

### THE IMPACT OF THE LAW OF CONFIDENTIALITY ON REGULATION

TIMOTHY DUTTON QC<sup>1</sup>

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It is important to understand before we get into the detail the reasons why, in a regulatory context, a proper understanding of the numerous facets of the law relating to confidentiality is so important. Wrongdoers tend to want to commit wrongdoing in secret. It is very rare for a wrongdoer to proclaim in public the nature and extent of his or her wrongdoing. Claims to confidentiality or privilege are therefore abundant in circumstances where the regulator may suspect that wrongdoing has occurred. We will all of us be familiar with a problem which so commonly arises in a regulatory context: a rule breach has been committed by a regulated person or entity then in order to escape scrutiny by a regulator or a complainant a “cover up” occurs. Often, in a regulatory context the cover up is worse than the original “crime”. Whereas the original wrongdoing may be evidenced from primary and non-confidential sources, a cover up may occur with the assistance of people sworn to secrecy and in particular can occur where lawyers are in possession of information provided to them under the cloak of legal advice or litigation privilege.

Many of the examples which I give in the course of this paper are drawn from my own work in the fields of financial services, accountants, lawyers and the medical profession. My intention, however, is not to provide a paper in which the principles are limited simply to these fields. Whilst I draw on examples from these fields, I hope that they will resonate in different fields of practice. I hope it will become apparent when we get into the nitty-gritty that the underlying principles which apply in the law of confidentiality are relevant in all

fields of regulatory and disciplinary activity albeit their impact will be affected one way or another by (a) the particular facts relating to the information under examination and (b) the particular regulatory scheme in question and whether or not the regulator is or is not bound to maintain confidentiality.

It is critical for all of us as practitioners in this area to have a well-grounded understanding of the different facets of the law of confidentiality. A mistaken disclosure for example, of a source of information in a sensitive case could lead to the identification of an individual whose life or limb may at risk. In one of the cases with which I had been involved a shooting occurred of an individual who had been providing information to the authorities under the cloak of confidentiality. I hasten to add that the shooting was not, as far as I can tell, the result of any untoward disclosure on the part of either the police or the regulatory authority in question. The point I am making is that there can be circumstances where a duty to maintain confidentiality is a duty which is important in some cases to the life and limb of individuals, and in many cases to the protection of the private or family life of individuals under Article 8 of the ECHR.

A second reason why a full understanding of the law is required is that use of confidential information can be of critical importance to the success of regulatory proceedings either for the claimant/regulator, or indeed for the defendant/regulated. More often than not the use of confidential information is likely to assist the regulator. However, as is apparent from *Medcalfe v. Mardell* [2002] UKHL 27 an inability on the part of the defendant/accused to use confidential or privileged information in his or her own defence can be said to impair the ability of that individual to advance a credible or tenable defence<sup>2</sup>. In such circumstances, courts and tribunals need to be apprised by both parties

<sup>1</sup> See footnote 24.

<sup>2</sup> A point relied upon by the solicitors in *Shaw and Turnbull v Logue* (Jay J 13<sup>th</sup> January 2014) but in which the Court held that the disadvantage caused by relevant material being privileged and any disadvantage in not being able to refer to privileged material had to be tethered to a particular evidential point.

and their representatives of the essential principles of the law of confidentiality, the questions of admissibility, and whether or not weight can be given to confidential information being used, or whether adverse inferences can or cannot be drawn from the absence of information which a tribunal might otherwise expect to have before it, where such information is protected by the law of confidentiality or privilege.

In the course of this paper I hope to touch upon the following areas each of which is important in our practices:

1. Public Interest Immunity or as I prefer to call it, Public Interest Confidentiality.
2. The doctrine of waiver
3. The use of confidential but non-privileged material.
4. The doctrine of privilege and its impact on regulation.
5. So-called “exceptions” to the law of privilege, including as to without prejudice communications.
6. Disclosures between authorities: police – regulator, regulator – police or prosecuting authorities and international disclosures between different authorities.

**Public Interest Immunity or Public Interest Confidentiality**

Confidentiality is not by itself a ground of immunity from disclosure of information or documents in the course of litigation whether by a party or by a non-party. The desirability in the public interest that confidentiality in the relevant subject matter should be preserved may give rise to Public Interest Immunity or as I prefer to describe it Public Interest Confidentiality<sup>3</sup>: it is important to recognise that in circumstances where relevant information may be provided from a confidential source it is not appropriately described as “immune” from disclosure, rather it is subject to

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<sup>3</sup> Public Interest Immunity can be a misnomer since the Court may order material which is properly the subject of public interest confidentiality to be disclosed if in all the circumstances justice require disclosure I therefore prefer “Public Interest Confidentiality”.

doctrine of Public Interest Confidentiality<sup>4</sup> which may when the court comes to balance the relevant factors in play lead to an order that disclosure should occur.

Confidentiality is a necessary but not a sufficient basis for a claim for Public Interest Immunity. In *Alfred Crompton Amusement Machines Ltd v. Customs & Excise Commissioners* [1974] AC 405 at 433 Lord Cross said:

*“Confidentiality is not a separate head of privilege, but it may be a very material consideration to bear in mind when privilege is claimed on the grounds of public interest.”*

The purpose behind the claim for Public Interest Immunity/Confidentiality is to prevent a document or information being placed before the court or a tribunal because its public disclosure will be damaging to the public interest. Such a requirement cannot apply if the document or information itself does not warrant being treated as secret – in other words there must be confidentiality in the document or in the information itself before the doctrine can be invoked. Gibbs ACJ in *Thanki v. Whitlam* [1978] 142 CLR 1 (High Court of Australia) encapsulated the requirements for confidentiality as follows:

*“It may be necessary for the proper functioning of the public service to keep secret a document of a particular class, but whilst the document has been published to the world there no longer exists any reason to deny to the court access to that document, if it provides evidence that is relevant and otherwise admissible.”<sup>5</sup>*

The additional ingredient apart from confidentiality which has to be established for the doctrine to be invoked is that the public interest in preserving the secrecy of a particular document or information or class of document overrides the public interest in the administration of justice, which ordinarily requires that the parties should not be obstructed from placing relevant evidence before the court. Lord Templeman in

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<sup>4</sup> See footnote 3

<sup>5</sup> There may be an additional consideration if by some degree of prior publication disclosure of the document or information would still be capable of causing harm for example to national security – see *Thorburn v. Herman* The Times, May 14, 1992.

*R v. Chief Constable of West Midlands Police ex parte Wiley*<sup>6</sup> put it as follows:

*“A claim to public interest immunity can only be justified if the public interest in preserving the confidentiality of a document outweighs the public interest in securing justice.”*

*“In such circumstances some derogation from the golden rule of full disclosure may be justified but such derogation must always be the minimum derogation necessary to protect the public interest in question and must never imperil the overall fairness of the trial.”*

Public Interest Immunity/Confidentiality is normally advanced on one or other of four bases:

1. That disclosure would be prejudicial to national security or foreign relations;<sup>7</sup>
2. That disclosure would create or fan ill-informed or captious public or political criticism of the inner workings of government, and/or increase the difficulties of the decision making process;<sup>8</sup>
3. That disclosure would impede the flow of information necessary in the public interest, in particular by discouraging candour in communications by or to persons with public responsibilities or by discouraging informants from coming forward;<sup>9</sup>
4. That immunity is required to set a limit on the state’s invasion of an individual’s privacy.<sup>10</sup>

The problem, from a practitioner’s point of view is that reported authorities relating to public interest confidentiality always concern *ex post facto* examination of events. From a practitioner’s point of view, particularly a practitioner advising a regulator, the problem can be a very real one and it can arise at the point when telephone contact is made by an informant to the regulator. We are principally concerned in the

regulatory context with the third category of Public Interest Confidentiality i.e. maintaining the “*flow of information necessary in the public interest*” and by encouraging informants to come forward.

