Neutral Citation Number: [2026] EWHC 2416 (KB)

Case No: KB-2026-000426

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

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

Date: 21/09/2026

Before:

MR JUSTICE BUTCHER

- -

Between:

(1) CARTER-RUCK SOLICITORS (A FIRM) **(2) MOHAMED AMERSI**	**Claimants**
- and –	
SOLICITORS REGULATION AUTHORITY LIMITED	**Defendant**

- -
- -

Justin Rushbrooke KC and Richard Howell (instructed by **BCL Solicitors LLP**) for the **Claimants**
Tamara Oppenheimer KC and Philip Ahlquist (instructed by **Jenner & Block (London) LLP**) for the **Defendant**

Hearing dates: 21 – 23 July 2026

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Approved Judgment

This judgment was handed down remotely at 11.30am on 21 September 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE BUTCHER

Contents

Mr Justice Butcher:

1. This has been the expedited trial of a Part 8 Claim which raises a single but important issue: whether a statutory notice to produce documents under s. 44B Solicitors Act 1974 ('the 1974 Act') requires regulated persons to produce documents or information which is subject to their clients' legal professional privilege ('LPP').

2. Counsel for the Defendant, the Solicitors Regulation Authority ('the SRA'), said during the course of argument, as to the law on this issue, that 'everyone agrees that the situation is unsatisfactorily unclear at the moment and it needs to be clarified.' My conclusion, for the reasons which follow, is that a notice under s. 44B of the 1974 Act cannot require regulated persons to produce documents or information subject to their clients' LPP, if the client does not waive that privilege.

Factual Setting

3. What is involved is essentially a point of law and statutory construction, which could have arisen in relation to another case or other cases. It is nevertheless useful to summarise the factual background to the present case at the outset of this judgment.

4. The SRA has been investigating the First Claimant ('Carter-Ruck'), a well-known firm of solicitors, which has a particular specialism in defamation, privacy and other media law, and one of its partners, since 8 September 2023. The investigation concerns Carter-Ruck's conduct while acting for the Second Claimant ('Mr Amersi') in bringing or threatening data protection and defamation claims in 2021/22. Carter-Ruck and the relevant partner, and, though he is not the target of the SRA's investigation, Mr Amersi as well, deny any wrongdoing, including any suggestion that they sought to mislead the court.

5. The SRA issued three production notices to Carter-Ruck under s. 44B of the 1974 Act, requiring the production of documents in relation to the client files held by Carter-Ruck for Mr Amersi. Those notices were dated 10 August 2024, 25 February 2025 and 6 October 2025. Between September 2023 and February 2025, Carter-Ruck and the SRA corresponded regarding the SRA's power to require production of material which is subject to LPP where the owner of that privilege does not consent.

6. Between November 2024 and October 2025 Mr Amersi submitted his own representations to the SRA regarding his concerns about the use of his files insofar as they were confidential and/or subject to LPP. He indicated that he was prepared to assist the SRA subject to appropriate assurances that his documents would not be shared with any third parties. In November 2025 the SRA provided, in correspondence, details of its procedures to safeguard privilege, but no agreement was reached in respect of the provision of documents.

7. On 7 October 2025, the SRA withdrew the first of its notices, but required Carter-Ruck to comply with the second notice by 14 October 2025, and also required compliance with the third notice which it had issued by 21 October 2025.

8. On 10 October 2025, the Claimants indicated to the SRA that they would commence proceedings in the High Court seeking declaratory relief if the remaining notices were not withdrawn or suspended. On 13 October 2025 the SRA declined to suspend the

notices. On 14 October 2025 the Claimants issued the present Part 8 proceedings, seeking a declaration that the SRA is not entitled in law, under s. 44B of the 1974 Act, to require the production of material subject to LPP.

9. The Claimants say that their concerns do not rest on an abstract point of principle. They say that real problems have arisen since the SRA embarked on a 'campaign' to investigate so-called 'SLAPPs' (Strategic Lawsuits against Public Participation). They say that the SRA has shown a preparedness to investigate allegations of SLAPPs uncritically and without due regard to the risk that complaints are being weaponised by media defendants to deflect genuine legal claims; that its investigation officers are willing to advance speculative concerns about potential dishonesty by senior solicitors; and that it is increasingly seeking the production of privileged materials even while the litigation which has given rise to the complaint, or related litigation, is ongoing.

10. For its part, the SRA contends that it needs to be able to require the production of documents subject to LPP. In the case of investigations instigated as a result of a client complaint it may not need to deploy a power to compel production of such materials from regulated persons, because a client is likely proactively to provide privileged material in order to permit the investigation to take place. In other cases the evidence pertaining to the alleged misconduct does not concern communications subject to the client's LPP (e.g. an investigation concerning workplace bullying or harassment). It says, however, that it faces a particular challenge in conducting investigations where a complaint is raised by a non-client, especially where the interests of the solicitor and the client are aligned. It is in those circumstances, the SRA says, that it is particularly important that it should have the power to compel the production of documents subject to LPP.

11. It says further that one species of case in which this need arises is in relation to SLAPPs. It says that it recognises the need for freedom of speech and a free press in a democracy, and recognises the critical role that solicitors have in protecting and defending their clients' rights, including their rights to privacy and to protect their reputation, but that it is important that legal action to enforce these rights is pursued properly, and that solicitors must act honestly and with integrity in doing so, avoiding the use of heavy-handed tactics that are oppressive or abusive.

12. It says that it particularly needs to review privileged communications between solicitors and their clients in order to investigate and take regulatory action against solicitors using, or assisting their clients to use, the legal system improperly by pursuing SLAPPs. In particular there is such a need: (i) where there is a concern that a solicitor has made claims or assertions without merit, and there is a question whether the solicitor has taken reasonable steps to satisfy themselves that the claim is properly arguable; (ii) where the client instructs a solicitor to conduct a dispute in an oppressive manner, and there is a question as to whether the solicitor has given appropriate advice; and (iii) where litigation is pursued for an improper purpose and there is a question of whether the solicitor has explored their client's motives and intentions and given proper advice.

13. The SRA put in evidence, in the form of a statement of Mr Jonathan Peddie, which gave what he described as 'six recent examples of cases where the SRA's ability to review privileged material was necessary to investigate solicitors for serious misconduct including dishonesty, fraudulent misappropriation of client monies, falsification of legal instruments, manifest incompetence and failure to avoid blatant conflicts of

interest; participation in fraudulent conveyancing transactions and facilitating abusive litigation at the expense of vulnerable clients and the taxpayer.' These examples, as Mr Peddie says, 'range across a variety of practice areas including litigation, conveyancing, and probate work.'

The Positions of the Parties in Outline

14. The Claimants' case is that s. 44B of the 1974 Act does not give any power to the SRA to require the production of material subject to a client's LPP if that client does not consent. In brief outline, they contend:

(1) That under the principle of legality, fundamental common law rights, including LPP, cannot be overridden by statute except by clear words. Absent express language or necessary implication, the courts presume that even the most general words are intended to be subject to the basic rights of the individual. Compelling solicitors to provide the SRA with material subject to their clients' LPP involves a breach of their clients' right to LPP, and so would need to be authorised by Parliament by express words or necessary implication.

(2) On its proper construction, s. 44B does not abrogate LPP. There are no express words to that effect. Nor is the high bar of necessary implication satisfied. Far from giving effect to Parliament's intention, the SRA's construction involves implying a power to override LPP into s. 44B in circumstances where the Law Society had sought an express power to that effect from Parliament when s. 44B was enacted in its current form, but an amendment to that effect was opposed by the Government in the House of Lords and withdrawn.

(3) The court should give effect to the intention of Parliament and the fundamental right to LPP. No authority binds this court to hold that s. 44B overrides LPP by necessary implication, and the fact that the SRA's misinterpretation of s. 44B has apparently not been the subject of court challenge before now carries no weight.

(4) Even if, contrary to the above, s. 44B, construed in accordance with domestic principles of statutory interpretation, would otherwise authorise the SRA to obtain material subject to LPP, that would be incompatible with art. 8.1 of the European Convention on Human Rights ('ECHR'), because the statutory scheme is not justified under art. 8.2, not least because of the absence of proper safeguards to protect clients' LPP, and is in any event inherently disproportionate. Given that it is 'possible', under s. 3(1) Human Rights Act 1998 ('HRA 1998'), to interpret s. 44B as not overriding LPP, it is the duty of the court so to construe it.

15. The SRA contends that s. 44B of the 1974 Act does give it the power to require the production of documents subject to the client's (but not the solicitor's) LPP. It argues, in summary:

(1) That both LPP and the regulation of the solicitors' profession are underpinned by the same public policy of upholding the administration of justice. The importance of LPP is not to be regarded as being set against some other public policy consideration, with a balance having to be struck. On the contrary, both are complementary manifestations of the same societal need for effective and reliable legal advice and representation.

(2) There is a real need for the SRA to have the ability to consider privileged material in investigating, and potentially prosecuting, cases of alleged misconduct.

(3) It is settled law that the 1974 Act does authorise the SRA to require the production of privileged material pursuant to a s. 44B notice. The Court of Appeal in Parry-Jones v Law Society [1969] 1 Ch 1 ('Parry-Jones') held that the Law Society was entitled to require the production of privileged material under antecedent legislation analogous to the 1974 Act. It has been confirmed in Simms v Law Society [2005] EWHC 408 (Admin) ('Simms') that that approach applies to the 1974 Act. In accordance with the approach of the Court of Appeal in Sports Direct International plc v Financial Reporting Council [2021] Ch 457 ('Sports Direct'), this result is to be regarded as based on a legislative override of the common law right.

