



Neutral Citation Number: [2019] EWCA Civ 1600

Case No: A3/2019/0421

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS COURT (ChD)

Master Clark
HC-2016-001537

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2nd October 2019

Before :

LORD JUSTICE LEWISON
LORD JUSTICE FLOYD
and
LORD JUSTICE HAMBLÉN

Between :

LEE VICTOR ADDLESEE
(and the others listed in the Schedule annexed to the
Amended Claim Form)

Appellants

- and -

DENTONS EUROPE LLP

Respondent

MR THOMAS GRANT QC & MR THOMAS MUNBY (instructed by **Forsters LLP**) for
the **Appellant**
MR WILLIAM FLENLEY QC & MR ADAM KRAMER (instructed by **Clyde & Co LLP**)
for the **Respondent**

Hearing dates : 23rd & 24th July 2019

Approved Judgment

Lord Justice Lewison:

Introduction and background

1. The question on this appeal is easy to pose, but not so easy to answer. It is: what happens to legal advice privilege attaching to communications between a company and its lawyers, once that company has been dissolved; and the Crown has disclaimed all interest in its former property?
2. The relevant background to the appeal can be shortly stated. A large group of investors invested in a scheme marketed by a Cypriot company called Anabus Holdings Ltd. The lawyers acting for Anabus were an English LLP called Salans LLP. Salans LLP has since been renamed Dentons Europe LLP. In the course of acting for Anabus documents came into existence on Salans' files which, for the purposes of this appeal, we must assume would have attracted legal advice privilege. The documents in question are in Dentons' possession. Anabus was dissolved in Cyprus on 11 January 2016. In so far as any rights relating to the documents have passed to the Crown as *bona vacantia*, the Crown has disclaimed all interest in them "without either asserting or waiving any legal professional privilege". The investors claim that the scheme was fraudulent. In May 2016 the investors issued proceedings against Dentons claiming damages for deceit or negligence. Unsurprisingly, they wish to see documents passing between Salans and Anabus. They are likely to be highly relevant evidence. It is accepted, for the purposes of this appeal only, that the documents in question did attract legal advice privilege at the time when they came into existence (and were not, for example, within the so-called "iniquity exception"). The question on this appeal is whether legal advice privilege subsists notwithstanding the dissolution of Anabus. Master Clark held that it did. In so holding, she distinguished the decision of the Upper Tribunal in *Garvin Trustees Ltd v The Pensions Regulator* [2015] Pens LR 1, in which Judge Herrington held that legal advice privilege did not survive the dissolution of a Northern Irish company which had been the client. The ground of distinction was that, whereas in *Garvin* it was no longer possible to restore the dissolved company to the register, in our case that was still a legal possibility. It is common ground that the Master was bound by *Garvin*; but that we are not. The investors appeal.
3. The appeal first came on for hearing on 22 May 2019 before Sir Brian Leveson P and Lewison and Floyd LJ. The area of debate between the parties at that time was, in essence, whether the Master had correctly distinguished *Garvin*. There was no challenge to the correctness of *Garvin* itself. However, all members of the court expressed concerns whether *Garvin* was, indeed, correctly decided. With some encouragement from the court, Mr Flenley QC, on behalf of Dentons, applied for permission to serve a Respondent's Notice taking that point. The court acceded to that application; and adjourned the appeal on terms. This is the judgment following the resumed hearing of the appeal. In the meantime, Sir Brian has retired: hence the different constitution of this court. The issue which the court raised with the parties, as subsequently refined, may be encapsulated as follows:

"whether, legal professional or legal advice privilege having attached to a communication by reason of the circumstances in

which the communication was made, the communication remains privileged unless and until privilege is waived; or whether the privilege is lost if there is no person entitled to assert it at the time when a request for disclosure is made.”

The investors’ argument

4. Mr Grant QC and Mr Munby presented the investors’ argument, which can be summarised as follows:
 - i) Legal advice privilege is a right inhering in and solely for the benefit of an identifiable client and the client’s successors in title. No third party is entitled to assert it.
 - ii) If there is no legal person entitled to assert the right, then it ceases to exist. Legal advice privilege cannot be decoupled from the client and the client’s successor in title. An ownerless right makes no juridical sense.
 - iii) On the dissolution of a foreign company the provisions of the Companies Act 2006 do not apply; and legal advice privilege does not pass to the Crown as *bona vacantia* at common law.
 - iv) If, contrary to iii) above, legal advice privilege did pass to the Crown, (a) the Crown has no interest in enforcing the privilege; and (b) the Crown has disclaimed all interest in it, the effect of which is to extinguish it.
 - v) Where no person has the right to legal advice privilege, the right does not exist and the court cannot enforce it.
 - vi) There is no real prospect of the company being restored to the register.
 - vii) But even if there were, the mere prospect of restoration does not require either the company’s former lawyers or the court to maintain privilege on the off-chance that such a restoration might one day take place. The court must deal with the facts as they are at the time when the application for disclosure is made.

The rationale for legal advice privilege

5. The question posed above is a novel one, which had not arisen for decision before *Garvin*. In such circumstances it is necessary to be cautious about taking literally general descriptions of legal professional privilege even when coming from the most distinguished of judges. In addition, legal professional privilege is commonly categorised under two different heads: legal advice privilege and litigation privilege. Although they have a common purpose, the scope of each is different. We are concerned only with legal advice privilege.
6. The identification of the underlying policy is of critical importance; because, as Lord Scott explained in *Three Rivers DC v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610 at [35], legal advice privilege “should be given a scope that reflects the policy reasons that justify its presence in our law.” That, to my mind, is the key to the resolution of this appeal.

7. In *R v Derby Magistrates' Court ex p B* [1996] 1 AC 487 Lord Taylor of Gosforth CJ comprehensively reviewed the authorities. I will pick out some extracts from them shortly. Unless otherwise stated, the emphasis in quoted passages is mine. Having considered the authorities, Lord Taylor concluded:

“The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence *will never be revealed without his consent*. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.”