*D v. NSPCC* [1978] AC 171 was a case involving an informant who reported to the defendants (the NSPCC) that the claimant was beating her child. Lord Diplock encapsulated the principle thus:

*“I will extend to those who give information about neglect or ill-treatment of children to a local authority or the NSPCC a similar immunity from disclosure of their identity in legal proceedings to that which the law accords to police informers. The public interest served by preserving anonymity of both classes of informant are analogous; they are of no less weight in the case of the former than in the latter class, and in my judgment are of greater weight than in the case of informers of the Gaming Board to whom immunity from disclosure of their identity has recently been extended by this House.”*

Where a regulator is regulating in the public interest, and particularly where such a regulator is regulating pursuant to statutory powers, the principle in *D v. NSPCC* will apply. Thus, for example, informants to the Solicitors Regulation Authority who wish to remain anonymous will be entitled to be treated in accordance with the principles as they apply to Public Interest Confidentiality: see *Buckley v. The Law Society (Nos 1 and 2)* [1983] 1 WLR 985, and [1984] 1 WLR 1101.

It does not follow that regulators can give enforceable undertakings of confidentiality and anonymity to informants in circumstances where there may be a subsequent application for disclosure of documents containing the information provided by the informant and possibly the informant’s identity in proceedings. The regulator is entitled to say to an informant that the information being provided by the informant (in circumstances where the informant requires confidentiality and anonymity) will be treated confidentially by the regulator and used fairly for the purposes of proper investigation by the regulator but that in due course it may be possible that a court will order disclosure either of the information provided by the informant and/or the identity of the informant.

<sup>6</sup> [1995] 1 AC 274 at 280.

<sup>7</sup> E.g. *Burmah Oil Company Ltd v. Governor & Company of the Bank of England* [1980] AC 1090 per Lord Salmon at 1121.

<sup>8</sup> See Lord Reid in *Conway v. Rimmer* [1968] AC 910 at 952.

<sup>9</sup> See *D v. NSPCC* [1978] AC 171, per Lord Diplock at page 218.

<sup>10</sup> See *Re Joseph Hargreaves Ltd* [1900] 1 Ch 347 per Lord Reid in *Conway v. Rimmer* [1968] AC 910 at 946f and see *Lonrho plc v. Fayed (No 4)* [1994] QB 775 at 787 per Lord Bingham MR.

Issues which arise in this context are also connected with the fact that regulators when obtaining information in the exercise of their regulatory functions are only permitted to use the information which has been obtained for the purposes of their regulatory disciplinary functions, not for other purposes. It follows that in the course of the performance of the regulator's powers the ability to use information provided by informants will be circumscribed by:

1. The doctrine of Public Interest Confidentiality;
2. The restraints imposed upon the regulator by the statutory or other powers pursuant to which the regulator is exercising its functions; and
3. The regulator's obligations to comply with disclosure requirements either under the CPR, the regulatory or disciplinary scheme in respect of which the documents may become relevant, or possibly other requirements such as subpoena powers being exercised by other authorities – for example if a criminal investigation is running in parallel with the regulatory investigation.

These points fell for consideration in connection with the MMR vaccine case and the regulatory and disciplinary pleadings which the GMC pursued against Dr Andrew Wakefield and others – see *Wakefield v Channel Four, Deer and the GMC* [2006] EWHC 3289 (QB). The GMC conducts its regulatory and disciplinary functions in accordance with powers provided to it under The Medical Act 1983 and in particular section 35(A). Section 35(A) of the Act authorises the Council of the GMC to require “(a) a practitioner or (b) any other person to supply such information or produce such a document as required by the [GMC] for the purpose of assisting it or any of its committees in carrying out its functions in respect of professional conduct, professional performance or fitness to practice”.

In the course of its enquiries into Dr Wakefield the GMC had disclosed to it documents from the Legal Services Commission which derived from the claims and proceedings being brought by various families whose children were said to have suffered illness as a result of the MMR vaccine, documents, and witness statements or exhibits for use in the GMC's disciplinary

proceedings, and files of documents disclosed to the GMC by University College London relating to the research carried out by Dr Wakefield and others. Many of these were confidential.

In the meantime Dr Wakefield started libel proceedings against Channel 4 Television Corporation and Brian Deer, a reporter. In the course of the GMC disciplinary proceedings, the GMC had disclosed to Dr Wakefield the three categories of documents which I have just described. They were disclosed to him in connection with the disciplinary proceedings, and for no other purpose. However, in the libel proceedings his solicitors, quite properly, listed those documents as relevant documents but were not prepared to permit inspection of them by Channel 4 without an order of the court. The GMC was brought into the proceedings as intervener in order for it to be given the opportunity to make submissions as to whether or not inspection should occur in the libel action. Before the court the GMC advanced two arguments in support of its contention that inspection should not be permitted. First, the GMC pointed to the fact that section 35(A) of the Medical Act was an extremely broad provision which enabled the GMC effectively to obtain any document (including confidential documents) which it considered would assist it in carrying out investigations in respect of professional conduct, professional performance or fitness to practice even if such documents were confidential - subject only to the proviso in section 35(A) that a document could not be obtained if it would not be a compellable document in court (i.e. a privileged document). Since section 35(A) was cast in wider terms than would be the case for disclosure in civil proceedings, or under the *Norwich Pharmacal* jurisdiction<sup>11</sup>, the court should be cautious before ordering inspection of documents in civil proceedings which had come into the GMC's possession via a statutory mechanism which is intended to permit a regulator to carry out full investigations in circumstances where the regulator itself might not choose to use such documents which were or might be subject to confidentiality.

The second argument was that information had been provided to the GMC confidentially by sources such as

<sup>11</sup> For a discussion of the impact of the lawyer's duty of confidentiality in the context of a *Norwich Pharmacal* application against solicitors see *United Company Rusal Plc v HSBC Bank Plc, Debevoise Plimpton LLP (Tugendhat J)* [2011] EWHC 404 (QB)

parents or others concerned with children who had been examined or treated by Dr Wakefield, and the GMC was concerned that such sources of information might dry up if it became known that information provided in confidence to the GMC could be subject to disclosure in High Court proceedings. In particular the GMC provided evidence to the court that it had (through a senior officer) given undertakings of confidentiality to parents and others when carrying out its investigations which enabled the GMC to be provided with information in confidence by such sources. Eady J in the High Court ordered that the defendants should be permitted to inspect the documents despite the GMC's arguments. He reached his decision by the following route:

1. He fully accepted that inspection should not be ordered of documents unless it is necessary and proportionate to the litigation and that patient confidentiality is a relevant factor to take into account when determining such questions.
2. He agreed that it would not be appropriate for documents provided to the GMC to be "automatically" copied to the claimant and thereafter to the defendants for inspection. The usual criteria of relevance and ultimately of necessity and proportionality had to be applied.
3. Thirdly, he saw that there was in place an agreed provision between claimants and defendants whereby any "truly confidential" material which was required to be disclosed and inspected should be subject to an effective and secure regime, so that the information would only come into a limited number of hands, as may be necessary for the proper conduct of the litigation. He went on to hold that there would never be any need for any patient or parent to be identified. Subject to that, he said that the defendants were entitled prima facie to inspect what is disclosed in accordance with the requirements of standard disclosure.