(4) The power to override LPP is, on a proper construction, conferred by s. 44B. That is a necessary implication into the section, whose statutory purpose would otherwise be stultified. Other provisions of the 1974 Act indicate that when Parliament intended to limit the SRA's powers to non-privileged material, it specified that. When the predecessor of the section was introduced in 1985, the speeches of government ministers indicated that what could be compelled was disclosure of the solicitor's 'case files', which would include privileged material. Further, a notice to produce documents under s. 44B is enforced by the same powers as a notice to produce documents in an intervention, and it is well-established that the power to require the delivery up of documents on an intervention extends to privileged documents. Moreover, s. 44B should be construed consistently with previous legislation, which involves, here, construing it consistently with the meaning attached to precursor legislation in Parry-Jones. The Claimants' reference to the Hansard records of the debate on 6 March 2007 is inappropriate and inadmissible.

(5) Alternatively to the argument on statutory override and necessary implication, disclosure of documents subject to the client's LPP to the SRA for the purposes of an investigation is not an infringement or is a permissible infringement of that LPP.

(6) It has already been determined that the operation of s. 44B is consistent with art. 8 of the ECHR: SRA v Charles Henry & Co. [2015] EWHC 552 (QB). In any event, it is. It is both necessary and proportionate in this case for the SRA to consider the relevant material.

The Statutory Framework

16. Under Part 3 of the Legal Services Act 2007 ('the 2007 Act'), the Law Society is an approved regulator (s. 20(2) and Part I of Schedule 4 to the 2007 Act). Parliament has conferred regulatory functions on the Law Society. The Law Society has delegated those functions to the SRA, pursuant to s. 79(1)(c) of the 1974 Act. For convenience, in summarising the statutory provisions, I will refer to the SRA rather than the Law Society.

17. The principal governing statute is the 1974 Act. That Act, as is stated in its long title, 'consolidate[d] the Solicitors Acts 1957 to 1974 and certain other enactments relating to solicitors'. Part II of the 1974 Act makes provision in relation to professional practice, conduct and discipline of solicitors and clerks. Section 31(1) confers powers on the SRA to make rules for regulating professional practice, conduct, fitness to

practise and discipline of solicitors. If any solicitor fails to comply with such rules, 'any person may make a complaint in respect of that failure' to the Solicitors Disciplinary Tribunal ('SDT'). Section 32(1) requires the SRA to make rules concerning solicitors' accounts and trust accounts. These must 'empower' the SRA 'to take such action as may be necessary to enable it to ascertain whether or not the rules are being, or have been, complied with' (s. 32(1)(c)).

18. Section 35 is headed 'Intervention in solicitor's practice'. It provides:

> 'The powers conferred by Part II of Schedule 1 shall be exercisable in the circumstances specified in Part I of that Schedule.'

For convenience I have reproduced Schedule 1 to the 1974 Act as an annex to this judgment ('Annex 1').

19. Relevantly for present purposes, paragraph 1 of Schedule 1 provides that, subject to immaterial exceptions, the powers in Part II may be exercised in the following circumstances (amongst others): (i) the SRA has reason to suspect dishonesty on a solicitor's part in connexion with that solicitor's practice (paragraph 1(1)(a)); (ii) the SRA is satisfied that the solicitor has failed to comply with rules made under ss. 31, 32 or 37(2)(c) of the 1974 Act (paragraph 1(1)(c); (iii) a solicitor 'has been committed to prison in any civil or criminal proceedings' (paragraph 1(1)(e)) or struck off the roll or suspended from practice (paragraph 1(1)(g)); (iv) a sole solicitor is incapacitated by illness or accident to such an extent that he is unable to practise, or a solicitor lacks capacity or has abandoned his practice (paragraph 1(1)(ee), (f) and (h)); or (v) the SRA is satisfied that it is necessary to exercise the Part II powers to protect the interests of clients, or former or potential clients, of the solicitor or his firm, or the interests of the beneficiaries of any trust of which the solicitor is or was a trustee (paragraph 1(1)(m)).

20. Part II of Schedule 1 confers extensive powers exercisable on intervention by the SRA. These include, under paragraph 6, that the SRA may resolve that monies held by a solicitor or his firm in connexion with his practice, or any trust of which he is a trustee, shall vest in the SRA and shall be held by it on trust to exercise in relation to them the powers in Part II of Schedule 1 and otherwise upon trust for the persons beneficially entitled to them. Following service of such a notice, the solicitor may, within 8 days, apply to the court for an order withdrawing the notice (paragraph 6(4)).

21. Paragraph 9 of Schedule 1 gives powers to the SRA to require a solicitor or his firm to produce or deliver 'all documents in the possession or under the control of the solicitor or his firm in connection with his practice or former practice or with any trust of which the solicitor is or was a trustee' (paragraph 9(1)(a)). By sub-paragraph 9(6), the SRA may apply to the court for an order authorising a person appointed by the SRA to enter any premises to search for and take possession of any documents to which the order relates, or property required for the purposes of accessing information in such documents. If the SRA takes possession of documents under paragraph 9, it is to serve on the solicitor a notice that possession has been taken, and a person on whom such a notice is served may, within 8 days, apply to the High Court for an order directing the SRA to deliver the documents to such person as the applicant may require (paragraph 9(7)-9(9)). By sub-paragraph 9(10) it is provided that the SRA may apply to the High

Court for an order as to the disposal or destruction of any documents of which the SRA has taken possession.

22. The Administration of Justice Act 1985 ('the 1985 Act') inserted into the 1974 Act a number of provisions in relation to 'Solicitors' discipline'. These included a new section 44B of the 1974 Act. The version of the section inserted by the 1985 Act was in these terms:

> **'44B Power of Society to examine files in connection with complaints.**
>
> (1) Where the Council are satisfied that it is necessary to do so for the purpose of investigating any complaint made to the Society –
>
> (a) alleging professional misconduct by a solicitor; or
>
> (b) relating to the quality of any professional services provided by a solicitor,
>
> the Society may give notice to the solicitor or his firm requiring the production or delivery to any person appointed by the Society, at a time and place to be fixed by the Society, of all documents in the possession of the solicitor or his firm in connection with the matters to which the complaint relates (whether or not they relate also to other matters).
>
> (2) Sub-paragraphs (2) to (12) of paragraph 9 of Schedule 1, together with paragraphs 12 to 16 of that Schedule, shall apply in relation to the powers conferred by subsection (1) as they apply in relation to the powers conferred by sub-paragraph (1) of paragraph 9, and accordingly in those provisions –
>
> (a) any reference to a person appointed, or to a requirement, under that sub-paragraph shall be construed as including a reference to a person appointed, or to a requirement, under subsection (1); and
>
> (b) any reference to any such documents as are mentioned in that sub-paragraph shall be construed as including a reference to any such documents as are mentioned in subsection (1).'

23. That version of section 44B was replaced by a new section 44B of the 1974 Act by the 2007 Act, which also inserted new sections 44BA-BC. Those sections are in the following terms:

> **'44B Provision of information and documents by solicitors etc**
>
> (1) The Society may by notice require a person to whom this section applies—

(a) to provide information, or information of a description, specified in the notice, or

(b) produce documents, or documents of a description, specified in the notice.

(2) This section applies to—

(a) a solicitor;

(b) an employee of a solicitor;

(c) a recognised body;

(d) an employee or manager of, or a person with an interest in, a recognised body.

(3) The Society may give a notice under this section only if it is satisfied that it is necessary to do so for the purpose of investigating—

(a) whether there has been professional misconduct by a solicitor;

(b) whether a solicitor, or an employee of a solicitor, has failed to comply with any requirements imposed by or by virtue of this Act or any rules made by the Society;

(c) whether a recognised body, or any of its managers or employees has failed to comply with any requirement imposed by or by virtue of the Administration of Justice Act 1985 or any rules made by the Society and applicable to the body, manager or employee by virtue of section 9 of that Act;

(d) whether there are grounds for making, or making an application to the Tribunal for it to make, an order under section 43(2) with respect to a person who is or was involved in a legal practice (within the meaning of section 43(1A)).

(4) A notice under this section—

(a) may specify the time and place at which, and manner and form in which, the information is to be provided or document is to be produced;

(b) must specify the period within which the information is to be provided or the document produced;

(c) may require the information to be provided or document to be produced to the Society or to a person specified in the notice.

(5) The Society may pay to any person such reasonable costs as may be incurred by that person in connection with the provision of any information, or production of any document, by that person pursuant to a notice under this section.

(6) Paragraphs 9(3) and (4) and 13, 15 and 16 of Schedule 1 apply in relation to the powers to obtain information conferred by this section, but for this purpose—

(a) paragraph 9 of that Schedule has effect as if—

(i) in sub-paragraph (3) for "such documents" there were substituted "information to which a notice given to him under section 44B applies",

(ii) in that sub-paragraph for "sub-paragraph (1)" there were substituted "the notice", and

(iii) in sub-paragraph (4) for "produce" (in the first place) to the end there were substituted "provide information pursuant to a notice under section 44B to provide the information to any person appointed by the Society at such time and place as may be specified in the order.", and

(b) the reference to the solicitor or his personal representative in paragraph 13 of that Schedule is to be construed as a reference to the person to whom the notice was given under this section.