8. On the way to his conclusion Lord Taylor quoted from a number of cases which express the same thought.

“it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him, *should be kept secret, unless with his consent*.” (Sir George Jessel MR in *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, 649)

“The reason of the privilege is that there may be that free and confidential communication between solicitor and client which lies at the foundation of the use and service of the solicitor to the client; but, if at *any time or under any circumstances* such communications are subject to discovery, it is obvious that this freedom of communication will be impaired.” (Sir Balliol Brett MR in *Pearce v Foster* (1885) 15 QBD 114, 119-120)

“I take it that, as a general rule, one may say *once privileged always privileged*. I do not mean to say that privilege cannot be waived...” (Sir Nathaniel Lindley MR in *Calcraft v Guest* [1898] 1 QB 759, 761)

“privilege attaches for *all time and in all circumstances*” (Stevenson J in *Hobbs v Hobbs* [1960] P 112, 116-117)

9. As Lord Taylor put it later in his speech:

“... once *any exception* to the general rule is allowed, the client's confidence is necessarily lost. The solicitor, instead of being able to tell his client that anything which the client might say would never in any circumstances be revealed without his consent, would have to qualify his assurance. He would have to

tell the client that his confidence might be broken if in some future case the court were to hold that he no longer had "any recognisable interest" in asserting his privilege. One can see at once that the purpose of the privilege would thereby be undermined."

10. Thus, he concluded:

"For this reason I am of the opinion that *no exception* should be allowed to the absolute nature of legal professional privilege, once established."

11. Agreeing with Lord Taylor, Lord Lloyd said:

"If the client had to be told that his communications were only confidential so long as he had 'a recognisable interest' in preserving the confidentiality, and that some court on some future occasion might decide that he no longer had any such recognisable interest, the basis of the confidence would be destroyed or at least undermined. There may be cases where the principle will work hardship on a third party seeking to assert his innocence. But in the overall interests of justice it is better that the principle should be preserved intact."

12. In the course of his speech Lord Lloyd commended Bingham LJ's statement of the principle in *Ventouris v Mountain* [1991] 1 WLR 607, 611. That statement is:

"Without *the consent of the client*, and in the absence of iniquity or dispute between client and solicitor, *no inquiry* may be made into or disclosure made of any instructions which the client gave the solicitor or any advice the solicitor gave the client, whether in writing or orally."

13. According to Bingham LJ, the nature of privilege precludes even an inquiry into communications passing between lawyer and client. It is not, therefore, simply a matter of making an inquiry and waiting to see whether anyone objects. Lord Hoffmann made much the same point in *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 at [30]:

"*It is not the case that LPP does no more than entitle the client to require his lawyer to withhold privileged documents in judicial or quasi-judicial proceedings*, leaving the question of whether he may disclose them on other occasions to the implied duty of confidence. The policy of LPP requires that the client should be *secure* in the knowledge that protected documents and information *will not be disclosed at all*."

14. The security of knowledge to which Lord Hoffmann referred must surely be knowledge at the time that the communication is made. That, to my mind, is clear from an earlier passage in his speech at [7] where he said:

“First, LPP is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice.”

15. It was that case that finally established that legal advice privilege was not confined to the question of disclosure in legal proceedings; but was a fundamental human right.

16. In *B v Auckland District Law Society* [2003] UKPC 38, [2003] 2 AC 736 the Law Society was investigating a complaint against solicitors. They handed certain documents to counsel appointed by the Law Society on the express basis that privilege was not waived. The issue on appeal was whether the Law Society was entitled to refuse to return the documents to the solicitors. Lord Millett repeatedly emphasised the absolute nature of legal advice privilege and that its foundation was that the communication would not be revealed “at any time or under any circumstances”: see [39] and [42]. At [47] he said that legal advice privilege:

“... requires that a lawyer must be able to give his client an absolute and *unqualified* assurance that whatever the client tells him in confidence will *never* be disclosed without his consent.”

17. One of the arguments was that by handing over the documents to the Law Society’s counsel privilege had been waived. Lord Millett dealt with that argument as follows:

“[68] The society's argument, put colloquially, is that privilege entitles one to refuse to let the cat out of the bag; once it is out of the bag, however, privilege cannot help to put it back. Their Lordships observe that this arises from the nature of privilege; it has nothing to do with waiver. It does not follow that privilege is waived generally because a privileged document has been disclosed for a limited purpose only.... The question is not whether privilege has been waived, but whether it has been lost. It would be unfortunate if it were. It must often be in the interests of the administration of justice that a partial or limited waiver of privilege should be made by a party who would not contemplate anything which might cause privilege to be lost, and it would be most undesirable if the law could not accommodate it.

[69] The society argued that, once the documents were produced to [counsel], they ceased to be privileged. Their Lordships consider that this is playing with words. It confuses the nature of the documents with the rights to which the arrangements with [counsel] gave rise. *The documents are privileged because they were created for the purpose of giving or receiving legal advice. If they are not produced voluntarily, production cannot be compelled.* If they are produced voluntarily, the right to withhold production no longer attaches to them. In that sense the privilege may be said to be lost. But

they are the same documents, and it is not inappropriate to describe them as privileged. *Their inherent characteristics are the same.* The policy which protected them from unauthorised disclosure is the same. The cat is still a cat. It can be put back in the bag.”

18. It is thus the documents themselves that are privileged because of their nature; and only voluntary production that destroys the privilege.

19. In *Three Rivers* Lord Scott said at [24]:

“if a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest. It can be waived by the person, the client, entitled to it and it can be overridden by statute... but *it is otherwise absolute.*”

20. In the same case Lord Rodger said at [54]:

“So it is settled that, *in the absence of a waiver by the client,* communications between clients and their lawyers for the purpose of obtaining legal advice must be kept confidential and *cannot be made the subject of evidence.*”

21. In *R (Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1, [2013] 2 AC 185 Lord Neuberger said at [17]:

“Where legal professional privilege (“LPP”) attaches to a communication between a legal adviser and a client, the client is entitled to object to any third party seeing the communication for any purpose, unless (i) the client has agreed or waived its right, (ii) a statute provides that the privilege can be overridden, (iii) the document concerned was prepared for, or in connection with, a nefarious purpose, or (iv) one of a few miscellaneous exceptions applies (eg in a probate case where the validity of a will is contested).”

22. The last of these exceptions refers to what is commonly known as a *Larke v Nugus* statement, where a solicitor prepares a note recording observations about the client’s testamentary capacity.

The ambit of legal advice privilege

23. Mr Grant QC, on behalf of the investors, accepts that legal advice privilege is absolute, provided that the communication sought to be protected falls within the ambit of legal advice privilege. But, he argues, the logically anterior question is: what are the boundaries of that privilege? It is only if a communication is within those boundaries that protection is absolute. Mr Grant accepted that the boundaries are, in essence, to be determined in accordance with the underlying policy. I have already quoted authoritative statements describing the underlying policy. So the next question, in my judgment, is: what are the boundaries of legal advice privilege?