*Wakefield v. Channel 4 Television* demonstrates what I suggest is a trend in the decisions of the courts. If confidentiality can be protected sufficiently through redaction then relevance is likely to trump all other considerations.

In most regulatory cases the regulator will have the power to obtain documents having been set upon a course of enquiry through a confidential source<sup>12</sup>. It is therefore unlikely, in most cases, that the regulator will be troubled by requirements of disclosure of confidential sources – if all of the relevant information the regulator requires and which may be relevant to any defence on the part of the regulated can be obtained through the use of regulated statutory powers, then the relevance of the confidential informant may fall away.

There is one category of case where a real concern may arise: that is where the informant is the source of the relevant evidence, the evidence does not come to light through the exercise of statutory or other powers, and the informant insists for his own safety on anonymity but his evidence, or what he has said to the regulator, remains relevant.

In these sorts of cases (admittedly rare) it seems to me that the regulator, if it wishes to preserve the anonymity of the source, will have to apply to maintain that anonymity before a tribunal, which is not constituted in the form of a tribunal which will ultimately hear the case. If the regulator wishes to preserve confidentiality and anonymity in these circumstances the regulator will have to undergo a PII type of application at an early enough stage and before a tribunal seized of sufficient material to make an informed judgment so that justice can be done between the parties. The regulator would have to decide whether to make the application without notice (or with notice) to the Defendant. The regulator will have to supply sufficient information to enable argument to take place whilst retaining the critically confidential information until the ruling of the tribunal has been made. Criminal practitioners are familiar with these difficulties. In a regulatory context they occur less often, but they do occur from time to time. The important point to make is that thought needs to be given at an early stage for resolving the question as to disclosure in a forum which would render the information safe should disclosure not be ordered.

### **Waiver of Confidentiality**

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<sup>12</sup> See e.g. the GMC under S35(A) of the Medical Act 1983, or the SRA under Sections 44B and Schedule 1A of the Solicitors Act 1974

It is commonly thought that when an individual makes a complaint to a regulator he or she waives confidentiality, or privilege in the subject matter of the complaint. Many complaints to regulators of the professions concern matters which are confidential to the complainant. Whilst the principle, that making a complaint involves a waiver of confidentiality or of privilege, is broadly correct, the critical question is: how far does the waiver go? Is there a waiver for all purposes or only for the purposes of the investigation of the complaint? Can the waiver be treated as limited only to the very information supplied on a voluntary basis by the complainant or may the regulator (or the complainant) be subject to a requirement to disclose more?

As to the first point. It seems to me that a waiver of confidentiality or privilege by the making of a complaint to a regulator normally extends only to the regulator using the material for the regulator's proper purposes.

A person who relies on material in court or tribunal proceedings that would otherwise be privileged may be deemed to have waived privilege in other related documents, where the document in respect of which privilege is waived would otherwise be rendered misleading by virtue of being plucked out of its wider context. This principle was summarised as follows by Lord Bingham CJ in *Paragon Finance Plc v Freshfields*:

*While there is no rule that a there is no rule that a party who waives privilege in relation to one communication is taken to waive privilege in relation to all, a party may not waive privilege in such a partial and selective manner that unfairness or misunderstanding may result.*<sup>13</sup>

In order to establish a collateral waiver of privilege in related documents it is necessary to establish that privilege has been waived in the context of legal proceedings and that the documents sought to be disclosed fall within the scope of the initial waiver of privilege.

Broadly speaking the privilege will not be waived in collateral materials until the privileged document has

been relied upon in some way in court proceedings. In *General Accident Fire and Life Assurance Corp Ltd v Tanter* Hobhouse J considered that it was necessary for the privileged material to have been relied upon in evidence before a waiver would be triggered in respect of collateral material.<sup>14</sup> Although there is some uncertainty as to what stage in proceedings that collateral waiver will operate, it appears to be accepted that the doctrine will not operate in respect of waiver of privilege that is made when no proceedings are contemplated.<sup>15</sup> In *Ramac Holdings Limited v Brachers* [2002] EWHC (Ch) 1683) Etherton J held:

*"No case has been drawn to my attention which has applied the principle outside partial waiver made during the course of legal proceedings. In that context, the ambit of "the issue in question", which governs the extent to which privilege is waived in relation to collateral or associated documents, can readily be understood. In circumstances such as the present, where the partial waiver is said to have taken place at a time when there was no litigation and none was contemplated, the concept of "the issue in question" is difficult to grasp. It is relevant to note in this context that, even where the partial waiver has taken place in the course of litigation, the courts in general, as Hollander and Adams say at page 214 of their work: 'have not extended the ambit of the waiver beyond what is necessary and, if in doubt, have taken a relatively restricted view of 'the issue in question.'"*<sup>16</sup>

This is reinforced by the principle that a party who waives privilege in a document for a limited purpose only, will not necessarily be precluded from asserting privilege over those documents in subsequent proceedings (*British Coal Corporation v Dennis Rye Ltd* [1988] 1 WLR 1113, 1121).

It is for the court, and not the party, to determine objectively what is the extent of the waiver.<sup>17</sup> In *Fulham Leisure Holdings Limited v Nicholson Graham & Jones*, Mann J summarised the principles to be applied by the court in determining the scope of the necessary collateral waiver:

<sup>13</sup> *Paragon Finance Plc v Freshfields* [1999] 1 W.L.R. 1183, 1188.  
<sup>14</sup> *General Accident Fire and Life Assurance Corp Ltd v Tanter* [1984] 1 WLR 100, 113-114.  
<sup>15</sup> Thanki, *The Law of Privilege* (2nd edn, 2011) [5.133].  
<sup>16</sup> *Ramac Holdings Limited v Brachers* [2002] EWHC (Ch) 1683 [56].  
<sup>17</sup> Hollander, *Documentary Evidence* (10<sup>th</sup> edn, Sweet and Maxwell) at 433.