(7) Paragraphs 9 (other than sub-paragraphs (1) and (3)), 12, 13, 15 and 16 of Schedule 1 apply in relation to the powers to obtain documents conferred by this section as they apply in relation to the powers conferred by paragraph 9(1) of that Schedule, except that for this purpose—

(a) any reference in paragraph 9 of that Schedule to a person appointed, or to a requirement, under sub-paragraph (1) of that paragraph is to be construed as a reference to a person appointed, or to a requirement to produce documents, under this section,

(b) any reference in that paragraph to any such documents as are mentioned in paragraph 9(1) of that Schedule is to be construed as a reference to any documents to which a notice under this section applies,

(c) the references to the solicitor or his firm in paragraph 9(5) and (6) of that Schedule, and the reference to the solicitor or personal representative in paragraph 9(7) of that Schedule, are to be construed as references to the person to whom the notice was given under this section, and

(d) the reference in paragraph 9(12) of that Schedule to the Society is to be construed as including a reference to a person specified under subsection (4)(c).

(8) Where powers conferred by Part 2 of Schedule 1 to the 1974 Act are exercisable in relation to a person within paragraph (a), (b), (c) or (d) of subsection (2), they continue to be so exercisable after the person has ceased to be a person within the paragraph in question.

(9) In this section—

"manager" has the same meaning as in the Legal Services Act 2007 (see section 207 of that Act);

"recognised body" means a body recognised under section 9 of the Administration of Justice Act 1985;

and the reference to a person who has an interest in a recognised body is to be construed in accordance with sections 72 and 109 of the Legal Services Act 2007.

44BA Power to require explanation of document or information

(1) The Society may, by notice, require a person to whom a notice is given under section 44B (or a representative of the person) to attend at a time and place specified in the notice to provide an explanation of any information provided or document produced pursuant to the notice.

(2) The Society may pay to any person such reasonable costs as may be incurred by that person in connection with that person's compliance with a requirement imposed under subsection (1).

(3) Paragraphs 9(3) and (4) and 13, 15 and 16 of Schedule 1 apply in relation to a notice under this section, except that for this purpose—

(a) paragraph 9 of that Schedule has effect as if—

(i) in sub-paragraph (3) for "having" to "sub-paragraph (1)" there were substituted "refuses, neglects or otherwise fails to comply with a requirement under section 44BA(1)", and

(ii) in sub-paragraph (4) for "produce" (in the first place) to the end there were substituted "provide an explanation of any information provided or document produced pursuant to a notice under section 44B (or a representative of such a person) to attend at a time and place specified in the order to provide an explanation of any information so provided or document so produced.", and

(b) the reference to the solicitor or his personal representative in paragraph 13 of that Schedule is to be construed as a reference to the person to whom the notice was given under this section.

44BB Provision of information and documents by other persons

(1) The High Court, on the application of the Society, may order a person to whom section 44B does not apply—

(a) to provide information, or information of a description, specified in the notice, or

(b) to produce documents, or documents of a description, specified in the notice.

(2) The High Court may make an order under this section only if it is satisfied—

(a) that it is likely that the information or document is in the possession or custody of, or under the control of, the person, and

(b) that there is reasonable cause to believe that the information or document is likely to be of material significance to an investigation into any of the matters mentioned in section 44B(3)(a) to (d).

(3) An order under this section may direct the Society to pay to a person specified in the order such reasonable costs as may be incurred by that person in connection with the provision of any information, or production of any document, by that person pursuant to the order.

(4) Section 44B(4) applies in relation to an order under this section as it applies in relation to a notice under section 44B.

(5) Paragraphs 9(5A) and (7) to (12), 12, 13, 15 and 16 of Schedule 1 apply in relation to an order under this section as they apply in relation to an order under paragraph 9(4) of that Schedule, except that for this purpose—

(a) the reference to the solicitor or personal representative in paragraph 9(7) of that Schedule is to be construed as a reference to the person in respect of whom the order under this section is made,

(b) the reference in paragraph 9(12) of that Schedule to the Society is to be read as including a reference to a person specified under section 44B(4)(c) (as applied by subsection (4) of this section), and

> (c) the reference to the solicitor or his personal representative in paragraph 13 of that Schedule is to be construed as a reference to the person to whom the notice was given under this section.
>
> **44BC Information offences**
>
> (1) It is an offence for a person who knows or suspects an investigation into any of the matters mentioned in section 44B(3)(a) to (d) is being or is likely to be conducted—
>
> (a) to falsify, conceal, destroy or otherwise dispose of a document which the person knows or suspects is or would be relevant to the investigation, or
>
> (b) to cause or permit the falsification, concealment, destruction or disposal of such a document.
>
> (2) In proceedings for an offence under subsection (1) it is a defence for the accused to show that the accused had no intention of concealing facts disclosed by the documents from the person conducting the investigation.
>
> (3) It is an offence for a person, in purported compliance with a requirement imposed on the person under section 44B, 44BA or 44BB—
>
> (a) to provide information which the person knows to be false or misleading in a material particular, or
>
> (b) recklessly to provide information which is false or misleading in a material particular.
>
> (4) A person who is guilty of an offence under subsection (1) or (3) is liable—
>
> (a) on summary conviction, to imprisonment for a term not exceeding the general limit in a magistrates' court or a fine not exceeding the statutory maximum, or both;
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine, or both.
>
> (5) In relation to an offence under subsection (1) or (3) committed before 2 May 2022 the reference in subsection (4)(a) to the general limit in a magistrates' court is to be read as a reference to 6 months.'

Parliamentary material

24. I was referred to certain material from the Parliamentary debates preceding the passage of both the 1985 and 2007 Acts. There were some issues as to whether, the extent to

which and basis on which the court could have regard to this material. I will come back to those issues. At present, it is convenient to set out the relevant passages.

25. The Administration of Justice Bill, which when enacted became the 1985 Act, was debated in the House of Lords on 14 January 1985. In moving that the Bill be read a second time, the Lord Chancellor, Lord Hailsham of St Marylebone, said, amongst other things:

> 'Clause 2 of the Bill inserts a further new section into the principal Act [viz. the 1974 Act], by which the society may compel a solicitor to produce his case files. Under the 1974 Act this power is restricted to cases where there has been undue delay in dealing with a matter, so that the files can be given to another solicitor to complete the work. It is now extended to cover cases in which it is necessary for the society to examine papers for the purpose of investigating a complaint, whether of professional misconduct or of poor work.'

26. The Administration of Justice Bill was debated by the House of Commons on 16 May 1985. In moving that the Bill be read a second time in that House, the Attorney-General, Sir Michael Havers QC MP, said this:

> 'Clause 2 makes a significant contribution to making the society's investigation of complaints more effective by inserting a further new section into the principal Act, under which the society may compel a solicitor to produce his case files. Under the Solicitors Act 1974, that power is restricted to cases where there has been undue delay in dealing with a matter, so that the files can be given to another solicitor to complete the work. It is now extended to cover cases in which it is necessary for the society to examine papers for the purpose of investigating a complaint. That power will provide a useful evidential tool in matters of misconduct, but, equally importantly, will be the starting point in investigating complaints of shoddy work.'

27. The Legal Services Bill, which when enacted became the 2007 Act, was debated in the House of Lords on 6 March 2007. One amendment debated, numbered 149B, and put forward by Lord Hunt of Wirral and Lord Kingsland QC, and which had been suggested by the Law Society, was, in part, as follows:

> '(2) After that section insert –
>
> "**44D Confidential or privileged documents or information**
>
> (1) Any document or information must be produced or delivered to the Society pursuant to any notice given by virtue of this Act or in accordance with any rules made by the Society even if it is –
>
> (a) confidential;

> (b) subject to legal professional privilege; or
>
> (c) subject to any other restriction upon production or admissibility whether imposed by statute or otherwise;
>
> save that any document or information in respect of which the solicitor under investigation is entitled to legal professional privilege need not be produced.
>
> (2) Any document or information received by the Society pursuant to any notice given by virtue of this Act or in accordance with any rules made by the Society –
>
> (a) may be used by the Society only for the exercise of the Society's functions under this Act;
>
> (b) is admissible in evidence in any proceedings brought or defended by the Society but otherwise remains confidential or privileged; and
>
> (c) must be used in any public hearing in a way that protects the confidentiality or privilege of the person entitled to it in so far as it is reasonably practicable to do so.'

28. In moving that amendment, Lord Kingsland said:

> 'Amendment No. 149B states that the legal professional privilege should not apply in particular circumstances. This is a potentially important new section, which should apply to all lawyers. Were the principle of this amendment to be accepted, we would seek for an equivalent provision for licensing of licensed conveyancers and other lawyers. I beg to move.'

29. Replying to that, Baroness Ashton of Upholland, the Parliamentary Under-Secretary of State for Justice, said:

> 'Amendment No. 149B does two things. First, it allows the Law Society to require production of confidential and privileged information. We do not accept that because there are real sensitivities in relation to allowing a regulator to override professional privilege or have unfettered access to material of a confidential nature in the way proposed. At this stage, we are not persuaded that the Law Society has made the case for this power.'

30. Lord Kingsland then, with leave of the House, withdrew amendment 149B (which had included other provisions in addition to those I have quoted above) and the amendment was not moved. At third reading in the House of Lords, the Minister moved an amendment (No. 20) to the Bill substituting the present version of ss. 44B-44BC. This amendment was adopted without debate.