24. In my judgment, the answer to Mr Grant’s point is that the establishment of legal advice privilege (and therefore its boundaries) depends on the nature and purpose of the communication; and the circumstances under which it is made. I have already quoted Lord Millett’s statement that “The documents are privileged *because* they were created for the purpose of giving or receiving legal advice.” The inherent characteristics of the documents created for that purpose and in those circumstances endure.
25. A communication thus “qualifies” for legal advice privilege as a result of the purpose for which and the circumstances in which it was made. That emerges clearly from the test that Lord Scott proposed in *Three Rivers* at [38]:

“In cases of doubt the judge called upon to make the decision should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law. If it does not, then, in my opinion, legal advice privilege would not apply. If it does so relate then, in my opinion, the judge should ask himself whether the communication falls within the policy underlying the justification for legal advice privilege in our law. *Is the occasion on which the communication takes place and is the purpose for which it takes place such as to make it reasonable to expect the privilege to apply?* The criterion must, in my opinion, be an objective one.”

26. These statements of high authority show that privilege attaches to a communication because of the nature of the communication and the circumstances under which it is made; and that the privilege thus established remains absolute unless it is waived.

The “iniquity exception”

27. No privilege attaches to documents or communications between client and lawyer, where the purpose of the client was the furtherance of crime, fraud or other iniquity. The concept of “iniquity” in this context is a broad one. The existence of this exception does not, however, conflict with the principle that once privilege attaches it remains in being unless waived by the client; nor with the underlying rationale. The client knows (or ought to know) when he consults his lawyer, whether the purpose of the consultation is the furtherance of crime, fraud etc. So there is no retrospective stripping away of privilege. The communication in question never attracted legal advice privilege in the first place: *Crescent Farms (Sidcup) Sports Ltd v Sterling Offices Ltd* [1972] 1 Ch 553, 564G. As Professor Zuckerman explains (Civil Procedure 3rd ed) para 16.107:

“Communications made for illegal or improper purposes, such as the furtherance of crime or the commission of fraud or furtherance of iniquity, are not privileged. This principle is not so much an exception to the rule that communications between client and lawyer for the purpose of obtaining legal advice ... are privileged, as a mark of the outer bounds of the definition of privilege.”

28. In my judgment, therefore, the boundaries of legal advice privilege, within which it is absolute unless and until waived, are that the communication in question must be a communication between lawyer and client, made in connection with giving or receiving legal advice, otherwise than for an iniquitous purpose.
29. All the statements I have quoted suggest that privilege attaches to communications at the time when they were made; and that the privilege remains unless and until the client consents to its waiver. The rationale for the privilege means that privilege comes into existence at the time when the person in question consults his lawyer. The client must be sure *at the time when he consults his lawyer*, that, without his consent, there are *no circumstances* under which the privileged communications will be disclosed without his consent. As Lord Taylor explained, the lawyer's mouth "is shut forever." It is not the immunity which must be asserted. On the contrary, it is the consent to disclosure which must be established.
30. This position is reflected in, for example, section 8 of the Police and Criminal Evidence Act 1984. That section empowers a magistrate to issue a search warrant where a number of conditions are fulfilled. One of those conditions is that the material "does not consist of or include items subject to legal privilege". Where a constable is searching premises, he has no power to seize anything which he reasonably believes is an item subject to legal privilege: section 19. Items subject to legal privilege are defined in section 10 as:
- “(a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;
 - (b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and
 - (c) items enclosed with or referred to in such communications and made—
 - (i) in connection with the giving of legal advice;
 - or
 - (ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings,when they are in the possession of a person who is entitled to possession of them”
31. This provision was said in *R v Central Criminal Court, ex p Francis & Francis* [1989] AC 346 to encapsulate the common law. Professor Zuckerman also considers that section 10 is “a useful definition of the common law privilege”: Civil Procedure (3rd ed) para 16.4. There is no requirement here for legal advice privilege to be positively asserted.

The public interest dimension

32. Legal advice privilege is not merely a private right. It is not like a private right to confidentiality. Lord Hoffmann made this point in the extract from his speech in *Morgan Grenfell* that I have quoted. It is, in Lord Taylor's words, "a fundamental condition on which the administration of justice as a whole rests": *Derby Magistrates* at 507D. Other judges have expressed the same principle:

"The present case does not, with respect, involve a contest between competing private and public interests, but between two competing public interests of high importance: the public interest in the maintenance of the integrity of the legal profession and the public interest in the administration of justice. The former interest may be said to require that all relevant information be made available to those charged with the investigation and determination of complaints against legal practitioners. The latter requires that a lawyer must be able to give his client an absolute and unqualified assurance that whatever the client tells him in confidence will never be disclosed without his consent." (*B v Auckland District Law Society* at [47])

"... the seeking and giving of [legal] advice is strongly in the public interest" (*Three Rivers* at [34])

"The public interest in a party being able to obtain informed legal advice in confidence prevails over the public interest in all relevant material being available to courts when deciding cases." (*Three Rivers* at [112], citing *Re L (A Minor)* [1997] AC 16)

Successors and others

33. Privilege does not cease on the death of a living person. That is established by the decision of the House of Lords in *Bullivant v Attorney-General for Victoria* [1901] AC 196. In the course of an investigation in Australia into the tax affairs of a deceased person the authorities obtained an order to examine witnesses in England. One such witness was one of his executors, who was a solicitor. The question was whether, despite his objection, he could be required to produce documents prepared by him in the course of his profession relating to the execution of conveyances by the deceased. Most of the argument concerned the applicability of the "iniquity exception". But a secondary argument raised the question of whether privilege survived death. Lord Lindley dealt with that argument as follows:

"The mere fact that a testator is dead does not destroy the privilege. The privilege is founded upon the views which are taken in this country of public policy, and that privilege has to be waived, and *unless the people concerned in the case of an ordinary controversy like this waive it*, the privilege is not gone - it remains."