1. It is first necessary to identify the event or transaction in respect of which the disclosure has been made.
2. That event or transaction may be identifiable simply from the nature of the disclosure made — for example, advice given by counsel on a single occasion.
3. However, it may be apparent from that material, or from other available material, that the transaction is wider than that which is immediately apparent. If it does, then the whole of the wider transaction must be disclosed.
4. When that has been done, further disclosure will be necessary if that is necessary in order to avoid unfairness or misunderstanding of what has been disclosed.<sup>18</sup>

In addition to these general principles, the court is entitled to have regard to the purpose for which the privileged material was disclosed.<sup>19</sup> In particular, the court will have regard to whether the party who waives privilege in respect of a particular transaction does so for the purposes of relying on it in the litigation or whether the disclosure was made accidentally. The purpose for this distinction was explained by Mann J in *MMI Research Ltd v Cellxion Ltd & Ors*:

*“A party cannot, by disclosing part of a document or by disclosing one document in a context in which there are others, take the benefit of that document in a manner which would render use of the document without any other material unfair or misleading. That is the basis on which I decided the Fulham Leisure case, and that is why there is a difference between cases in which a party is positively relying on a document put forward and a case where a party has produced a document because they were obliged to do so. In the former case, the scope for misleading is rather greater than in the latter.”<sup>20</sup>*

<sup>18</sup> *Fulham Leisure Holdings Limited v Nicholson Graham & Jones* [2006] EWHC 158 (Ch) [11].

<sup>19</sup> *Fulham Leisure Holdings Limited v Nicholson Graham & Jones* [2006] EWHC 158 (Ch) [18].

<sup>20</sup> *MMI Research Ltd v Cellxion Ltd & Ors* [2007] EWHC 2456 (Ch) [27].

Therefore, a party who makes disclosure of a document with the intention of relying upon it in the course of the litigation will be subject to more onerous obligations to make disclosure of collateral material than a party whose disclosure is accidental or done solely with a view to complying with standard disclosure obligations. These authorities establish that the context behind the transaction or event in respect of which disclosure is sought is crucial to the doctrine of collateral waiver of privilege. In considering the whole of the material relevant to the transaction, the court will consider such relevant material to comprise all of the material that puts the transaction in context. Two of the most important aspects to the context surrounding the transaction is, first, the purpose of the transaction that has been called into question and, second, the purpose for which the privileged material has been disclosed.

#### **Provision of information from one regulator to another, one authority to another or from the police to regulators**

A useful starting point for consideration of provision by one authority to another, and in particular by police to a regulator, is to be found in *Woolgar v. Chief Constable of Sussex Police* [2000] 1 WLR page 25. The nurse who was the matron of a nursing home was arrested and interviewed by the police after the death of a patient. The police concluded that there was insufficient evidence to charge the nurse with any offence. The local health authority then referred the matter to the Nursing and Midwifery Council. The NMC asked the police for any relevant information. The police asked the nurse for her consent for disclosure of a transcript of her interview under caution, which she refused. On being told that the police solicitor would listen to the tape and then decide whether it should be disclosed to the NMC, the nurse applied for an injunction to restrain the police from disclosing the transcript on the grounds that it was confidential. Lord Justice Kennedy said:

*“Undoubtedly when someone is arrested and interviewed by the police what he or she says is confidential. Clearly it may be used in the course of a criminal trial if charges are brought arising out of that investigation, but if it is not so used the person interviewed is entitled to believe that, generally speaking, his or her confidence will be respected. If authority be required for that proposition it can be*

*found in Taylor v. The Director of the Serious Fraud Office [1999] 2 AC 177. But as all of the authorities cited indicate there are exceptional circumstances which justify disclosure by the police, otherwise within the course of a criminal trial, of what has been said by a suspect during the course of an interview, in circumstances where the suspect or former suspect does not consent to such disclosure. The question which arises in this case is whether, if the regulatory body of the profession to which the suspect belongs is investigating serious allegations and makes a formal request to the police for disclosure of what was said in interview, the public interest and the proper working of the regulatory body is or may be such as to justify disclosure of the material sought. If the answer to that question is in the affirmative how, as a matter of procedure should contentious issues in relation to disclosure be resolved?"*

Kennedy LJ concluded that where a regulatory body operating in the field of public health and safety seeks access to confidential material, which the police are reasonably persuaded is relevant to the subject matter of an enquiry being conducted by the regulatory body, then confidentiality should be maintained, unless public interest is shown to exist which entitles the police to release the material to the regulatory body which may use the material for the purpose of its own enquiry.

He added this:

*"Even if there is no request from the regulatory body, it seems to me that if the police come into possession of confidential information which, in their reasonable view, in the interest of public health or safety, should be considered by a professional or regulatory body, then the police are free to pass that information to the relevant regulatory body for its consideration. Obviously in each case a balance has to be struck between competing public interests, and at least arguably in some cases the reasonableness of the police may be open to challenge. If they refuse to disclose, the regulatory body can, if aware of the existence of the information, make an appropriate application to the court. In order to safeguard the interests of the individual, it is, in my judgment, desirable that, where the police are minded to disclose, it should, as in this case, inform the person affected of what they propose to do in such time as to enable that person, if so advised, to seek assistance from the court. In some cases that*

*may not be practicable or desirable, but in most cases that seems to me to be the course that should be followed. In any event, in my judgment, the primary decision as to disclosure should be made by the police who have the custody of the relevant material and not by the court."*

The principles to be derived from *Woolgar* are not confined to cases involving public health or public safety. The principles apply to any regulator where it is in the public interest for the regulator to receive confidential material from the police in the discharge of its regulatory functions. Thus, in *Pamplin v. The Law Society* 2001 EWHC Admin 300 the police having interviewed a number of people, including a solicitor's clerk, under caution on suspicion of possible perversion of the course of justice handed over the interview transcript to the Law Society, and the Law Society wanted to make use of the material in respect of a possible order under section 43 of the Solicitors Act to prevent Mr Pamplin from working for solicitors (a man well known to the court – see *Pamplin v. Express Newspapers*<sup>21</sup>) because he was suspected of altering an attendance note in furtherance of the alleged perversion of the course of justice. Mr Pamplin's application for an injunction to the High Court on the grounds that (a) the Law Society was unlawfully interfering with his private life contrary to Article 8 of the ECHR and (b) the Law Society was acting unlawfully and contrary to the principles in *Woolgar* both failed. On the first ground – alleged breach of Article 8 – Newman J found that there was no involvement of the private life of the solicitor's clerk. On the contrary, he held that the issue for determination by the Law Society concerned his public existence – namely his provision of services to the public as a clerk in the employment of a firm of solicitors in connection with those arrested on suspicion on criminal offences. As to (b) - the *Woolgar* principle - Newman J found that although the police had not sought the solicitor's consent before handing over the material, that was of no consequence: in circumstances where the police in good faith considered it proper to hand the information over to the Law Society and the Law Society also in good faith considered it proper to use the information, there was no basis on conventional public law grounds for injuncting either. On the contrary there was a public interest in the information

<sup>21</sup> [1985] 1 WLR 689

obtained in the course of confidential police interviews to be used by the regulatory body for the protection of the public and in due course rights would arise if the solicitor's clerk considered that orders were made which were unjustified whether that be by way of challenge to such an order to the High Court or to the Solicitors Disciplinary Tribunal as can now occur.