LPP

31. LPP is a right arising out of a relationship of confidence between lawyer and client. The confidential character of a communication, however, is not by itself enough to allow privilege to be claimed. The communication must, instead, be for the dominant purpose of seeking or obtaining legal advice, or contain a record of such advice, or be for the dominant purpose of actual or contemplated litigation: see R (Jet2.com Ltd) v Civil Aviation Authority [2020] QB 1027 at [95]-[96] per Hickinbottom LJ. The upshot is that, as it was put by Lords Briggs and Hamblen in Attorney General v Jamaican Bar Association (2023) 54 BHRC 738, at [10]:

> '… confidentiality extends to protect a far broader range of information and documents than does LPP; all the more so now that attorneys increasingly offer professional services in areas which may involve neither the giving of legal advice nor the conduct of litigation. By contrast the extent of LPP is relatively strictly confined…'

32. Where it applies, LPP is a fundamental right. In R v Derby Magistrates' Court, ex p. B [1996] 1 AC 487, Lord Taylor of Gosforth CJ reviewed the authorities on the subject. At 504 G/H, he cited the early case of Wilson v Rastall (1792) 4 Durn. & E. 753, where there was a reference by Buller J to an earlier case in which he had rebuked a Mr Reynolds for seeking to give evidence of what he had learned while acting as the defendant's attorney. As Buller J said:

> 'I strongly animadverted on his conduct, and would not suffer him to be examined: he had acquired his information during the time that he acted as attorney; and I thought that the privilege of not being examined to such points was the privilege of the party, and not of the attorney: and that the privilege never ceased at any period of time. In such a case it is not sufficient to say that the cause is at an end; the mouth of such a person is shut forever.'

33. At 507 A/C Lord Taylor cited the more recent case of Hobbs v Hobbs and Cousens [1960] P 112, where, at 116-117, Stevenson J had said:

> 'privilege has a sound basis in common sense. It exists for the purpose of ensuring that there shall be complete and unqualified confidence in the mind of a client when he goes to his solicitor, or when he goes to his counsel, that that which he there divulges will never be disclosed to anybody else. It is only if the client feels safe in making a clean breast of his troubles to his advisers that litigation and the business of the law can be carried on satisfactorily. . . There is…an abundance of authority in support of the proposition that once legal professional privilege attaches to a document . . . that privilege attaches for all time and in all circumstances.'

34. At 507 C/E Lord Taylor said this:

> '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.'

35. At 509 F/G, Lord Lloyd of Berwick said:

> 'Mr. Goldberg argued that times have changed, and that greater emphasis is now placed upon the court being put into possession of all relevant material, in order to arrive at the truth. But the principle remains the same; and that principle is that a client must be free to consult his legal advisers without fear of his communications being revealed.'

36. Lord Nicholls of Birkenhead stated, at 510G-511C:

> 'The law has been established for at least 150 years, since the time of Lord Brougham L.C. in 1833 in *Greenough v. Gaskell*, 1 M. & K. 98: subject to recognised exceptions, communications seeking professional legal advice, whether or not in connection with pending court proceedings, are absolutely and permanently privileged from disclosure even though, in consequence, the communications will not be available in court proceedings in which they might be important evidence.
>
> The principle has not lacked critics, from Jeremy Bentham onwards. Nevertheless, in *Grant v. Downs* (1976) 135 C.L.R. 674, 685, Stephen, Mason and Murphy JJ. accurately summarised the legal position thus:
>
> > "The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision."

> In *S. v. Safatsa* 1988 (1) S.A. 868, 886, Botha J.A. made the cautionary observation that any claim to relaxation of the privilege must be approached with the greatest circumspection.'

37. In R (Morgan Grenfell Ltd) v Special Commissioner of Income Tax [2003] 1 AC 563 ('Morgan Grenfell'), Lord Hoffmann said, at [7]:

> '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. The cases establishing this principle are collected in the speech of Lord Taylor of Gosforth CJ in *R v Derby Magistrates' Court, Ex p B* [1996] AC 487. It has been held by the European Court of Human Rights to be part of the right of privacy guaranteed by article 8 of the Convention (*Campbell v United Kingdom* (1992) 15 EHRR 137; *Foxley v United Kingdom* (2000) 31 EHRR 637) and held by the European Court of Justice to be a part of Community law: *A M & S Europe Ltd v Commission of the European Communities* (Case 155/79) [1983] QB 878.'

38. The privilege involved in LPP is not simply one against the production of documents / information in or in relation to judicial or quasi-judicial proceedings. Since at least R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532, which was a case involving the examination of prisoners' privileged correspondence while they were absent from their cells, it has been clear from decisions at the highest level that LPP is a privilege which operates to prevent divulgence of communications with a legal advisor in circumstances which do not involve judicial or quasi-judicial process.

39. The scope of LPP is subject to certain limitations. It is not controversial that these include that:

(1) LPP does not exist in relation to documents which are themselves part of a criminal or fraudulent proceeding or communications made in order to get advice for the purpose of carrying out fraud or other iniquity. This is so whether the solicitor was or was not ignorant of the fact that he was being used for that purpose. This is often referred to as the 'iniquity exception', and is frequently also identified by reference to the case of R v Cox and Railton (1884) 14 QBD 153, which recognised it.

(2) LPP can be waived by the client, whose privilege it is. When it is the client who complains to the SRA about his own solicitor, there is clearly a strong case to be made that, even if there is no express waiver, there is an implied waiver. But a refusal by a client to waive his privilege for any reason or none cannot be questioned or investigated by the court: B v Auckland District Law Society [2003] 2 AC 736 ('B v Auckland') at [44] per Lord Millett. Furthermore, it will be the lawyer's duty to claim the privilege on behalf of the client, or former client, whose privilege it is, when it is arguable that there is such a privilege: see Addlesee v Dentons Europe LLP [2020] Ch 243 ('Addlesee'), at [59]-[60] and [92].

40. In addition to these inherent limitations on LPP, it is not in doubt that there can be a statutory restriction or abrogation of the privilege. A key issue in the present case is whether s. 44B amounts to such an abrogation.

The relevant principles of statutory interpretation

41. The principles of statutory interpretation have recently been summarised in the following way by the Supreme Court in Darwall v Dartmoor National Park Authority [2025] UKSC 20, [2025] AC 1292 at [15] per Lords Sales and Stephens:

> ‘The courts in conducting statutory interpretation are seeking to ascertain the meaning of the words used in a statute in the light of their context and the purpose of the statutory provision: *R (N3) v Secretary of State for the Home Department* [2025] UKSC 6; [2025] 2 WLR 386, paras 61-63. As noted there, a leading statement of principle was given by Lord Hodge in *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, with whom those in the majority agreed. He stated, at para 29:
>
>> “The courts in conducting statutory interpretation are ‘seeking the meaning of the words which Parliament used’: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: ‘Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.’ (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, p 397: ‘Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.’”

42. In an area in which fundamental rights are in play, and there is a question as to whether they have been removed or altered by a statutory provision, the courts presume that legislation is subject to those fundamental rights, absent express language or necessary implication. This is often called the principle of legality. It was stated thus by Lord

Hoffmann in R v Secretary of State for the Home Department, ex parte Simms [2000] 2 AC 115 at 131 E-F:

> 'Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.'

Germane case law

43. A large number of cases were cited, of which perhaps six are central to a consideration of the issues which have to be addressed. For the purposes of exposition, I will identify and summarise the significant cases here, permitting a briefer reference to them when reaching conclusions on the arguments put forward.

44. The first authority is that of Parry-Jones. This case concerned the interpretation of rule 11(1) of the Solicitors' Accounts Rules 1945 (and the similarly-worded rule 11(1) of the Solicitors' Trust Accounts Rules 1945), which had effect as if made under s. 29 Solicitors Act 1957. Rule 11(1) of the Solicitors' Accounts Rules provided that the Council of the Law Society could, 'in order to ascertain whether these rules have been complied with', 'require any solicitor to produce … his books of account … and any other necessary documents' to be inspected by a person appointed by the Council, and that person's report on those documents could be used 'as a basis for proceedings under the Solicitors' Acts, 1932 to 1941.'

45. The Law Society served notices on Mr Parry-Jones, a solicitor, requiring production of his books of account and any other necessary documents relating to his practice as a solicitor and to every trust of which he was sole trustee or co-trustee only with a partner. Mr Parry-Jones commenced an action seeking an injunction to restrain the Law Society from having access to confidential information relating to any client of his without the express authority of that client. The Law Society applied to strike out the indorsement to the writ on the basis that it disclosed no reasonable cause of action. Buckley J acceded to that application at first instance and dismissed the action: [1968] 1 Ch 195. In the course of his judgment, Buckley J said, at 202 F/G, that, though it was unnecessary for him to decide the point, he was 'prepared to assume that at any rate under the heading of "any other necessary documents" the investigating officer might require to see documents which in litigation would be the subjects of legal, professional privilege.' He continued that: 'For the reasons I have indicated, however, I am of the opinion that the plaintiff cannot object to this, provided that the disclosure of the documents in question is truly necessary to enable the investigating officer to ascertain whether or not the plaintiff has complied with the accounts rules.'

46. Mr Parry-Jones appealed to the Court of Appeal. On that appeal, unlike at first instance, he represented himself. The appeal was dismissed, the members of the Court delivering *ex tempore* judgments. Lord Denning MR and Diplock LJ each delivered substantive judgments, and Salmon LJ agreed with both. In the course of his judgment Lord Denning MR said that the Law Society's rules about clients' money had been 'a very important safeguard for clients all over the country' (6 D/E). Later he summarised Mr Parry-Jones' argument as follows:

> 'He says that he is not bound to produce to the accountant a document or information which is privileged from production. We all know that, as between solicitor and client, there are two privileges. The first is the privilege relating to legal proceedings, commonly called legal professional privilege. A solicitor must not produce or disclose in any legal proceedings any of the communications between himself and his client without the client's consent. The second privilege arises out of the confidence subsisting between solicitor and client similar to the confidence which applies between doctor and patient, banker and customer, accountant and client, and the like. The law implies a term into the contract whereby a professional man is to keep his client's affairs secret and not to disclose them to anyone without just cause (see *Tournier v National Provincial & Union Bank of England*). This particularly applies in the relationship of solicitor and client. The solicitor is not to disclose his client's affairs to anyone at all except under the most special and exceptional circumstances. In reliance on these principles, Mr Parry-Jones says that the accountant sent by the Law Society should not be allowed to see documents or information relating to a client's affairs.'