34. That case, too, establishes that the privilege remains unless waived; but that it may be competent for the personal representatives to waive it. It is also noteworthy that Lord Lindley did not articulate the principle in terms of property, successors in title, or devolution of rights; but by reference to the underlying public policy. Nor did he say that the right to *assert* privilege had “vested” in the personal representatives. What they had was the power to *wave* it. Absent a waiver the privilege “remains”. Whether privilege had to be “claimed” by the dead man’s executors was not the legal point in the case, although in practical terms that will usually be the case on the facts.
35. In addition, it seems to be the case that at least one of the rationales for the maintenance of legal advice privilege after the client’s death is a concern for those left behind as much as a concern for the deceased. In *Three Rivers* Lord Rodger explained at [55]:
- “People have a legitimate interest in keeping such matters private. The case for confidentiality is, if anything, even more obvious when it comes to the preparation of a will. Rightly or wrongly, the provisions are often shaped by past relationships, indiscretions, experiences, impressions and mistakes, as well as by jealousies, slights, animosities and affections, which the testator would not wish to have revealed but which he must nevertheless explain if the solicitor is to carry out his wishes. Divulging the provisions during the testator's lifetime or disclosing the reasons for them after the testator's death could often cause incalculable harm and misery. *The public interest lies in minimising the risk of that happening.*”
36. In *R v Molloy (Deceased)* [1997] 2 Cr App 238 the Court of Appeal (Criminal Division) was faced with an unusual application. An appeal on behalf of Mr Molloy was on foot; although Mr Molloy was dead. The lawyers acting on the appeal wanted to waive privilege in the instructions given to his legal team at the original trial. The question was whether they could. The question posed by Roch LJ was: “does the right to *wave* legal professional privilege die with the person”. It is to be noted that the question related not to the continuing existence of the privilege; but to the right to waive it. Both counsel agreed that the personal representatives were entitled to waive privilege on the authority of *Bullivant*. Roch LJ agreed. He said that legal professional privilege does not cease on the death of the client “but vests in his or her personal representatives”. This is the language of property rights, which may now need qualification. Roch LJ also said that in *Bullivant* their Lordships “unanimously decided that privilege survived death and could be claimed by the dead man’s executors”. It is also worth noting that there was no underlying property in issue in *Molloy*; so it was not a case of legal advice privilege (or more accurately the right to waive it) passing with a particular item of property.
37. This court most recently considered the nature of legal professional privilege in *Shlosberg v Avonwick Holdings Ltd* [2016] EWCA Civ 1138, [2017] Ch 210. The question for the court was: what happened to privilege if the client became bankrupt? In the court below, Arnold J ([2016] EWHC 1001 (Ch) at [62]) described legal professional privilege as follows:

“Privilege is a right to resist the compulsory disclosure of information, and in particular documents which contain legal advice or were created for the dominant purpose of obtaining information or advice in connection with actual or contemplated litigation. ... It follows that it is purely a negative right.”

38. That description was not the subject of argument in this court: [2016] EWCA Civ 1138, [2017] Ch 210 at [43]. Nor was the point that arises in this case relevant in *Shlosberg*. In addition, this seems to me to be a more restrictive description of legal advice privilege than that given by Lord Hoffmann in *Morgan Grenfell* which I have already quoted at [13] above.

39. Despite the wide definition of “property” in section 436 (1) of the Insolvency Act 1986, this court held in that case that legal professional privilege did not pass to the trustee in bankruptcy of a person to whom it belonged before his bankruptcy. The court rejected the argument that legal professional privilege was “property”. It was a personal right of the bankrupt. Nor was it a power over property which the trustee could deploy by waiving privilege. Etherton MR said at [69]:

“Mr Marshall accepted that the trustee can use privileged documentation and the information contained in it for the statutory purpose of getting in and realising the bankrupt's estate. He submitted, and the judge concluded, however, that the trustee can only use such documentation and information in a way that would not amount to a waiver of privilege. I agree.”

40. In my judgment the rationale for that conclusion is that privilege attaches to a document or communication. It is more than just a personal right to assert a refusal to produce the documents in question for inspection. In addition, in the light of that case the reasoning in *Molloy*, which used the language of property rights, needs qualification.

A right must belong to someone?

41. Mr Grant does not suggest that the existence (or continuing existence) of legal advice privilege is dependent on its being actually asserted by the client or the client's successor-in-title. In that respect I consider that he was right. This analysis is, in my judgment, borne out by the orders made in both *Derby Magistrates* and the *Morgan Grenfell* case. In *Derby Magistrates* the question that the Divisional Court had certified (and for which the House of Lords gave leave) was:

“Whether a witness summons may properly be issued under section 97 of the Magistrates' Courts Act 1980 to compel production by a prosecution witness in committal proceedings of proofs of evidence and attendance notes giving factual instructions to his solicitor which (a) may contain or record previous inconsistent statements by the witness; and/or (b) which are the subject of legal professional privilege which has not been waived.”

42. The argument for the successful appellant was that:
- “... section 97 of the Act of 1980 does not *empower* the court to order the production of documents which are the subject of legal professional privilege which has not been waived.”
(Emphasis added)
43. At the conclusion of his review of the authorities Lord Taylor ended by saying that the witness summons should be quashed. In other words, the magistrates’ court had no power to issue the witness summons. It was not a question of issuing the summons and then waiting to see whether the recipient asserted legal professional privilege.
44. In *Morgan Grenfell* Morgan Grenfell had marketed a tax avoidance scheme which the Inland Revenue wished to investigate. The tax inspector served notice under s 20 (1) of the Taxes Management Act 1970. That entitled an inspector to serve notice requiring the production of documents which in the inspector’s reasonable opinion contained or might contain information relevant to tax liability. The important point is that Morgan Grenfell applied for an order of *certiorari* quashing the notice on the ground that it was *ultra vires*. It was that case which succeeded in the House of Lords. It was not Morgan Grenfell’s case that it had a defence to the request to produce documents. Rather, if (as the House of Lords accepted) the issue of the notice was *ultra vires*, the inspector had no right to ask for the privileged material in the first place. In addition, it would, to my mind, be very odd if the scope of a statutory power depended on the response of a person against whom it was proposed to be deployed.
45. However, Mr Grant argues that a right must belong to someone; and if there is no one to whom it can be said to belong, the right cannot exist. If there is no legal person who is *capable* of asserting legal advice privilege, then the privilege ceases to exist. Legal advice privilege is not a capacious cloak to be thrown over communications. It is a defined right with defined limits; and that necessarily entails a right-holder. He marshalled a comprehensive anthology of dicta by exceptionally eminent judges in which legal advice privilege has been described as a “right” belonging solely to the client. From that foundation he argues that the existence of the privilege (and its ability to be asserted) depends irreducibly upon the existence of the client or their successor in title. It is inherent in the very nature of a right that there is someone whose right it is. He relied on a number of definitions in legal and other dictionaries which state that a “right” is a person’s ability to control something; and that “every right involves a person invested with the right”. I do not consider that this argument takes matters any further. The right or immunity (i.e. the privilege) is created at the time that the communication is made. I would accept that if there is no extant person at *that* time, there can be no right. But since privilege attaches to a communication made by a client to a lawyer (or vice versa), I find it impossible to conceive of a factual scenario in which that might be the case. The immunity from production thus created belongs to the person who was the client at the time. Once created, the immune status attaches to the communication. Once the client ceases to exist, the only remaining question is whether there is anyone who has the right to waive it. That is the way in which Lord Lindley approached the question in *Bullivant*; and is exactly the question which Roch LJ posed in *Molloy*. In my judgment it is the right question.
46. Nor do I consider that statements made by distinguished judges to the effect that legal advice privilege is a right bind us to decide this point in the investors’ favour. The

point which arises in this case was not before the court in any of the cases in which those pronouncements were made; and I do not consider that general descriptions of that nature require us to hold that privilege is lost if there is no person entitled to assert it. So to hold would, in my judgment, undermine the essential rationale for the very existence of legal advice privilege. As Lord Scott said in *Three Rivers*, it is the rationale which shapes the scope of the privilege.