*Woolgar* reached a conclusion similar to that reached by the High Court and the Court of Appeal in *W v. Egdell* [1989] Ch 359 but through different routes. In *Egdell* the claimant was a paranoid schizophrenic who shot and killed five people and injured two others. He pleaded guilty to manslaughter on the grounds of diminished responsibility and was ordered to be detained in a secure hospital. For the purpose of an application to a mental health review tribunal with a view towards his ultimate release, the claimant, through his solicitors, retained the defendant, a consultant psychiatrist, to report on his state of mental health. The consultant psychiatrist formed a more serious view of the claimant's condition than had been taken by the medical officer responsible for his treatment and his report was adverse to the claimant's application. After considering the report, the claimant, through his solicitors, withdrew his application. The defendant consultant psychiatrist was so concerned about the difference between his view and those formed by the medical officer that without the claimant's consent he forwarded a copy of his report to the Assistant Medical Director at the hospital. The claimant brought an action against the defendant alleging breach of confidence. The claim failed before Scott J (as he then was) and it also failed on appeal. Scott J held that it was *"in my judgment plain ... that the circumstances did impose on Dr Egdell a duty of confidence. If, for instance, Dr Egdell had sold the contents of his report to a newspaper, I do not think any court of equity would hesitate for a moment before concluding that his conduct had been a breach of his duty of confidence. The question in the present case is not whether Dr Egdell was under a duty of confidence; he plainly was. The question is as to the breadth of that duty. Did the duty extend so as to bar disclosure of the report to the Medical Director of the hospital?"*

Scott J then went on to state as follows:

*"The fact is that Dr Egdell was engaged by W. He was the doctor of W's choice. Nonetheless, in my opinion, the duty he owed to W was not his only duty. W was not an ordinary member of the public. He was, consequent upon the killings he perpetrated, held in a secure hospital subject to a regime whereby decisions concerning his future were to be taken by public authorities, the Home Secretary or the tribunal. W's own interests would not be the only ones nor the main criterion in the taking of those decisions. The safety of the public would be the main criterion. In my view, the doctor called upon, and Dr Egdell was, to examine a patient such as W owes a duty not only to his patient but also a duty to the public. A duty to the public would require him, in my opinion, to place before the proper authorities the result of his examination if, in his opinion, the public interest so required. This would be so, in my opinion, whether or not the patient instructed him not to do so."*

Whilst the Court of Appeal agreed with the result, Bingham LJ disagreed with the "subjective" approach to the question of the doctor exercising his judgment to make a disclosure in the public interest. In considering the public interest qualification to the duty of confidence owed to the claimant, Bingham LJ stated that only the most compelling circumstances could justify a doctor in acting in a way which would injure the immediate interests of the patient, as the patient perceives them, without obtaining his consent. However, he went on to hold: *"where a man has committed multiple killings under the disability of serious mental illness, decisions which may lead directly or indirectly to his release from hospital should not be made unless a responsible authority is properly able to make an informed judgment that the risk of repetition is so small as to be acceptable. A consultant psychiatrist who becomes aware, even in the course of a confidential relationship, of information which leads him, in the exercise of what the court considers a sound professional judgment, to fear that such decisions may be made on the basis of inadequate information and with a real risk of consequent danger to the public is entitled to take such steps as are reasonable in all the circumstances to communicate the grounds of his concerns to the responsible authorities"*.

On my reading of these authorities, the ultimate decision as to whether or not disclosure of confidential information in the circumstances of *Woolgar* and *Egdell* ultimately lies in the hands of the court. An individual doctor, police officer or regulator may make a decision to make a disclosure. But if that decision is challenged, whilst the judgment of the officer, individual or regulator is a highly relevant (indeed weighty) factor in the exercise of the judgment as to whether the disclosure is in the public interest it is the court which holds that balance and not the individual by reference either to any contractual provision or indeed the individual's honestly held but subjective judgment.

These cases lead to a further consideration. Suppose a doctor in the position of Dr Egdell reaches the views that Dr Egdell did but chose not to make the disclosure to the hospital as to his justified concerns as to the danger which the patient posed were he to be released? Suppose then that the patient were released and he committed further killings? Would it be open to the regulator to bring proceedings against a person in the doctor's position for failing to disclose the information, and how would a court or tribunal deal with the doctor's assertion that he did not consider he was at liberty to disclose because the information given to him by the patient was given to him in confidence? This is a very real concern for doctors involved in mental health and also in reports for the purposes of litigation.

Can I suggest that the solution to this problem lies in the following analysis? First, if a doctor believes that a patient presents a real risk to public safety he is bound to ask himself the question "should I warn the person at the hospital which has the custody of the patient of the risk which he faces if he were to be released?" The answer to this question (on the Egdell facts) is in conscience, "yes". The next step for the doctor is to consult his professional body with a view to the professional body either sanctioning the release of the information or seeking the approval of the court for the information to be released in circumstances where the patient's interests can be protected (he can be represented). But there could be justified grounds for criticism of the doctor if, having formed a justified view in good faith that a person represents a threat to public safety, he were to do nothing. At this point his regulator (here the GMC) might be interested.

A similar dilemma arises where experts are involved in cases and they obtain information in such cases where the information is provided to them under the cloak of legal advice privilege or litigation privilege. Here, the doctor is retained to advise or report as an expert. There are circumstances where doctors acquire information under the cloak of privilege which gives rise to a very real concern on the part of the recipient that another practitioner represents a threat to public safety – the other practitioner possibly being the defendant in the case, or indeed (although rarely one hopes) the opposing expert! In these circumstances a genuine suspicion that a medical practitioner represents a risk of harm to the public may arise: yet the doctor in receipt of the information which gives rise to the suspicion may feel that he is unable to do anything with the information because he has received it in circumstances of legal advice or litigation privilege – each being absolute for these purposes.

What is a doctor to do in such circumstances? Under the relevant professional rules a doctor may be bound to report a suspicion that another doctor represents a threat to public health or safety. In my view, although I hasten to add this is not uncontroversial, the reporting of the doctor's suspicion - but nothing more - does not give rise to the disclosure of legally privileged information. If a doctor says to his regulator "I suspect another doctor is a risk to the public" that is no more than the reporting of an individual's subjective state of suspicion. Clearly if the doctor were to report the content of the information which gives rise to the suspicion he will be using privileged information. But provided he reports no more than his suspicion, what use is being made of, or what harm is being done to, or publication of, privileged information? I appreciate that there is a view that the mere reporting of a suspicion even without the content of the information which gives rise to a suspicion in some way involves the use of privileged information or communication. My own view is that it does not. Indeed a regulator in possession of the reported suspicion would not be able to use the privileged information which gave rise to the suspicion, he wouldn't even know about it. What the regulator would then do will be to use its powers (e.g. the GMC under section 35(A) of the Medical Act 1983) to conduct an investigation. In the process of conducting that investigation confidential records may well come into its possession which could be of use in

the course of the investigation (provided such records were not in and of themselves subject to privilege) and if the suspicion were well-founded the investigation should indicate whether or not the suspicion was justified. This is a difficult and sensitive area - for a failure to report a well-grounded suspicion can in and of itself give rise to disciplinary proceedings.

