 at [120] is satisfied, the form of declaration sought neither resolves that dispute, nor provides an answer to a necessary step in its resolution.

62. The reason for this is twofold:

    i) The legal right on which A bases its claim to a declaration is its asserted entitlement to legal professional privilege in the relevant documents and its right as against B, to whom it has provided that information on a limited waiver basis, to have that privilege maintained. As I understand it there is no dispute as to B's obligation to maintain the privilege if the documents are in fact privileged; the issue is whether or not that is the case. The question of the procedure by which that dispute comes before the court for resolution is not part of the existence or extent of the legal right itself.

    ii) The existence or extent of the legal right itself is now to be determined by the counterclaim. For the purposes of that determination, there is no need to declare whether or not B was under an obligation to withhold production on the grounds of A's assertion of privilege, nor whether or not B is obliged or entitled to make its own assessment of the status of the documents.

63. It also follows from the fact that the dispute as to the status of the documents will be determined by the counterclaim that the answer to the question posed in Aiken LJ's seventh principle (namely whether the grant of declaratory relief in the form sought by A is the most effective way of resolving the issues raised) is no. The most effective way is for the court to determine the counterclaim. There is no need to declare the nature of B's obligations or entitlements in a situation in which the FRC has made a request for documents or issued a statutory notice, but nothing more has occurred than the assertion by A that the documents or communications are subject to its legal professional privilege. That state of affairs has now been superseded by the counterclaim.

64. In short, the declaration is not required to resolve the substantive dispute because that will be achieved through the relief granted on the counterclaim. It would in any event be inappropriate, because the making of it would only resolve a procedural step which is not in my view an effective mechanism for further resolution of the substantive dispute itself.

65. In any event I do not think that the declaration sought would be an accurate reflection of the true legal position. It describes the obligations and entitlements of A and B in a manner which in my view is misconceived.

66. The declaration sought by A is expressed to declare what should happen in circumstances in which the FRC has served a statutory notice on B. In that circumstance, there are two main points which are not in issue:

    i) the FRC has a legal right derived from SATCAR to obtain the information sought by the statutory notice so long as it relates to the statutory purpose, but the entitlement cannot extend to documents or information which would be protected from disclosure in High Court proceedings by legal professional privilege (paragraph 1(8) of Schedule 2 to SATCAR); and

ii) the limitation on the FRC's entitlement extends not just to privileged information where the privilege belongs to the person to whom the notice has been given, but also to privileged information which belongs to a third party on whose behalf the documents are being held by the recipient of the notice or who may have come into possession of the relevant documents pursuant to a limited waiver.

67. The first question which therefore arises is how to identify the basis of the entitlement not to disclose in High Court proceedings. That entitlement is given to B as the person otherwise obliged to provide the information and it derives from the privileged nature of the information or document as a matter of fact and law. It does not derive from any assessment by B of the validity of A's assertion that the documents are privileged (paragraph (b) of the proposed declaration), nor more importantly does it derive from the mere assertion of privilege by A (paragraph (a) of the proposed declaration) any more than it would derive from the mere assertion by B of its own privilege if that were to be the question in issue.

68. The way in which A has formulated its proposed declaration concentrates on the nature of B's obligation. But B has no obligations to A pursuant to the terms of SATCAR. Such obligations as it has under SATCAR are owed only to the FRC. The obligations that it has to A derive from the terms of the relationship between auditor and client including anything which may be derived from the basis on which A provided the documents to B under a limited waiver in the first place. B accepts that this relationship will require it to maintain any legal professional privilege, at least until such time as A expressly consents to the privilege being waived, but that can only extend to a document which is in fact privileged in the first place.

69. Doubtless, A and B can agree to anything they like as between themselves, but I think that it would require clear words for B to be obliged by its own relationship with A to maintain a claim to privilege on the basis of nothing more than a mere assertion by A that a privilege exists. There is no indication that that was the nature of the relationship in the present case.

70. In this context, I do not accept that B is simply exercising a ministerial function when it is determining how to respond to a statutory notice seeking the production of documents in respect of which A asserts privilege. It has interests of its own to protect. Thus, it may (for perfectly proper reasons) wish to ensure that the FRC has access to the maximum amount of information which was made available to it by its own client during the course of the relevant audit. It also has an interest because it has a direct obligation to the FRC to comply with the statutory notice. As I have already explained, that obligation is to comply unless the document is in fact privileged, not unless B believes that it is privileged or A asserts that it is.

71. For these reasons I agree with the FRC's submission that the grant of the declaration sought by A would be inconsistent with the nature of the obligations imposed by the SATCAR regime. It would also be inconsistent for another but linked reason identified by the FRC. The enforcement regime provided for by paragraph 2 of Schedule 2 to SATCAR contemplates the ability of the FRC to apply to court if it appears that the person to whom a statutory notice has been given "*has failed to comply with that notice*". This formulation presupposes a failure to comply, which would not occur for some indeterminate period if B was under the legal obligation contemplated by A's proposed declaration (a). It is said that there is no inconsistency between paragraph 2

and proposed declaration (a) because it is simply designed to operate as a mechanism for holding the ring. I disagree. In my view, SATCAR contemplates that the FRC can proceed as it sees fit if there is a failure to comply with a statutory notice. That application will be dismissed if legal professional privilege is established, but the making of the declaration sought by A would interfere with the FRC's right to initiate the process as contemplated by paragraph 2 in a manner which is inconsistent with SATCAR.