47. Mr Grant's argument would, in my judgment, amount to a retrospective redrawing of the boundaries of legal advice privilege in a particular case. That subverts the policy that the boundaries must be clear and immutable at the time when the communication is made.

Dissolution of a corporation

48. As I have said, the principal question posed by this appeal is a novel one. Mr Grant's secondary argument is that where the court is called upon to consider whether privilege applies to a novel situation, there is a policy choice to be made. It is true that once privilege has been established the balance has already been struck (as *Derby Magistrates* decides) but that does not address the anterior question whether privilege has been established at all. He relied on part of the speech of Lord Carswell in *Three Rivers* in which his Lordship said at [86]:

“Determining the bounds of privilege involves finding the proper point of balance between two opposing imperatives, making the maximum relevant material available to the court of trial and avoiding unfairness to individuals by revealing confidential communications between their lawyers and themselves. The practice which has developed is a reconciliation between these principles: *Seabrook v British Transport Commission* [1959] 1 WLR 509, 513, per Havers J. There is a considerable public interest in each of these. The importance of keeping to a minimum the withholding of relevant material from the court, upon which Mr Pollock laid emphasis, is self-evident. It was stressed by Wigmore (*Evidence in Trials at Common Law*, vol 8, rev McNaughton (1961), p 554, para 2291), who expressed the opinion that the privilege should be strictly confined within the narrowest possible limits consistent with the logic of its principle, an approach echoed in the speech of Lord Edmund-Davies in *Waugh v British Railways Board* [1980] AC 521, 543. The competing principle of legal professional privilege is also rooted in public policy: cf *B v Auckland District Law Society* [2003] 2 AC 736, 756-757, paras 46-47. It is not based upon the maintenance of confidentiality, although in earlier case law that was given as its foundation. If that were the only reason behind the principle the same privilege would be extended to such confidants as priests and doctors, whereas it has been settled in a line of authority stemming from the *Duchess of Kingston's Case* (1776) 1 East PC 469 that it is confined to legal advisers: see, e g, Cross & Tapper on Evidence, 9th ed (1999), pp 461-465.”

49. He also relied on the decision of the Supreme Court in *Prudential*, in which the court by a majority refused to extend the scope of legal advice privilege to legal advice given by accountants. That decision showed, he said, that the law does not favour extending legal advice privilege to the greatest possible extent.
50. In refusing to *extend* privilege to a defunct corporation (as he would put it) Mr Grant argues that policy comes down on the side of refusing such an extension. First, unlike the death of an individual which is inevitable, the dissolution of a corporation is under its own control. Second, by the time that a corporation is dissolved, at the least in the usual case its affairs should have been fully wound up (whether solvently or insolvently); and any overlooked assets will vest in the Crown as *bona vacantia*. In other words, unlike an individual, it leaves behind no estate to be protected for the benefit of those entitled under a will or intestacy. Nor does it have any goodwill or reputation to protect; and it owes no moral obligation to anyone left behind. Third, it is fanciful to suppose that the human representatives of a corporation would be deterred from being candid with the company's lawyers. Any such person must know that over time management will change and that in the event of insolvency the office holder might well decide to waive privilege. Thus a conclusion that privilege does not survive the dissolution of the client company (or its successors in title) will not expose a company to any risk to which it is not already exposed. There is no reason to believe it would inhibit a properly advised company (or its management) in any way from communicating freely with its lawyers.
51. I do not consider that this is the right way to characterise the question. As I have said, in my judgment privilege attaches to a communication at the time when it is made. It is not a question of extending the scope of privilege, but of extending the circumstances in which privilege, once attached to a communication, ceases to apply.
52. The firm position that the law has taken, reiterated throughout the cases, is that once privilege has attached to a communication, it will only cease if waived by the client (or someone otherwise entitled to waive it) or is overridden by statute. *Derby Magistrates* holds that the balance was struck once and for all in the 16th century; and is insistent that no further exceptions should be created. In addition, the fact that some clients would not be deterred from being candid with their lawyers does not restrict the ambit of legal advice privilege. To quote Lord Scott in *Three Rivers* again at [34]:

“It is obviously true that in very many cases clients would have no inhibitions in providing their lawyers with all the facts and information the lawyers might need whether or not there were the absolute assurance of non-disclosure that the present law of privilege provides. But the dicta to which I have referred all have in common the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else.”

53. In the *Prudential* case Lord Sumption quoted Lord Scott and said at [118]:
- “The underlying principle is that those clients who do wish to consult a lawyer on the basis of *absolute confidence* should be entitled to do so, notwithstanding that absolute confidence may be less important to others.”
54. That was a dissenting judgment; but Lord Neuberger, giving the leading judgment of the majority (with which the other members of the majority agreed) said in terms at [20] that he could not improve on Lord Sumption’s explanation of the rationale for legal advice privilege.
55. I may also add that we have been shown two further Australian cases in both the Federal Court and the Court of New South Wales in which judges have held that privilege continues to attach to such communications made by a corporate client, even after the corporation has been dissolved: *Lake Cumbeline Pty Ltd* [1994] FCA 1479, [1994] 136 ALR 58, 63-66 (“In my opinion, once it is established that the documents are privileged then the privilege is not lost unless there is a waiver express or implied by the person entitled for the time being to that privilege.”); *Swaab v Commissioner of the NSW Police Service* [2005] NSWSC 901 (where it was held that privilege survived dissolution whether or not it had vested in the Australian Securities Commission, which is the equivalent of vesting in the Crown as *bona vacantia*). I believe that they were rightly decided. Mr Grant says that those cases are difficult to reconcile with the earlier Australian case of *Baker v Evans* (1987) 77 ALR 565. I do not agree. In *Baker* Pincus J appears to me to have accepted that the dissolution of a company did not put an end to the privilege (p. 567 line 41). That case was decided on a different point.
56. Mr Grant countered by referring to two authorities from the United States of America. *Red Vision Systems Inc v National Real Estate Information Service* LP 2015 PA Super 5 is a decision of the Pennsylvania Court of Appeals. The court reviewed a number of authorities, some of which upheld the continued existence of privilege after the dissolution of a corporation and others that did not. The foundation of the actual decision in that case seems to me to be the proposition that under Pennsylvania law “the privilege is not absolute and Pennsylvania law imposes a shifting burden of proof in disputes over disclosure of communications allegedly protected by attorney-client privilege”. That is not the law of this jurisdiction. The court did, however, hold that attorney-client privilege did not survive the dissolution of a corporation. We were also shown a decision to much the same effect in the District Court for the Southern District of New York: *Securities and Exchange Commission v Carillo Huettel LLP* 13 Civ 1735. That case, too, referred to a number of different American authorities some of which went one way and some the other. The judge noted that the Fourth Circuit had described the question as an “unsettled legal question”. I am not prepared to assume that the law in this regard is settled across the United States. Moreover, it may well be that in the United States the balance between the public interest in protecting legal advice privilege and the public interest in placing all relevant evidence before a court has not been so decisively struck in favour of legal advice privilege as is has been in this jurisdiction. As Lord Taylor said in *Derby Magistrates* at 508E, the balancing exercise was performed once and for all in the 16th century, and since then has applied across the board.