47. Lord Denning MR then reasoned as follows:

> 'In my opinion the contract between solicitor and client must be taken to contain this implication: the solicitor must obey the law, and, in particular, he must comply with the rules made under the authority of statute for the conduct of the profession. If the rules require him to disclose his client's affairs, then he must do so.'

Lord Denning MR then considered the terms of s. 29 Solicitors Act 1957 and rule 11(1) of the Solicitors' Accounts Rules 1945 and said of the latter:

> 'In my opinion that rule is a valid rule which overrides any privilege or confidence which otherwise might subsist between solicitor and client. It enables the Law Society for the public good to hold an investigation, even if it involves getting information as to clients' affairs. But they and their accountant must, of course, themselves respect the obligation of confidence. They must not use it for any purpose except the investigation, and any consequential proceedings. If there should be subsequent application to the disciplinary committee, the information can be used for that purpose. In all other respects

> the usual rules of legal professional privilege apply – see section 46(6) of the Act.'

48. Section 46(6) of the 1957 Act, to which Lord Denning MR made reference, was a provision which empowered an applicant or complainant to the disciplinary committee to issue writs of subpoena *ad testificandum* and *duces tecum*, 'but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action.'

49. Diplock LJ, in his judgment, said that the foundation of Mr Parry-Jones's case was that an inspection of documents under rule 11 was 'in the nature of a judicial procedure'. He went on:

> 'So far as Mr Parry-Jones' point as to privilege is concerned, privilege, of course, is irrelevant when one is not concerned with judicial or quasi-judicial proceedings because, strictly speaking, privilege refers to a right to withhold from a court, or a tribunal exercising judicial functions, material which would otherwise be admissible in evidence. What we are concerned with here is the contractual duty of confidence, generally implied though sometimes expressed, between a solicitor and client. … I agree with Lord Denning MR that section 29 of the Solicitors' Act 1957, which deals with accounts (the whole of the material in which consists of information about clients' affairs because it is the clients' accounts only which are dealt with in this section) and empowers the council to take such action as may be necessary to enable them to ascertain whether or not the rules are being complied with, necessarily empowers the council to make rules which entitled the council of the Law Society to override that privilege…'

50. Morgan Grenfell was a case considering whether an inspector of taxes had power to compel access to a bank's privileged documents. Under s. 20 of the Taxes Management Act 1970 ('TMA 1970'), an inspector of taxes could require a taxpayer to deliver to him such documents as were in his possession or power and which contained or might contain information relevant to any tax liability to which that person was or might be subject. A bank had devised and marketed a scheme for clients to secure low-cost term funding through a tax arrangement based on property. The inspector sought to require the bank to disclose, inter alia, its instructions to, and the advice of counsel in relation to the scheme. The House of Lords unanimously allowed an appeal by the taxpayer, and quashed the notice requiring production of the privileged documents. The House of Lords held that LPP was a fundamental right which could be overridden only by express words or necessary implication; that s. 20 TMA 1970 did not override it expressly; and that it was not a necessary implication from the structure of the Act as a whole that it was intended to be overridden by a notice under s. 20.

51. In the course of his speech, after paragraph [7] in relation to LPP, which I have already quoted, Lord Hoffmann said, at [8]:

> '[8] Secondly, the courts will ordinarily construe general words in a statute, although literally capable of having some startling

> or unreasonable consequence, such as overriding fundamental human rights, as not having been intended to do so. An intention to override such rights must be expressly stated or appear by necessary implication. The speeches of Lord Steyn and myself in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115 contain some discussion of this principle and its constitutional justification in the context of human rights. But the wider principle itself is hardly new. It can be traced back at least to *Stradling v Morgan* (1560) 1 Pl 199.'

52. Lord Hoffmann then noted that s. 20 TMA 1970 contained no express reference to LPP. He considered and rejected the argument that the exclusion of LPP was necessarily to be implied from the structure and other terms of the TMA 1970. The strongest argument, he said, in support of the case that it was implied derived from ss. 20B(8) and 20C(3) of the Act which provided that LPP was preserved in respect of documents in the possession or power of a lawyer. The argument was simple: if Parliament had intended to preserve LPP in general, why had it specifically provided for its preservation in respect of documents in the possession of lawyers? Lord Hoffmann rejected the argument, not least on the basis that it would have been irrational to preserve LPP for documents in the hands of lawyers but not for documents (which might well be copies or originals of the same documents) in the hands of the taxpayer. He recognised, however, that it was fair to ask why Parliament had dealt expressly with documents in the hands of a lawyer but not with those in the hands of the client, and said that he thought that the explanation might lie in <u>Parry-Jones</u>.

53. Lord Hoffmann cited from the judgments of Lord Denning MR and Diplock LJ in that case, and then said, at [30]-[33]:

> '[30] One could hardly imagine a stronger Court of Appeal, but I am bound to say that I have difficulty with the reasoning. 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. The reasoning in the *Parry-Jones* case suggests that any statutory obligation to disclose documents will be construed as overriding the duty of confidence which constitutes the client's only protection. In the present proceedings, however, it is accepted that the client is protected by LPP and that this can be overridden only by primary legislation containing express words or necessary implication.
>
> [31] It is unfortunate that the Court of Appeal was not referred to valuable judgments of the Supreme Court of New Zealand in *Comr of Inland Revenue v West-Walker* [1954] NZLR 191, which reached the opposite conclusion in the context of a statutory power to require the production of documents and information for the purposes of the administration of the taxing statutes. The New Zealand judges pointed out that LPP was not

merely a rule of evidence but a substantive right founded on an important public policy.

[32] 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 information disclosed by the solicitor for any purpose other than the investigation. Otherwise the confidentiality of the clients had to be maintained. In my opinion, this limited disclosure did not breach the clients' LPP 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 a case in which disclosure is sought for a use which involves the information being made public or used against the person entitled to the privilege.

[33] In the light of the *Parry-Jones* case, it seems to me explicable that Parliament should wish to make it clear that even if the Court of Appeal was right in saying that the true basis for the client's right to prevent his lawyer from disclosing documents concerned with obtaining legal advice to the tax authorities (or any other non-judicial authorities) was a duty of confidence rather than LPP, no such disclosure could be required under sections 20(3) or 20A(1) without the client's consent. No such provision was of course required in the case of documents in the hands of the client himself, to which the duty of confidence was obviously irrelevant. Any protection to which such documents were entitled had to be based upon LPP and, so far as it existed, would be subject to the principle that it could be removed only by express language or necessary implication.'

54. At [39] Lord Hoffmann added:

'[39] It is of course open to Parliament, if it considers that the revenue require such powers, to enact them in unambiguous terms. But there is also the Human Rights Act 1998 to be borne in mind. The appellants put forward an alternative submission that, if your Lordships agreed with the construction given to section 20(1) by the Court of Appeal, you should make a declaration that it was incompatible with the right to privacy under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (scheduled to the Human Rights Act 1998). In the circumstances it is unnecessary for your Lordships to pronounce upon the point. It is however the case, as I have mentioned, that the European Court of Human Rights has said that LPP is a fundamental human right which can be invaded only in exceptional circumstances: see *Foxley v United Kingdom* (2000) 31 EHRR 637, 647, para 44. Mr Brennan said that the public interest in the collection of the revenue could

> provide the necessary justification but I very much doubt whether this is right. Nor is it sufficient to say simply that the power is not used very often. That is no consolation to the person against whom it is used. If new legislation is passed, it will have to be seen whether it is limited to cases in which the interference with LPP can be shown to have a legitimate aim which is necessary in a democratic society.'

55. Lord Hobhouse delivered a speech agreeing with Lord Hoffmann and expressing his reasons for his conclusion in his own words. At [44] he cited the speech of Lord Hoffmann in R v Secretary of State for the Home Department, ex p Simms, and said:

> 'The context in which Lord Hoffmann was speaking was human rights but the principle of statutory construction is not new and has long been applied in relation to the question whether a statute is to be read as having overridden some basic tenet of the common law: *Viscountess Rhondda's Claim* [1922] 2 AC 339; *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428. The protection given by the common law to those entitled to claim legal professional privilege is a basic tenet of the common law as has been reaffirmed by *B (A Minor) v Director of Public Prosecutions*.'

56. Lord Hobhouse then gave his essential reasoning for allowing the appeal as follows:

> '[45] It is accepted that the statute does not contain any express words that abrogate the taxpayer's common law right to rely upon legal professional privilege. The question therefore becomes whether there is a necessary implication to that effect. A necessary implication is not the same as a reasonable implication as was pointed out by Lord Hutton in *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428, 481. A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.
>
> [46] In the present case the statutory language falls a long way short of meeting this criterion. The arguments advanced by the revenue are fully discussed in the opinion of my noble and learned friend. I agree with his conclusion. At best from the point of view of the revenue the legislation is equivocal. Left to myself I would incline to the view that the implication, if any, is that the legislature was intending to preserve the legal professional privilege of the taxpayer rather than abrogate it; otherwise, why preserve it in respect of documents in the hands of the adviser when the client has not consented to waive the privilege?