72. A proper appreciation of the source of the parties' respective obligations points the way to the correct solution. It is for B to determine whether the document is privileged, not because it is under no obligation to disclose it if it makes a determination that it is, but because it is the person by whom the duty to disclose on service of a statutory notice is imposed. If it makes the wrong decision, it will be liable to A if and in so far as it has failed to maintain a privilege in respect of which it was under a duty to A to maintain. In that regard, it is likely that B will have been under a duty to tell A about the statutory notice and will have done so. Accordingly, A's rights are capable of being protected by proceedings (and if appropriate an injunction) against B, based not on SATCAR but on the terms of the underlying relationship between A and B. In an appropriate case, it is always open to A, B or indeed the court to join the FRC to those proceedings, and the identity of the party who bears the burden of the argument may vary depending on the precise nature of the underlying issue.

73. If B makes a decision the other way and decides that it will withhold the document on the grounds of A's legal professional privilege, it is always open to the FRC to challenge that decision, which it will presumably do by an application to court under paragraph 2 of Schedule 2 to SATCAR. In that context, which will be a dispute arising out of B's obligations to the FRC under SATCAR, the principal dispute is between B and the FRC. SATCAR, and the effect of a statutory notice given under it, are at the root of the obligations in issue, but the court will always be able to make such directions as it considers appropriate to determine the dispute, including the joinder of A should that be an appropriate course to adopt.

74. As I have explained, all three parties commended the greater practicability of their respective solutions as to how a privilege dispute should be determined when the FRC seeks documents from B, which, contrary to the assertions of A, B does not believe to be privileged. I agree with the submission made by the FRC that there are real advantages in leaving the issue of any disagreement on disclosure to be determined in proceedings by A against B. This also seems to me to be the proper way in which a dispute between A and B on disclosure to the FRC (based as it is on the relationship between A and B not any relationship between A and the FRC) should be determined. I should add, however, that I do not accept that, if A's declaration were to be granted, it would put B in an impossible position if A refused to engage with the process. Were that to occur it would always be open for B to bring matters to a head by seeking declaratory relief against A.

75. Whether the proceedings are initiated by A for an injunction or B for a declaration, the most obvious practical advantage is that the dispute on whether the document is in fact privileged can be resolved in proceedings in which both participants will have the advantage of seeing the relevant document. The court will then be able to reach a fully informed decision, as has proved to be the case on the counterclaim in these proceedings. It seems to me that the fact that the court is used to dealing with privilege

disputes in ordinary litigation where one party has not seen the documents is neither here nor there. The situation will always be different where, whatever the context, the person in actual possession of the documents owes a prima facie duty to disclose, but the privilege of another person releases him from his obligation to do so.

76. Furthermore, any such proceedings by A or B will, for reasons that I have already explained, be proceedings in which B will have its own interests to protect. It may also have relevant evidence to adduce on the underlying substantive issue of privilege. While it is certainly the case that the documents in dispute will often be documents in respect of which A will be the primary source of the evidence as to its privileged status, that is not always the position. Thus, if the dispute relates to a case in which it is said that A's privilege is contained within a document created by B, which will sometimes be the case as B is the recipient of the statutory notice, B's witnesses will also be able to throw light on the document's status.

77. A submitted that it would not be sufficiently protected if it had to seek an injunction, because it may not know whether or not B was about to make disclosure. I do not agree. As the FRC pointed out in its submissions, the obligation for which A argues in its claim for declaration (a) only arises in the first place when A asserts a right to privilege, which presupposes that B is intending to disclose and has communicated that intention to A. Even if that were not to be the case, and B's obligation is said to arise on the back of some general overarching assertion of privilege, I do not think that it is realistic to consider that B (or any former auditor in B's position) will not engage with their client before making disclosure in sufficient detail to enable it to seek an injunction if it wishes to do so.

78. I also disagree with A's submission that, where privilege is in issue, it is always more appropriate for the FRC to seek a copy of the same document directly from A so that there can be an argument between the person who wants to see the document and the person who owns the privilege. There are two fairly obvious reasons why that may not be a satisfactory answer. The first is that A may no longer have the relevant document and the second is that the FRC will often wish to look at the document as it appears on the audit file. It is, after all, B's audit of A which is at the heart of the investigation in respect of which the statutory power of inspection arises.

79. While there is the possibility that the FRC might contend that it is not bound by the resolution of the issue in that way, the only context in which such a question might arise in practice is if the FRC took the view that the proceedings between A and B involved a collusive attempt by A and B to mislead the court as to the status of the documents. Doubtless the FRC would then exercise its rights under paragraph 2(1) of Schedule 2 to SATCAR to apply to the court. Otherwise there is no particular reason for the FRC to consider that it should not be bound by a determination as between A and B when the court will have had the benefit of argument between two parties, both of whom will have had sight of the material and both of whom will therefore have been able to make full submissions on privilege.

80. For all these reasons, I do not consider that this is a case in which declaratory relief in the form sought by either A or B (as a fallback alternative) is appropriate. The declarations sought neither deal with the dispute as to the existence and extent of the legal right between the parties in the most effective way, nor declare the true position as a matter of law.