### Legal Professional Privilege and Litigation Privilege

I cannot turn this paper into an exegesis about legal professional privilege and litigation privilege. However, they are important aspects of the law of confidentiality which we as practitioners must have in mind. First let us clear away the definitions. Litigation privilege applies where communications are occurring for the dominant purpose of use in connection with litigation. Privilege not only applies to communications but also to the content of materials. Thus, for example, a draft expert report prepared for use in litigation will be privileged. Two questions usually arise as to whether or not the privilege genuinely applies. First, what is the dominant purpose for which a document or communication was prepared? Secondly, was it for the purpose of litigation? It is not the purpose of this paper to address these two issues although we as practitioners will need to have these two questions in mind. A doctor preparing a report, for example, for some private non-litigious use will not be preparing the report under circumstances of privilege<sup>22</sup>.

Legal advice privilege applies to communications between a person and a legal adviser which are confidential and which are for the purpose of the giving or receiving of legal advice: see *Balabel v. Air India* [1988] Ch 317. Legal advice is broadly defined – see Lord Justice Taylor in *Balabel* – it may relate to the way a transaction is structured, or what is the best way to behave in the course of a particular transaction or proceedings. Further, legal advice privilege is not confined simply to the giving of advice in connection with proceedings – it applies to all matters in respect of which a lawyer is being consulted for the purpose of giving advice.

Legal advice privilege has progressed from being a rule of evidence to a human right. Lord Taylor, who was heavily involved in the cases concerning this issue,

made this clear in *R v. Derby Magistrates Court ex parte B* [1996] AC 487. In English law legal advice privilege is absolute and is not subject to any countervailing public interest which might permit privileged material to be used as evidence in court – again see *Derby Magistrates Court ex parte B*. A description of it as a fundamental human right was endorsed by Lord Hoffmann in *R (Morgan Grenfell Ltd) v. Special Commissioner for Taxes (HLE)* [2003] 1 AC 563 at 606H. In other parts of the world legal advice privilege is subjected to a countervailing public interest consideration and a court can balance each public interest – i.e. the public interest in court being provided with full information as compared with the public interest which justifies the preservation of confidentiality between a client and his lawyer. The reason why legal advice privilege in England is absolute is the principle that a person should be able to divest himself of all matters to his lawyer so that he can receive the fullest possible legal advice on the basis of all facts. This is seen as a fundamental principle and one which helps to ensure the rule of law. The fact that people divest themselves of their secrets to their lawyers is however a matter of considerable interest to regulatory authorities. If anyone wants to find out whether someone has been up to no good the surest way to find that out would be to obtain the file of information passing between a client and his solicitor relating to the particular matter of concern. If a person is suspected of misconduct in the financial markets then it is likely that his lawyers will have information from him as to whether or not he has committed such misconduct. Likewise, if a lawyer has committed misconduct his client file or confidential communications between him and others involved in the suspected wrongdoing, or within his firm, may well reveal whether or not he has been committing wrongdoing. It is here that the delicate balance between preservation of confidential information and in particular legal advice privilege comes to the fore.

The first, and critically important, point to make is that legal advice privilege is a right vested in the client. The first question therefore which arises in relation to any case where privileged information is in issue is in whom does the right or privilege vest? In regulatory work involving lawyers a confidential communication between an individual and a lawyer in circumstances

<sup>22</sup> And in circumstances where it is not covered by legal advice privilege.

where the individual is not the client of the lawyer may be subject to confidentiality but not legal advice privilege. If the information is subject only to a duty of confidence then the confidentiality is not absolute but is subject to the public interest considerations of the kind to which I have been referring. The first step always in these cases therefore is to work out in whom the right to absolute confidentiality vests – if anyone.

Assuming the right does arise one then examines whether it subsists for the purposes of the regulatory inquiry or proceedings. There are broadly speaking three routes by which material apparently privileged will not be subject to privilege in a regulatory inquiry/proceedings. These are:

1. Where one of the usual exceptions to privilege applies, e.g. waiver of privilege (I have already touched on this) or when the so-called “fraud exception” applies. i.e. The communication was not for the purpose of seeking bona fide legal advice but was itself improper such that privilege does not apply. See *R v. Cox & Railton* (1884) 14 QBD 153, 165 and see *Barclays Bank v. Eustice* [1995] 1 WLR 1238, 1249 and see *McE* [2009] 1 AC 908 paragraphs 11 and 82.
2. The privilege may have been overridden by statute. For discussion of this issue see *R v. Income Tax Commissioner ex parte Morgan Grenfell* [2003] 1 AC 563.
3. The third route is where the use results in no loss of privilege in the client because the material is not being used against the client; a further development has been occurring which is giving rise to expressions of concern by those writing on this topic. It is the notion that privileged material can be used in circumstances where it is being used so as not to “harm” the interests of those in whom the privilege is vested. I shall come back to this point in a moment because it has to be considered along with the second exception, namely overriding by statute.

Each of these routes to the loss, or absence of, privilege is not straightforward. As to the so-called fraud exception it is not an “exception” properly so called. If

an individual is using legal advice improperly – for example, in bad faith so as to commit a crime, then there is no privilege in the use of such information - because it is being used for the purpose of the commission of a criminal offence. The more difficult question is what is the scope of the so-called fraud exception? Plainly there can be no privilege in information which is being communicated or used for the purpose of the commission of crime – this much is clear from *R v. Cox & Railton* (1884) 14 QBD 153 and from other cases which have followed it over the century and a half since. Thus if an individual asks his solicitor to keep in the solicitor’s client account proceeds of the individual’s crime, the individual cannot claim privilege in the communication between himself and his solicitor in which he instructs the solicitor to keep the proceeds of his crime. How far does this go? The high point for the “exception” has been *Barclays Bank v. Eustice* [1995] 1 WLR 1238. In this case, solicitors advised farmers (who had entered into mortgages with banks) to enter into leases between themselves and companies under their control so as to create a lease which was a protected agricultural tenancy. When Barclays Bank sought to enforce its right to possession of the farms it was met by a defence and counterclaim that the farm was subject to an agricultural tenancy and therefore the bank could not obtain possession. The bank smelt a rat. It sought disclosure of the solicitors’ file and Schieman LJ said that there was sufficient prima facie evidence of impropriety to justify an order requiring the solicitors to make disclosure of the whole of their file relating to the advice given to their clients concerning the lease transaction. The suspicion or prima facie belief that there had been wrongdoing, albeit wrongdoing short of criminal conduct, was found sufficient by the Court of Appeal to justify intervention.

*Barclays Bank v. Eustice* has been subject to considerable criticism by authors and some doubt expressed in the authorities. In one of the recent cases to come before the senior courts *McE* [2009] 1 AC Lord Neuberger preferred not to express a view as to whether *Barclays Bank v. Eustice* had been correctly decided. The editors of *Thanki on the Law of Privilege* also express some concern as to whether *Barclays Bank v. Eustice* has pushed the exception to the privilege too far. In the context of regulation of lawyers it was

followed by the Divisional Court in *Simms v The Law Society* [2005] EWHC (Admin) 408.

### Overriding by Statute

In order for there to be a statutory override of a constitutional right (legal advice privilege) there must be clear language used by the legislature for such overriding to occur – see *R v. Income Tax Commissioner ex parte Morgan Grenfell* (supra). This issue arose in *McE* in connection with *RIPA*. The House of Lords decided in *McE* that *RIPA* did indeed override privilege so that a person who was a registered private investigator could eavesdrop on communications which were subject to legal advice privilege.