57. In my judgment Mr Grant's argument comes very close to the argument, rejected in both *Derby Magistrates* and *Nationwide Building Society v Various Solicitors* [1999] PNLR 52, that privilege comes to an end when the client whose privilege it was no longer has a "recognisable interest" in it. The reason why that argument was rejected was that it undermines the principle that the lawyer must be able to assure his client that the communications covered by legal advice privilege will *never* be revealed unless he consents. Legal advice privilege attaches at the moment when the protected communication is made. As far as the proposition that privilege ceases to exist on dissolution of a company is concerned, in *Derby Magistrates*, Lord Taylor was insistent that no exception to the principle "once privileged, always privileged" should be created. The investors' argument falls foul of that too.
58. If an exception were to be made in the case of a dissolved corporation, one would have to consider what other exceptions might have to be made. For example, a members' club that ceases to exist for lack of membership; a society registered under the Friendly Societies Act 1974 or non-charitable donations to a fund held by trustees might all be said to fall within the same principle. The recognition of exceptions would, in my judgment, undermine the policy of certainty that underpins legal advice privilege.

The role of the lawyer

59. In *Nationwide* solicitors were sued for negligence arising out of mortgage frauds. The question arose whether, in the action against the solicitors, they could be compelled to disclose privileged communications in circumstances where the risk of proceedings against the clients whose privilege it was was remote. Blackburne J held that privilege remained. As he put it:

"I take the view that whether or not the client has any recognisable interest in continuing to assert privilege in the confidential communications, the privilege is absolute in nature and the lawyer's mouth is "shut for ever". I further agree with Mr Davidson that it follows from this that it is the lawyer's duty to claim the privilege on behalf of the client, or former client, whose privilege it is, at any rate where it is at least arguable that the privilege exists."

60. Likewise, in *Morgan Grenfell* Lord Hoffmann said that when a lawyer was served with notice under the Taxes Management Act:

"... he has no privilege of his own but may, indeed *must*, assert that of his client."

Statutory override

61. Privilege may be overridden by statute; but a statute cannot do so by general words. If statute is to have that effect, it must do so expressly or by necessary implication: *Morgan Grenfell* at [8]. It was that principle that this court applied in *Shlosberg*, in concluding that nothing in the Insolvency Act took away privilege attaching to communications between Mr Shlosberg and his lawyers; or enabled anyone else to waive it.

62. It is not suggested in the present case that there is any statutory override.

Is there anyone who can waive privilege?

63. We are concerned with a dissolved foreign company. That is of importance, because it means that the domestic statutory provisions in Section 1012 of the Companies Act 2006 (which apply to companies registered in this jurisdiction) do not apply.

64. The Cypriot legislation applicable to the dissolution of a company provides that when a company is dissolved:

“... all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution ... shall ... be deemed to be *bona vacantia* and shall accordingly belong to the Republic, and shall vest in and may be dealt with in the same manner as other *bona vacantia* accruing to the Republic.”

65. It is common ground that, as regards assets belonging to the company situated in this jurisdiction, they are governed by English law. It is also common ground that legal advice privilege is, for this purpose only, to be treated as territorially limited to England and Wales. I will assume, without deciding, that this is correct.

66. Because the domestic legislation does not apply, whether anything passed to the Crown as *bona vacantia* depends on the common law. The Crown’s right to *bona vacantia* right is a prerogative right which entitles the Crown (at least) to all personal property that has no other owner. As Romer LJ put it in *Re Wells* [1932] 1 Ch 29, 56:

“... the rule at common law is that property must belong to somebody, and where there is no other owner, not where the owner is unknown, that is the distinction, it is the property of the Crown.”

67. The extent to which the right goes beyond personal property and chattels real is to some extent uncertain.

68. Where the Crown acquires property as *bona vacantia* at common law, it does so by virtue of a paramount title. It is not a successor in title to the former owner. Mr Grant illustrated that distinction by reference to a number of cases. In *Re Barnett’s Trusts* [1902] 1 Ch 847, 857 Kekewich J put it thus:

“There is no possibility of getting at this property through the deceased. It is because there is no one who can claim through the deceased that the Crown steps in and takes the property. The Crown takes it because it is, as it is described in the cases, *bona vacantia*. It is property which no one claims - property at large - there is no succession. The Crown does not claim it by succession at all, but because there is no succession.”

69. I should, perhaps, emphasise that we are concerned only with *bona vacantia* at common law. In other contexts (for instance the Crown’s rights to the estate of an intestate under section 46 of the Administration of Estates Act 1925) the Crown does acquire *bona vacantia* as successor.