> Further, the argument that a general public interest in collecting revenue for the executive suffices (in peace-time) implicitly to override the basic right and public interest represented by legal professional privilege is contrary to the authorities and the principles which the revenue accept that those authorities lay down.
>
> [47] The present appeal thus falls to be decided applying the well established principles of statutory construction to be found in English law. The appellants do not need the assistance of the Human Rights Act 1998 or the Convention for the Protection of Human Rights and Fundamental Freedoms. The judgments of the European Court of Human Rights in *Foxley v United Kingdom* 31 EHRR 637, and the European Court of Justice in *A M & S Europe Ltd v Commission of the European Communities (Case 155/79)* [1983] QB 878, show a general recognition of the importance of legal professional privilege.'

57. Lord Nicholls and Lord Scott agreed with Lord Hoffmann's speech, and Lord Hope agreed with both Lord Hoffmann and Lord Hobhouse.

58. Before leaving Morgan Grenfell it is helpful here to note that at [34]-[35] Lord Hoffmann dealt with a submission founded on the debates in the House of Commons leading to the Finance Act 1976. He said:

> '[34] [Counsel for the Crown] showed us the debates on the provisions which become Schedule 6 of the 1976 Act in Standing Committee E and on Report in the House of Commons. He did not submit that they contained any material sufficiently unambiguous to be admissible under the principle in *Pepper v Hart* [1993] AC 193 but he produced them to show that the question of LPP was brought to the attention of the House. So it was, but I find no indication that the House was being told that the intention was to abolish or restrict it. On the contrary, the Chief Secretary to the Treasury (Mr Joel Barnett), with the Solicitor-General (Mr Peter Archer QC) in attendance, said to the Standing Committee (HC Debates) 10 June 1976, Vol VI, col 686:
>
> > "I should make it quite clear — even without my hon. and learned Friend sitting beside me — that the purpose of this part of the schedule is not to require privileged and confidential documents to be handed over to the Inland Revenue. That is certainly not the intention."
>
> [35] It is certainly true that some opposition amendments which were said to be intended to ensure that LPP was preserved were not accepted by the Government. But this was because they were thought (rightly or wrongly) either to go beyond the scope of LPP at common law or to be unnecessary. The Parliamentary

material does not therefore assist in showing a clear intention to override a fundamental human right.'

59. In B v Auckland, the Privy Council decided an appeal from the Court of Appeal of New Zealand. In that case, a district law society in New Zealand, while investigating a complaint against a law firm, sought disclosure of documents in the firm's possession under s. 101(3)(d) of the New Zealand Law Practitioners Act 1982. Some documents had already been handed over pursuant to an arrangement with counsel under which any privilege in them was not waived. The Law Society argued that any privilege was overridden by the statute, and refused to return them when requested. In the Court of Appeal the argument that privilege had been overridden by the statute prevailed. The Privy Council advised that the appeal should be allowed.

60. In giving the advice of the Privy Council, Lord Millett said that section 101(3)(d) did not exclude LPP expressly and did not do so by necessary implication either. At [59] he said:

> '[59] It has been accepted in New Zealand that, if the section is capable of being interpreted on the supposition that the privilege is not abrogated by it, it should be so interpreted: see *Comr of Inland Revenue v West-Walker* [1954] NZLR 191, 213 per Gresson J. A useful test is to write in the words "not being privileged documents" and ask, not "does that produce a reasonable result?" or "does it impede the statutory purpose for which production may be required?" but "does that produce an inconsistency?" or "does it stultify the statutory purpose?" The circumstances in which such a question would receive an affirmative answer would be rare. But a statutory right to require production of correspondence between a person and his solicitor for the purpose of obtaining legal advice, for example, would obviously be inconsistent with the existence of a right to withhold documents on the ground of legal professional privilege. And unless a taxing master could require the production of privileged documents it would be impossible for him to perform his function of taxing a solicitor's bill of costs: see *Goldman v Hesper* [1988] 1 WLR 1238.'

61. At [65] he accordingly concluded that LPP was a good answer to the requisition under the 1982 Act.

62. Simms v Law Society was an appeal from the SDT. The Law Society had intervened in the solicitor's practice on the grounds that it had reason to suspect dishonesty ([5]), and subsequently disciplinary proceedings had been commenced which resulted in an order that the solicitor be struck off the roll ([6]). One of the matters appealed by Mr Simms was a decision by the SDT that he pay the costs of a preliminary ruling that the Office for the Supervision of Solicitors ('OSS') be permitted to use for the purpose of the disciplinary proceedings documents which would otherwise have been subject to LPP; and he also appealed the substantive decision of the SDT on grounds, inter alia, that it had been wrong to permit the use of documents subject to LPP.

63. A Divisional Court consisting of Latham LJ and Curtis and Newman JJ dismissed the appeal. The argument which had been addressed on behalf of Mr Simms in relation to LPP was that the decision of the Privy Council in B v Auckland had changed the relevant law. The Divisional Court said, at [38]-[40]:

> '[38] If correct, this contention would have far-reaching consequences for the Law Society when exercising its powers of intervention under the Solicitors Act 1974. Further, it would also mean that the decision of the Court of Appeal in *Parry-Jones v Law Society* [1969] 1 Ch. 1 was no longer good law. Yet further it would mean that the Board of the Privy Council in the New Zealand case had disagreed with the judgment of the House of Lords in *Regina (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax and Another* [2003] AC 563. This court is bound by the decision in *Parry-Jones* and the suggestion that it should be regarded as having been overruled, despite its boldness, and, as we have concluded, being obviously wrong, requires a little attention.
>
> [39] The Privy Council concluded in the New Zealand case that the Law Practitioners Act 1982 in New Zealand did not expressly or by necessary implication override LPP. It reached that conclusion not by disagreeing with the Morgan Grenfell case, but by applying it (see [2003] 2 AC 736 at G). The judgment contains invaluable guidance and illumination on the character of LPP, but it can only be treated as an authority in connection with the New Zealand legislation or identical legislation elsewhere. The Solicitors Act 1974 is not identical. Indeed, it contains significantly different provisions to which we will come.
>
> [40] We are not to be taken as underestimating the illumination given to the law in connection with LPP by recent decisions, but we are entirely satisfied, like the Tribunal in the instant case, that this appeal falls to be determined by considering two issues. First, whether the case of *Parry-Jones* is still good law. Secondly, whether, in any event, the case falls within the exception recognised by the case of *Cox v Railton* 14 QBD 153. As to the first, the argument has drawn attention to the speech of Lord Hoffmann in *Morgan Grenfell* (see [2002] 2 WLR at page 1037, 1038 paragraphs 32 to 26) and the observation he there makes as to the rationale of the *Parry-Jones* decision. But since the argument has also focused upon the New Zealand case, our starting point must be the statutory scheme under the Solicitors Act 1974 ("the Act").'

64. The Divisional Court then considered the statutory scheme for intervention in a solicitor's practice under s. 35 of the 1974 Act, including the terms of paragraph 9 of Part II of Schedule 1 of that Act. At [47] the Divisional Court pointed out that the powers under subparagraphs (2) to (12) of paragraph 9 of Schedule 1, together with paragraphs 12 to 16 of the Schedule, applied in connexion with powers conferred under

s. 44B of the Act, which was at the time in the form introduced by the 1985 Act, in relation to investigations.

65. At [48] to [51] the Divisional Court then said this:

> '[48] In our judgment the New Zealand case did not change the law in England and Wales. Apart from the distinctions which we have drawn between the two schemes, the case of *Parry-Jones* was cited in argument before the Board of the Privy Council (page 745 E-F) and was referred to in argument as an example of a situation where the Rules ".. included a power to override a claim of privilege". As we have already observed, the Board of the Privy Council decided that the legislation in New Zealand did not override LPP. Further, Lord Hobhouse and Lord Scott were members of the Board in the New Zealand case and were members of the Committee of the House of Lords giving judgment in the earlier *Morgan Grenfell* case.
>
> [49] Contrary to the appellant's submission to the Tribunal and to this court, *Parry-Jones* was not overruled by the House of Lords. Lord Hoffmann stated the opposite (paragraph 32):'
>
> [here followed the quotation of paragraph [32] of Morgan Grenfell].
>
> '[50] The Tribunal, in this case, was significantly influenced by the speech of Lord Hoffmann. It gave careful consideration to the statutory scheme and concluded:
>
> (1) that LPP had not been lost by express words or necessary implication; and
>
> (2) following Lord Hoffmann, concluded that: "If the disclosure of the document is not to be used 'against the client' or 'to his prejudice' and if steps can be taken to preserve the confidentiality of the document then … it is proper to allow" disclosure to the Tribunal (see paragraph (5) page 171 of the Ruling).
>
> [51] It is unnecessary for us to consider whether or not Lord Hoffmann's conclusion that the Law Society was authorised by statutory powers should be taken as a conclusion that LPP had been lost by express words or necessary implication and that, as a result, the Tribunal erred in its conclusion because we are satisfied that the Tribunal's decision was right. *Parry-Jones* remains good law. This court is not concerned to engage in a debate which might be said to arise in connection with the underlying rationale advanced by Lord Hoffmann. Suffice it to say that Lord Hoffmann stated that the Law Society was "authorised by … statutory powers" to take possession of documents and, as a result, did not breach LPP.'

66. At [52] the Divisional Court added that, because the intervention involved suspected dishonesty, the 'iniquity exception' to LPP recognised in Cox v Railton also applied.