If there is a statutory override to privilege in a regulatory context and the regulator has a right to obtain privileged material, the override will only extend so as to permit the regulator to fulfil the regulator’s proper regulatory functions. This much was made clear by Lord Hoffmann in *ex parte Morgan Grenfell* at paragraphs 32 to 34 when he said of the SRA’s powers to obtain and use information from solicitors:

***“This is not to say that on its facts the Parry-Jones case was wrongly decided. But I think that the true justification for the decision was not that Mr Parry-Jones’s clients had no LPP, or that their LPP had been overridden by the Law Society’s rules, but that the clients’ LPP was not being infringed. The Law Society were not entitled to use the information disclosed by the solicitor for any purpose other than the investigation. Otherwise, the confidentiality of the client had to be maintained. In my opinion, this limited disclosure did not breach the client’s legal professional privilege or, to the extent that it technically did, was authorised by the Law Society’s statutory powers. It does not seem to me to fall within the same principle as the case in which disclosure is sought for a use which involves information being made public or used against the person entitled to the privilege. (my emphasis)***

It can be seen from the emboldened parts of the passage in *Morgan Grenfell* quoted above that the primary ground of decision in *Morgan Grenfell* was the third route i.e. the client’s privilege was not being

breached. Alternatively, Lord Hoffmann held that if the client’s privilege was being breached, the incursion was authorised by statute. The use results in no loss of privilege by the client because the material is not being used against the client.

Lord Phillips in *McE* agreed with Lord Hoffmann’s judgment in *Morgan Grenfell*. As a result, there appears to be developing a “harm” principle in relation to a doctrine which most of us had been thinking was an absolute doctrine (see *Derby Magistrates ex p B*). The harm principle appears to work as follows: if a regulator obtains information which is privileged but intends to use that information solely for the purposes of the regulatory enquiry and disciplinary proceedings but not against the interests of the individual in whom the privilege lies then there is no breach of the privilege. If and insofar as there is a risk of breach, it can presumably be dealt with by a process of redaction. Lord Phillips in *McE* appears to be adopting this principle in this way.

Those of you who still have a foothold in the criminal world will be interested to know that the SRA advanced similar arguments (to the Lord Hoffmann approach in *Morgan Grenfell* and the Lord Phillips approach in *McE*) in the recent case (*Lumsdon v (1) LSB (2) BSB*) in connection with a challenge by the Bar to QASA. The SRA contended that if and insofar as QASA involved any incursion into privilege by the SRA such an incursion was justified under the SRA’s regulatory regime and in any event, since the incursion did not involve any use of the material against the interests of the person in whom the privilege vests (i.e. the client) there was no breach in fact being committed of privilege. The Divisional Court agreed (at [73] with the SRA on this point (and also with its submission in respect of Article 1 Protocol 1 and on all of the grounds being put forward by the SRA). QASA has gone to the Court of Appeal and at the time of writing judgment is reserved. Nevertheless, the authorities tend to indicate a refinement to the privilege principle in the regulatory context, namely whether or not the privileged material is being used against the interests of the person in whom the privilege lies. If the regulator is able to say that there is no breach of privilege because the material is being used entirely for the purposes of the proper regulation of a profession and without there being any harm to the person in whom the privilege vests, then the

*McE / Morgan Grenfell* line of authority is tending to indicate that such use is permissible.

In any event, some regulatory schemes do have a statutory override of privilege. The SRA is the one I have in mind. Under section 44B of the Solicitors Act 1974 the SRA considers that it is able to obtain privileged material and use such material for the purposes of its regulatory functions and in disciplinary proceedings before the Solicitors Disciplinary Tribunal. The court has agreed with this, see *Simms v. The Law Society (supra)*.

Many practitioners will have come across the case of *B and others v Auckland District Law Society* 2003 UKPC 38. That is a case which came before the Privy Council and confirmed the statutory provisions as they applied in Auckland. The provisions under the Solicitors Act 1974 are slightly different and one needs to be careful to ensure that if you are dealing with one scheme you are focussing upon the statutory provisions as they apply to solicitors in this country as opposed to in any other jurisdictions where the provisions may vary slightly but significantly.

It follows from all that I have been saying that if a lawyer in this country comes by information concerning another lawyer, in particular if the lawyer is a solicitor, then the duty to report misconduct to his regulator which arises under Chapter 10 of the Solicitors Code of Conduct 2011 may arise whether or not the information which he has come by is derived from confidential or even privileged sources. This chapter of the Code permits the solicitor to have regard to duties of confidentiality which applies to the client. If a solicitor considers that misconduct has occurred and if he can make a report of such misconduct without breaching client confidentiality or harming his client's interests then the obligation to report is likely to arise. This is a difficult area and one which calls sometimes for finely balanced and careful judgment. It is an area in which those of us dealing with legal regulation will quite frequently have to advise.

### **Without prejudice communications and discussions**

I have decided to include without prejudice negotiations in this paper because of the way regulatory schemes are developing. A few years ago regulators would not have

had powers to settle proceedings but would be required to make a formal complaint or make allegations to the relevant disciplinary tribunal and to prosecute that complaint or those allegations to a conclusion, asking an independent tribunal to make findings against the defendant and then to impose sanctions.

We have come to realise that such a simplistic approach to regulation is heavy handed. Many regulatory matters are capable of settlement provided the regulator and the regulated are able to see eye to eye and agree upon a sanction to meet the public interest requirement for the wrongdoing in question. The Financial Conduct Authority, formerly the Financial Services Authority, has through its penalty notice procedure been able to settle cases and has used a process of penalty discounting in order to entice the regulated community to settle cases. If the regulated person or entity is not prepared to settle then he or she can continue to challenge the FCA to its RDC and if the RDC imposes a finding or sanction which the regulated entity or person disagrees with the case can proceed by way of challenge to the tribunal.

However, in order for regulatory settlement to occur it is of real importance to know whether the discussions which take place between the regulator and the regulated which may lead to a settlement are themselves the subject of confidentiality, and privilege. As I say, this is of real importance not just in the context of financial sector regulation but more widely: the Financial Reporting Council now has provisions within its scheme for settlement of cases; the Solicitors Regulation Authority will be prepared in appropriate cases to enter into regulatory settlement agreements and may, even when cases are before a tribunal, be prepared to recommend a settlement to a tribunal which follows the *Carecraft* principle. In order for there to be a free exchange of information between advisers on both sides one would think that it would be sensible for such discussions to be cloaked under the "without prejudice" principle – i.e. to be cloaked by privilege.

### **The Principles**

Without prejudice negotiations are privileged and apply to all negotiations genuinely aimed at settlement, for this see Lord Griffiths in *Rush & Tompkins Ltd v. GLC*

[1989] 1 AC 1280 at 1300 and Oliver LJ in *Cutts v. Head* [1984] Ch 290 at 306.

The privilege has two foundations. First, as a matter of public policy the parties should be free to discuss matters which might lead to a settlement in complete confidentiality. Second, the privilege is founded upon the agreement of the parties to the discussions. Almost invariably when a regulator is entering into discussions with a regulated entity, either the regulator or the entity will say “may we enter into discussions on a without prejudice basis?” and provided that principle is accepted what then follows is confidential. The effect of the without prejudice principle is twofold. Firstly, documents covered by privilege are not admitted in evidence and secondly, such documents are immune from disclosure to third parties – see *Rush & Tompkins* (*supra*).