70. Mr Flenley QC argues that privilege passed to the Crown as *bona vacantia* at common law. It is a mistake to take words used by distinguished judges in one context and to apply them rigidly to another context. Whatever might be the status of the Crown's title in relation to solving problems of inheritance under the principles of private international law, the policy underlying legal advice privilege means that the Crown is to be treated as a successor in title (even if technically it might not be). On that basis, the company's legal advice privilege passed to the Crown along with the records and papers to which it attached. Although the Crown has disclaimed any interest in the underlying personal property, it has not waived privilege. The privilege therefore remains.
71. Mr Grant, on the other hand, argues that the better view is that, because of its nature, legal advice privilege is not something which the common law would regard as *bona vacantia* and therefore that the Crown acquired no right either to assert it or to waive it. Legal advice privilege cannot be described as "property" however widely that term is defined, as the decision of this court in *Shlosberg* shows. It may be that if the Crown acquired an asset as *bona vacantia* (e.g. a lease or a motor car) and the previous owner has taken legal advice about that asset, then the Crown would be entitled to the legal advice privilege relating to the advice about that specific asset. But that is not this case. Even in cases of true succession such as succession on death of a living person, there are some rights which do not devolve on successors because they are personal. As regards this last point, it is no doubt true that some personal rights do not devolve on personal representatives on the death of a living person. But that, in a sense, proves too much, because it is clear that legal advice privilege does survive a person's death.
72. I do not consider that the answer to this conundrum affects the outcome of the appeal. If the right to waive privilege never passed to the Crown (or if, as appears to be the case, its settled policy is neither to assert nor waive privilege) then, on the face of it there is no one who can or will waive privilege.
73. If, on the other hand, the right to waive privilege did pass to the Crown, it is clear that the Crown has not waived it. The disclaimer disclaimed the Crown's interest in the books and records of the company, but it was scrupulous to say that privilege was neither asserted nor waived. It would be perverse to interpret the disclaimer in any other way. Mr Grant's fall-back position under this head is that the disclaimer by the Crown is equivalent to waiver; and destroys or extinguishes the privilege. As I understand it, although we were shown no authority to this effect, the Crown is entitled to disclaim an interest in *bona vacantia*, whether it has acquired the *bona vacantia* at common law or by virtue of some statutory provision. The effect of a disclaimer ought to be the same in either case.
74. It is not self-evident, to me at least, that the effect of a disclaimer is necessarily to destroy or extinguish that which has been disclaimed, as opposed to the rights and liabilities of the person who has disclaimed. In the case of a leasehold interest, at least where the landlord and the tenant are the only parties involved, the effect of a disclaimer does indeed bring the leasehold estate to an end: *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70, 87; *Christopher Moran Holdings Ltd v Bairstow* [2000] 2 AC 172. But consider another case. Suppose that a company is dissolved for failure to file accounts. At the date of the dissolution it has a warehouse full of hazardous waste. The Crown disclaims. I do not doubt that the rights and

liabilities of the Crown as regards the hazardous waste come to an end on disclaimer. But the hazardous waste still exists.

75. Mr Grant relied on the explanation given by Sargant LJ in *Re Lister. Ex p Bradford Overseers and Bradford Corporation* [1926] Ch 149, 165. He said:

“The use throughout s. 54 of the words "disclaim" and "disclaimer" is in itself a strong indication of the scope of the section. The words, in my view, connote a renunciation of, or refusal to claim, rights or property which would automatically devolve on or accrue to the person making the disclaimer. They are precisely applicable to a renunciation of a property which with all its rights, interests and liabilities has vested in the trustee under s. 53, sub-s. 2, of the Act. They are not appropriate to any interests, rights or liabilities that have been acquired or undertaken by the voluntary act of the trustee himself, and independently of devolution of the bankrupt. "Disclaime, disclamare signifieth utterly to renounce.": Co. Litt. 102a; and for other references see Stroud's Judicial Dictionary, 2nd ed., vol. i., p. 539. And the word is habitually used in this sense at the present day with reference to the non-acceptance or renunciation of the office and estate of a trustee under a deed or of an executor and trustee under a will.”

76. I am entirely content to accept that description of disclaimer. But what is disclaimed is the bundle of rights and liabilities to which the disclaimer would otherwise have been entitled or to which he would have been subject. It is not necessarily destructive of the underlying property. Indeed, in *Lister* (which concerned a trustee in bankruptcy's liability for rates) that was the very mistake which this court held the trial judge had made. Moreover, the cases show, and the policy requires, that privilege is only lost by voluntary disclosure (i.e. waiver).
77. I do not, therefore consider that the disclaimer by the Crown can be treated as if it were a waiver; or as destructive of legal advice privilege.
78. Mr Grant goes on to argue that if privilege subsists following the dissolution of a corporation, the result will be a unique form of legal advice privilege which is incapable of waiver. The recognition of such a form of privilege would contradict the policy of the law that disputes should be decided on the basis of all relevant evidence. But the strong expressions of the policy underlying legal advice privilege all contemplate that the client's communications will *never* be revealed. If that is the consequence of the dissolution of a corporation, I do not consider that it conflicts with the underlying policy.

Garvin Trustees Ltd v The Pensions Regulator

79. I come at last to *Garvin*.
80. In *Garvin Trustees Ltd v The Pensions Regulator* [2015] Pens LR 1 the Upper Tribunal considered the question whether legal professional privilege survived the dissolution of a Northern Irish corporation. Desmond & Sons Ltd had been the

principal employer in relation to a pension scheme of which Garvin Trustees Ltd was the trustee. The main issue in the case was whether a Mr Gordon (who had been a director of the employer) was obliged to disclose certain documents which related to legal advice that the employer had obtained. Those documents had come under the control of the company's liquidators. Mr Gordon asked the liquidators whether he could keep certain of the documents concerning matters he had been involved in. The liquidators agreed; and handed the documents to Mr Gordon, without any restrictions on what he might do with them. Following the conclusion of the liquidation the company was dissolved.

81. For practical purposes, the legislation relating to the dissolution of a company in Northern Ireland is the same as both the relevant Cypriot legislation applicable in this case; and also section 1012 of the Companies Act 2016. UTJ Herrington held that the privilege did not survive. It is common ground that in the present case the Master was bound by the decision in *Garvin*. It is also common ground that we are not.

82. Judge Herrington held at [24] that privilege is "simply the right to resist the compulsory disclosure of information". Having referred to part of Lord Scott's speech in *Three Rivers*, he went on to say:

"This passage highlights another important feature of the right, namely that it is for the person who is entitled to the right to assert it and a third party is not so entitled even if he has possession of the documents concerned."