67. R (Lumsdon) v Legal Services Board [2014] EWHC 28 (Admin) concerned the judicial review of a decision by the Legal Services Board to introduce the Quality Assurance Scheme for Advocates ('QASA'). One alleged defect of the QASA scheme was that the advocate might be prevented by LPP from putting forward to the regulator points which might explain or mitigate what had been perceived by the judge to be incompetent advocacy. As to this, the Divisional Court (Sir Brian Leveson P, Bean and Cranston JJ) said, at [72]-[73]:

> '[72] … The example of mitigating circumstances most commonly mentioned in argument was the "late return" so familiar to members of the Criminal Bar, but there is no reason that the judge should not be made aware of this, and certainly no reason to keep it from the regulator. Another oft cited example is a change of instructions by the client during the trial. Again, this generally comes to the judge's attention: if the advocate is asked why he did not put a particular point to a prosecution witness who has already given evidence (having regard to the potential inference of recent invention), he is entitled and perhaps bound to tell the judge, if indeed it is the case, that the failure to put a particular proposition was not as a consequence of recent instructions and, thus, should not be held against the defendant. In that case, there is no breach of privilege.
>
> [73] In any event, the problem of privilege has long existed, at least in theory, in relation to allegations of misconduct or inadequate professional services, but we were given no evidence that it has proved a problem in practice. If a situation arises in which there is some privileged information which excuses what might be perceived as poor performance and which could not be revealed to the trial judge, the advocate would in our view be entitled to provide the gist of it to the regulator, which would in turn be bound not to use the information for any purpose other than determining the application for accreditation: see per Lord Hoffmann in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, [32].'

68. On appeal to the Court of Appeal ([2014] HRLR 29), the same submission was made by the applicant, who also submitted that the Divisional Court had misunderstood what Lord Hoffmann had said in Morgan Grenfell. Lord Dyson MR, giving the judgment of the court, said (at [25]):

> '... We are inclined to agree with the Divisional Court. But we do not need to decide this point. It is an inevitable feature of any scheme based on assessment by trial judges that the judge may not have all the information about the nature and timing of a client's instructions. But as we have seen, the claimants do not object in principle to assessment by trial judges….'

The point did not arise for consideration in the appeal to the Supreme Court.

69. The QASA was a scheme which had no direct statutory authorisation. The analysis in paragraph [73] of the Divisional Court's judgment proceeds on the basis that judges assessing the competence of criminal advocates could be provided with privileged information but because they were using it for the purposes of their assessment that was not to be regarded as infringing privilege. That analysis was the one which, as I understand it, was also adopted by Elisabeth Laing J in Law Society v Charles Henry and Co [2015] EWHC 552 (QB) at [17] where she said that:

> '… it is well established that this regime [viz that under s. 44BB as inserted by the 2007 Act] and its predecessors do not breach legal professional privilege: see *R (Morgan Grenfell) v Special Commissioners of Income Tax* [2003] 1 AC 563.'

70. Sports Direct concerned the power of the FRC to require a company to produce documents in connexion with an investigation into an auditor. The relevant statutory scheme was contained in the Statutory Auditors and Third Country Auditors Regulations 2016 ('SATCAR'). Paragraphs 1(8) and (9) of Schedule 2 to SATCAR provided:

> '(8) A notice under sub-paragraphs (1) or (3) does not require a person to provide any information or create any documents which the person would be entitled to refuse to provide or produce – (a) in any proceedings in the High Court on the grounds of legal professional privilege, or (b) in proceedings in the Court of Session on the grounds of confidentiality of communications.
>
> (9) In sub-paragraph (8) "communications" means – (a) communications between a professional legal adviser and his client, or (b) communications made in connection with or in contemplation of legal proceedings or for the purpose of those proceedings.'

71. The nature of the FRC's argument is described in the judgment of Rose LJ (with which Sir Terence Etherton MR and Lewison LJ agreed) at [19]-[20], as follows:

> '[19] On what basis does the FRC contend that, despite that apparently clear choice expressed by the legislature, Sports Direct is bound to provide privileged material in response to a notice given under paragraph 1(3)? The answer lies in an observation made by Lord Hoffmann in his speech in *Morgan Grenfell* as to the rationale behind the decision of the Court of Appeal in *Parry-Jones v The Law Society and ors* [1969] 1 Ch 1 ('*Parry-Jones*'). *Parry-Jones* decided that a solicitor being investigated by the Law Society could not refuse to hand over documents requested pursuant to powers under the Solicitors Act 1957 on the grounds that those documents were privileged for the benefit of his former clients. It was argued before the House of Lords in *Morgan Grenfell* that it

would be inconsistent for their Lordships to conclude that there was no statutory override for the benefit of the Revenue in the TMA, given the Court of Appeal's decision in *Parry-Jones* that there was such an override in the Solicitors Act 1957 for the benefit of the Law Society. Lord Hoffmann expressed doubts as to the reasoning in *Parry-Jones* which he regarded as suggesting that *any* statutory obligation to disclose documents would be construed as overriding the duty of confidence that a solicitor owed to his client. He went on:'

[There follows the quotation of paragraph 32 of *Morgan Grenfell*.]

'[20] The FRC submits that in that paragraph, Lord Hoffmann recognised a further exception to LPP to the effect that where a regulator such as the Law Society or the FRC has a statutory power to request documents then either:

i) there is no infringement of LPP when those documents are handed over in response to a request made under that power ('the no infringement exception'); or

ii) any infringement of LPP is technical only and can be regarded as authorised by the relevant statutory provisions on the basis of a less stringent test than that applied by the House of Lords in *Morgan Grenfell* or by the Privy Council in *B v Auckland* ('the technical infringement exception').'

72. At [23]-[24] Rose LJ said that FRC's argument should be rejected (and the appeal in relation to it allowed). She said:

'[23] Ground 1 of Sports Direct's appeal is that Arnold J was wrong to regard Lord Hoffmann's observation in para. 32 of *Morgan Grenfell* … as establishing a principle that the production of documents to a regulator is in some circumstances not an infringement of the LPP of clients of the regulated person. By Ground 3 it argues in the alternative that there can be no override of even a technical breach of privilege implied into Schedule 2 of SATCAR, given the clear and unambiguous terms of the limitation on SATCAR's power to call for documents.

[24] In my judgment both these grounds should be upheld. There is no justification for regarding what Lord Hoffmann said in para. 32 of *Morgan Grenfell* as authority either for the existence of a no infringement exception to the protection conferred by LPP or for the application of some lower threshold for implying a statutory override on the grounds that any infringement of Sports Direct's LPP would be technical. The task of the court is to apply the test laid down in *Morgan Grenfell* and *B v Auckland*, by looking at paragraph 1 of Schedule 2 to see whether Parliament must have intended to override the privilege.

> Paragraph 1(8) and 1(9) of Schedule 2 preclude any such implication.'

73. Rose LJ then undertook a detailed investigation of the previous case law in order to understand what prompted Lord Hoffmann to question the rationale behind the decision in Parry-Jones. She analysed Parry-Jones itself, Morgan Grenfell, B v Auckland and Simms. At [40] she continued:

> '[40] I do not see any support in the cases following *Morgan Grenfell* for the proposition that para. 32 of Lord Hoffmann's speech created a no infringement exception to the absolute protection provided by privilege. Lord Hoffmann did not express his conclusion as creating any such exception and the supposed existence of such an exception has not been picked up or relied upon in the subsequent case law, in particular in *B v Auckland* where it would have been most relevant. Lord Hoffmann was searching for some explanation for the existence of the express protection for privilege in section 20B(8) TMA to neutralise its potency as a basis for implying that no further protection for privilege was intended by Parliament. A satisfactory explanation was, I respectfully suggest, proposed by counsel for the bank. Lord Hoffmann's re-interpretation of *Parry-Jones* appears to have been a factor supporting his conclusion that there was no statutory LPP override in the TMA code. The usefulness of his analysis was, in my judgment, exhausted once it had fulfilled that purpose. Lord Hobhouse was content to arrive at the same conclusion without needing to unpick *Parry-Jones* to the same extent. I do not see that it is necessary to retrofit a new ratio decidendi into *Parry-Jones*. That case continues to stand, as it has stood for many years, as authority for two propositions: first, that rule 11 of the Solicitor's Account Rules 1945 conferred on the Law Society a power to compel the production of documents in the hands of the solicitor even though the clients of the solicitor could assert privilege in those documents; and second that rule 11 was not ultra vires the scope of the rule making powers in section 29 of the Solicitors Act 1957. Such a result is entirely consistent with the test for implied override set out by Lord Millett in *B v Auckland*, as the Divisional Court in *Simms* later held.'

74. At [43] Rose LJ referred to R (Lumsdon) v Legal Services Board, both in the Divisional Court and in the Court of Appeal and said that she did not see that as support for the existence of the no infringement exception.

75. Rose LJ also rejected the existence of what she had labelled the 'technical infringement exception'. At [46] she said:

> '… I find there is no support in the case law for a gradation of infringements of privilege or for a lower threshold to be applied when the override sought to be implied is for technical infringements only.'

76. Finally, in relation to submissions as to whether the conditions which the FRC said applied to the exceptions for which it contended were met, Rose LJ said:

> 'All these submissions served to fortify my conclusion that there are no exceptions to LPP other than the two recognised by Lord Taylor in *Derby Magistrates*. As Lord Nicholls said in that case, any incursions into the hitherto privileged area must be principled and clear, otherwise the confidence of the client in non-disclosure cannot exist. The difficulty of applying the supposed conditions for the new exceptions relied on by the FRC show that they are neither principled nor clear.'

77. Since the decision in Sports Direct the Inner House of the Court of Session has decided on a petition which raised the question of whether the Scottish Legal Complaints Commission ('SLCC') was entitled, under s. 17 and Schedule 2 to the Legal Profession and Legal Aid (Scotland) Act 2007 (asp 5) ('the Scottish 2007 Act') to apply for the production and delivery of documents which would otherwise be subject to LPP: SLCC v Murray [2022] CSIH 46, 2023 SC 10 ('Murray').