In civil law proceedings without prejudice communications may be admitted in evidence in the following limited circumstances helpfully summarised by Robert Walker LJ in *Unilever v. Proctor & Gamble* [2001] 1 All ER 783, as follows:

1. When the issue is whether without prejudice communications have resulted in a concluded compromise agreement.<sup>23</sup>
2. To show that an agreement apparently concluded between the parties during the negotiations should be set aside on the grounds of misrepresentation, fraud or undue influence.
3. If there is no concluded compromise, a clear statement which is made by one party to negotiations and which the other party is intended to act and does in fact act maybe admissible as giving rise to an estoppel: see *Hodgkinson & Corby v. Ward Mobility Services* [1997] FSR 178 at 191.
4. In order to explain delay or apparent acquiescence.
5. In cases of impropriety.

<sup>23</sup> See *Tomlin v. Standard Telephone* [1969] 1 WLR 1378 CAA and *Admiral Management Services v. Paraprotect Europe* [2002] FSR 914.

6. In cases where there is no public policy justification for the exclusion of the rule – see *Muller v. Lindsay & Mortimer*.
7. Where the words are used “without prejudice save as to costs” and the correspondence may be admitted on questions of costs.
8. In matrimonial cases where there is a distinct privilege extending to communications received in confidence with a view to matrimonial conciliation.

Regulatory cases it is sometimes said do not fit comfortably into the description of “civil proceedings”. Nevertheless, for the reasons which I have already alluded to regulators and the regulated will be concerned to ensure that communications which are made with a view to settlement of regulatory proceedings should be subject to the without prejudice rule for very good public policy reasons.

However, in the criminal context the authorities have taken a slightly different turn. In *R v. K* [2010] 2 WLR 905 there was a prosecution for tax evasion arising out of negotiations in matrimonial proceedings. A wealthy husband provided his wife with details of various foreign investments and bank accounts on a without prejudice basis as part of their discussions in divorce proceedings. An informant provided the Inland Revenue with details of the husband’s finances, indicating that he had failed to pay various taxes owing. The Inland Revenue proceeded to prosecute. Various questions arose at the trial of particular relevance being whether or not evidence of criminality – i.e. the failure to pay taxes – could be provided from the without prejudice communications in the divorce negotiations.

In the Court of Appeal Moore-Bick LJ stated:

*“Although the rule may originally have been limited to the use of admissions in the proceedings then pending between the parties, its scope has broadened as greater recognition has been given to its purpose and rationale. However, warnings have been sounded about the need to apply the “without prejudice” rule with restraint and only in cases to which the public interest underlying the rule are plainly applicable: see Prudential Assurance Company Ltd v. Prudential Assurance Company of America [2002] EWHC 2809 (Ch) at paragraph 27.”*

One factor to bear in mind when considering the limits of the rule is that it involves an encroachment on the principle that trials should be conducted on the basis of a full understanding by both parties and the court of the facts relevant to the issues in dispute: see Chadwick LJ [2004] ETMR 404 paragraph 23.

The court went on to state (see paragraph 67) that:

*“There is a strong public interest in the investigation and prosecution of crime and it is one that must be taken into account when deciding whether the public interest in promoting settlement is sufficient to render “without prejudice” communications inadmissible in subsequent criminal proceedings. Given that the law has not afforded such far reaching protection to confidential communications between lawyer and client, we find it difficult to accept that, if evidence of an incriminating admission falls into the hands of the prosecuting authorities, it is rendered inadmissible for subsequent criminal proceedings. It is rendered inadmissible against the maker at a subsequent criminal trial on public policy grounds simply by reason of the fact that it was made in the course of “without prejudice” discussions. The immediate purpose of the “without prejudice” rule is to enable parties to negotiate freely without compromising their positions in relation to their current dispute and although it may be justifiable to extend the scope of protection to subsequent proceedings involving either of the parties to the original negotiations, the public interest in preserving confidentiality becomes weaker the more remote the subject matter of the proceedings becomes from the subject of the original negotiation.*

*Criminal proceedings involve different parties and are of a different nature. To that extent they are necessarily at one removed from the dispute that gave rise to the negotiations. In those circumstances, we consider that the public interest in prosecuting crime is sufficient to outweigh the public interest in the settlement of disputes and therefore that admissions made in the course of “without prejudice” negotiations are not inadmissible simply by virtue of the circumstances in which they were made.”*

Basing ourselves on the Court of Appeal decision in *R v. K* it would seem to follow that if admissions of

criminal conduct were made in the course of without prejudice discussions between a regulator and a regulated entity it would be open to the regulator to disclose such admissions to the prosecuting authorities and for the prosecuting authorities to use such admissions in the course of their prosecution. However, it does not seem to me that the same flexibility applies if there is an attempt to use what was said in without prejudice discussions between the regulator and the regulated or between the regulated person in other regulatory proceedings where what was said falls short of admission to criminal conduct. In a case before the Solicitors Disciplinary Tribunal involving a firm of solicitors known as Atlantic Law and a Mr Greystoke, the FSA brought proceedings before the RDC which led to Mr Greystoke being permanently prohibited from conducting any authorised activities and being fined £200,000 with a fine of £200,000 upon his firm – effectively for authorising boiler room promotions in the United Kingdom. There were without prejudice discussions which took place between Mr Greystoke and his legal advisers and the FSA and its legal advisers. It was common ground that these were subject to without prejudice privilege.

Before the Solicitors Disciplinary Tribunal Mr Greystoke attempted to introduce the content of those without prejudice discussions before the tribunal. At a hearing in November 2013 the tribunal refused to confine the scope of the privilege so as to say that it did not apply to discussions between a regulator and a regulated entity or person which were undertaken with a view to achieving settlement of the regulatory proceedings. As a matter of public policy the SDT refused to permit reference to be made to those discussions before it. An application was made for judicial review of the tribunal’s decision, and refused by Blake J. The argument (by the Claimant) that regulatory proceedings are more akin to criminal proceedings and that therefore the without prejudice principle should not apply, failed.

There is an important public policy reason for preserving the privilege in communications between the regulator and a regulated individual or a regulated entity so that otherwise complex, stressful and expensive regulatory proceedings can be settled in the public interest with appropriate sanctions being imposed (where appropriate) by the regulator or indeed by

independent tribunals on the recommendations of both parties, following well know *Carecraft* principles. I see no reason why the without prejudice rule as it applies to civil proceedings should not apply equally in a regulatory context: public policy favours regulatory settlements in the public interest, and for the parties to be able to have frank discussions under the cloak of the without prejudice/privilege rule. The rule as provided for in R v. K belongs I suggest to its context – an admission of criminal conduct and the admission falling into the hands of a prosecuting authority where (incidentally) S78 of PACE may have a part to play.

**TIMOTHY DUTTON QC<sup>24</sup>**  
**Fountain Court Chambers**  
**Temple**  
**London**  
**EC4Y 9DH**

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