83. At [25] he said that the latter point was illustrated by *Schneider v Leigh* [1954] 2 QB 195. That is a very curious case. Mr Schneider was involved in a road accident with a vehicle owned by a company. He brought an action against the company for damages for personal injury. The company or its solicitors instructed Dr Leigh to examine him in connection with the litigation. Following his examination of Mr Schneider, Dr Leigh prepared a medical report for the company's solicitors. The solicitors quoted extracts from the report, which were very critical of Mr Schneider, in a letter to Mr Schneider's lawyers. Mr Schneider took the view that they were libellous and sued Dr Leigh. The question arose whether Dr Leigh could be compelled to disclose the whole of the report. The Court of Appeal, by a majority, held that he could. The essence of the reasoning of the majority was that the litigation privilege attaching to the report was the privilege of the company, not that of Dr Leigh. It followed, they held, that Dr Leigh could not assert it. But to my mind, what makes this case very strange is that (at least in the way that the law has developed) Dr Leigh would have been immune from suit for defamation under the witness immunity rule. That rule, originally devised to afford immunity from suit for defamation in relation to things said in court, now undoubtedly applies to witness statements and experts' reports coming into existence for the purposes of litigation: *Taylor v Serious Fraud Office* [1999] 2 AC 177. It probably did at the time when *Schneider v Leigh* was decided: *Watson v M'Ewan* [1905] AC 480. So *Schneider v Leigh* seems to me to have gone off on the wrong point.

84. There are two other points to be made about *Schneider v Leigh*. First, the species of legal professional privilege in issue was not legal advice privilege but litigation privilege. Litigation privilege (which covers broader matters than merely legal advice)

is not governed by the same rules as legal advice privilege. Second, *Schneider v Leigh* pre-dates *Derby Magistrates*.

85. At [33] Judge Herrington took as his starting point the proposition that the company itself could not assert the privilege because following the dissolution it ceased to exist. If it were to be entitled to assert any rights it would have to be restored to the register; and that could not be done because the relevant time limit had expired. He went on at [36] to consider the position of the Crown. He accepted that the legislation was wide enough to include as *bona vacantia* “a right to assert legal professional privilege which still persisted at the time of the dissolution of the company”. But the Crown had not asserted the right. Thus Judge Herrington concluded at [40]:

“It follows that with the Crown having no interest in asserting the privilege that Mr Gordon is under no obligation to maintain the privilege simply because the right has been vested in the Crown. The Crown has correctly concluded that it should not assert the privilege and in those circumstances absent any other restriction Mr Gordon has no obligation to maintain the privilege. As *Schneider v Leigh* shows the maxim ‘once privileged always privileged’ is not absolute.”

86. Curiously, Judge Herrington did not refer to *Derby Magistrates* at all; although it is fair to say that he did refer to *Nationwide*, in which parts of *Derby Magistrates* were quoted. But in his decision there is no discussion at all of the policy and public interest which underpins legal advice privilege.

87. Mr Grant rightly points out that *Garvin* was followed by Judge Berner in *Ford v Financial Conduct Authority* [2018] UKUT 358 (TCC) and by Arnold J in *Shlosberg*. It is also referred to in a number of leading textbooks, usually as supporting the proposition that legal advice privilege does not come to an end on the dissolution of a company, but passes to the Crown as *bona vacantia*: see Matthews & Malek *Disclosure* (5th ed) para 11.07; Thanki *The Law of Privilege* (3rd ed) para 1.37. But as he also points out, the Upper Tribunal is a superior court of record. It follows, therefore, that the precedential status of a decision of the Upper Tribunal is equivalent to that of a decision of the High Court: *Gilchrist v HMRC* [2014] UKUT 169 (TCC), [2014] Ch 183. As Lord Neuberger said in *Willers v Joyce (No 2)* [2016] UKSC 44, [2018] AC 843 at [9]:

“So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so.”

88. It is not, therefore, surprising that first instance decisions have followed *Garvin*. For the reasons I have given, however, I consider that the principle that Judge Herrington applied in *Garvin* was wrong. It is not a question of who can assert privilege. It is a question of who can waive it; and if there is a person entitled to waive privilege, whether they have done so. In the light of my conclusions thus far, I need not consider whether the Master was correct to distinguish *Garvin* on the facts of this case.

89. I should, perhaps, add that Mr Charles Hollander QC says in *Documentary Evidence* (13th ed) para 19.06 footnote 24 that although, for different reasons, *Garvin* may be right on the facts, “the analysis seems entirely wrong.” He points out that the liquidators had passed the documents to Mr Gordon before the dissolution of the company without imposing any restrictions on the use to which Mr Gordon could put them. It was, therefore, a case in which privilege had been lost before the dissolution. So *Garvin*, too, may have been a case that went off on the wrong point.
90. The result of my analysis is that I would hold that legal advice privilege, once established, remains in existence unless and until it is waived. It is established as a result of the purpose for which, and the circumstances in which, the communication was made. Whether there is no one who can now waive it; or whether the Crown could have waived it but has not done so; does not matter. I would therefore overrule *Garvin*; and hold that the Master was right in her refusal to order disclosure; but for different reasons.

The costs appeal

91. Master Clark decided that Dentons had been the successful party overall, but had failed on some of the issues argued before her. She therefore ordered the investors to pay 80 per cent of Dentons’ costs of the application. Mr Grant argues that even if Dentons are to be regarded as the successful party, the investors should not have to pay their costs. The reason for that conclusion is that Dentons did not need to appear on the application. Having purported to assert privilege on behalf of their non-existent client, they should simply have left it to the court to decide what to do in the light of submissions made on behalf of the investors. They ought not to have actively contested the application; and if they did, they did so at their own risk as to costs, whatever the outcome of the application. The same principle would apply equally to the costs of this appeal.
92. I reject that submission. As Blackburne J held in *Nationwide* and Lord Hoffmann held in *Morgan Grenfell* it is the lawyer’s duty to assert privilege. If, in order to fulfil that duty, they incur costs (including costs in resisting an application for disclosure) they are doing no more than fulfilling that duty. That was also the view taken by HHJ Simon Brown QC in *Mortgage Express v Sawali* [2010] EWHC 90181 (Costs), [2011] 2 Costs LR 288. It may well be that they will be unable to recoup their costs from their client (or former client) but that is a matter for them.
93. In addition, Dentons were the only named party to the application notice (as well as the only defendants in the main action); and the relief sought included a mandatory order against them. It would, to my mind, be extraordinary if a person served with an application notice claiming mandatory orders against them was not entitled to appear before the court to contest the orders sought. It is perfectly true that there are circumstances in which a person is unwilling to release information without a court order; and requires the court order as a form of protection against any complaint by the person whose information is sought. In such cases the person holding the information may choose not to defend the application. But that is a matter of choice. I do not say that solicitors *must* always participate in contested proceedings for disclosure; merely that they *may* do so without overstepping the limits of their duty. If they do so in the absence of indemnity from their client or former client, they will be personally at risk as to costs if they are unsuccessful.

94. In my judgment the Master was perfectly entitled to regard Dentons as the successful party and to award them the proportion of their costs that she did.

Result

95. I would dismiss the appeal.

Lord Justice Floyd:

96. I agree.

Lord Justice Hamblen:

97. I also agree.