78. The Inner House was referred, in addition to the terms of the Act, to its Explanatory Notes, and to a debate in the Scottish Parliament on the Bill which led to that Act, in which the relevant minister had opposed an amendment which would have explicitly required the subject of a notice to produce documents or information which were subject to rights of confidentiality, and where that amendment had been rejected on a division.

79. The SLCC made two main arguments. The first was whether there would be an infringement of LPP at all if the documents / information were handed over to a legal regulator: in other words a 'no infringement' argument. This was said to have been argued with 'a degree of diffidence'. The second was that the relevant Act, by necessary implication, provided a statutory waiver of LPP.

80. Lady Dorrian, delivering the opinion of the Court, dealt with the 'no infringement' argument at [30][1] as follows:

> 'The argument that there was no infringement arose from efforts to explain the decision in *Parry-Jones*, and from obiter comments by Lord Hoffmann in *Morgan Grenfell*. It seems to us to be a somewhat fruitless task to seek to elucidate the rationale of *Parry-Jones*. The distinction between general duties of confidence as opposed to LPP, as developed in a modern understanding of the issues, for example in the *Three Rivers* case and in *Morgan Grenfell* itself, as well as *B v Auckland* and [*Sports Direct*], may lie at the heart of it. When one compares the observations of Lord Denning at page 7 with those of Lord Diplock at page 10, it is not clear that they have in mind the same concept. In particular, Lord Diplock's comments at page 10 appear to be focussed on the general duty of confidentiality, and not legal advice privilege. In any event, we find the treatment of

[1] Using the paragraph numbering in the SC report.

> *Parry-Jones* in [*Sports Direct*] to be compelling, particularly at para 40. We reject the suggestion that a "no infringement exception" applies to LPP.'

81. As to the argument that there was a necessary implication of a statutory waiver of LPP, Lady Dorrian said, by way of introduction to the process of construction of the statute, the following, at [31]-[34][2]:

> '[31] Turning to the issue of necessary implication, consideration of this matter cannot be divorced from the vital nature of LPP as a fundamental right to which the courts have long attached the greatest degree of importance. It is of such significance that it does not yield, even in a case of murder, to the public interest (*R v Derby Magistrates Court, ex parte B*). In *B v Auckland* the court noted the comments in *R v Ukjee* [1982] 1 NZLR 561 that: "Whether the principle operates as a bar to the emergence of the truth and to the overall public detriment is not now a relevant legal consideration." This, along with the principle of legality to which we will turn shortly, explains why the question of implication has to be assessed by a test of absolute necessity. An implication that LPP is overridden can only arise if it follows necessarily from the express terms of the statute construed according to its context and purpose. The implication must be demonstrably necessary for at least an important aspect of the legislation to achieve its purpose. It is not enough that it might be convenient; sensible; or reasonable. (see *Morgan Grenfell*, per Lord Hobhouse, para 45). A necessary implication "connotes one which is compellingly clear" (*B (a minor) v DPP*, Lord Nicholls, p 464). Privilege may successfully be asserted unless the only available inference is that Parliament must have intended to set it aside.
>
> [32] The principle of legality is thus important in this connection, since,
>
> > "…in the absence of express words or a truly necessary implication, Parliament must be presumed to legislate on the assumption that the principle of legality will supplement the text" (*B (a minor) v DPP*, Lord Steyn, p 471)
>
> [33] In *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, at p 131, Lord Hoffmann stated:
>
> > "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights … The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights

[2] Again using the paragraph numbering in the SC report.

> > cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."
>
> Whilst it is true, as submitted by senior counsel for the petitioner, that even extremely weighty and fundamental issues may be the subject of necessary implication, the principle of legality means that one has to recognise that Parliament does not legislate in a vacuum but according to a framework of law which is understood; and that whilst statutory waiver by necessary implication is possible, the more fundamental the right the less likely it is that it would be left to implication. This is part of the context in which the issue of absolute necessity and the cogency of the argument must be very carefully assessed.'

82. Lady Dorrian proceeded to an examination of the terms of the Scottish 2007 Act and found that, looking at the statute as a whole, there could be no implication of a statutory waiver of LPP, and indeed that 'the opposite is the case'. There was a 'fundamental stumbling block' in the way of the petitioner's argument in a provision of the Act to the effect that an individual presenting a complaint against a legal practitioner could only pursue that complaint if he waived any right to confidentiality on his own part.

83. At [41] she went on to consider an argument based on the parliamentary material. She dealt with it in this way:

> '[41] Thus, without even examining any of the parliamentary material, we are satisfied that the petitioner's case must fail. In the course of the submissions we understood that it was not disputed that in the circumstances of this case we would be entitled to examine parliamentary material, at least in relation to divining the purpose of the Act. We note that the first condition for the operation of *Pepper v Hart* is that the legislation in question is ambiguous or obscure, or leads to an absurdity. In the strictest sense the legislation cannot be described as ambiguous. However the arguments upon which the case proceeds hinge on whether the statute must be read in such a way that a fundamental right should be taken as removed by implication. Yet, as Lord Browne-Wilkinson noted in *Pepper v Hart* (at p635) as part of his rationale for proposing that parliamentary materials should be available for consultation in limited circumstances,
>
> > "in a few cases it may emerge that the very question was considered by Parliament in passing the legislation. Why in such a case should the courts blind themselves to a clear indication of what Parliament intended in using those words? The court cannot attach a meaning to words which they cannot bear, but if the words are capable of bearing more than one

> meaning why should not Parliament's true intention be enforced rather than thwarted?"

> The present is a case where the question was considered by Parliament, and by parity of reasoning with cases of ambiguity, obscurity or absurdity, it would be unreasonable for the court to close its eyes to this when faced with the arguments of the petitioner, even if only to apply a cross-check to the interpretation to which the court considers the words of the statute themselves give rise. The material available shows that the Scottish Parliament was alive to the issue. In the debate at stage 3 the Minister recognised the difference between general confidentiality and LLP, and expressed concern that the proposed amendment would impinge on the issue of LPP. Consideration of the parliamentary material results in the conclusion reached by Lord Hoffmann when conducting the same exercise in *Morgan Grenfell* (paras 34-35) "The Parliamentary material does not therefore assist in showing a clear intention to override a fundamental human right".'

84. Three English first instance decisions rendered since Sports Direct was decided by the Court of Appeal were relied on by the SRA. The first was Da Rocha-Afodu v Law Society of England & Wales [2021] EWHC 1666 (Ch) ('Da Rocha-Afodu'). That was an appeal from an order by a Master enforcing s. 44B notices. Adam Johnson J considered an argument that the notices should not be enforced because of client privilege. He said at [21]-[22] that, even if the information sought did engage client privilege (which he doubted), the analysis in paragraph [32] of Morgan Grenfell (which he quoted, including the 'no infringement' reasoning), applied in that case and answered the appellant's point about privilege. It is clear that in that case, where the appellant represented himself, there was no argument on this issue in anything approaching the depth with which it has been considered before me.

85. The second was SRA v Edward James Williams [2023] EWHC 2151 (Admin) ('Williams'). In that case the Court was considering an appeal by the SRA against the refusal by the SDT to anonymise references to clients in its judgment in order to protect client privilege. Julian Knowles J said (at [68]) that as the communications in question were subject to LPP which had not been waived that should have been the end of the matter; and that the SDT should have anonymised its reasons as the SRA had asked it to. His reasoning was, in part, that which he expressed in paragraph [41] as follows:

> '[41] LPP is a fundamental right which cannot be overridden by some competing public interest. Parliament can only override it by express words or necessary implication: *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax and Another* [2003] 1 AC 563. [15]). Parliament has permitted the Law Society to require solicitors to disclose to the Law Society documents which are subject to LPP. Such limited disclosure either does not breach the clients' LPP or, to the extent that it technically does, is authorised by the Law Society's statutory powers; cf *B v Auckland District Law Society* [2003] 2 AC 736, [69]. It is critical that this 'limited disclosure' does not involve

> the information which is subject to LPP being made public: *Morgan Grenfell*, [32].'

86. That was a case in which neither the respondent nor the SDT appeared or was represented. Again it is apparent that the argument on the relevant point was far less detailed than that before me.

87. The third case is the decision on anonymity made by Thornton J in SRA v Sa'id [2024] EWHC 1619 (Admin), Annex ('Sa'id'). The SDT had refused to anonymise the respondent's clients. The court found that the SDT had fallen into error in taking that course. In the course of her judgment Thornton J referred (at [3]) to 'the SRA's practice to seek anonymisation in cases of this nature to protect legally privileged communications which have been disclosed by a solicitor to the SRA by reason of the SRA's statutory powers and as an exception to the absolute nature of [LPP]'. The respondent had supported the SRA's anonymity appeal and had played no part in it (see [1]).

Textbooks

88. I was referred to the consideration of the issues which arise in the present context in two textbooks. The first was the extensive discussion in Passmore, *Privilege* (5th ed) at 1-220 – 1-239. I cite one paragraph of that discussion here, though I have had regard to all of it:

> '[1-223] Where does this leave us? *Parry-Jones* is a much discussed decision whose reasoning has been seriously doubted, even if its outcome has somehow survived. It had a focus on the fact that privilege was not, in 1967, when it was decided, regarded as a fundamental right available outside of legal proceedings. Lord Hoffmann refused to accept its reasoning in *Morgan Grenfell*, and yet his analysis has now been confined to the need to explain away TMA s20B(8) in the circumstances which arose in that decision. While there was a brief analysis in *Parry-Jones* of whether the Solicitors Accounts Rules at issue there and made under the Solicitors Act 1957 truly overrode privilege, this was an unsatisfactory analysis given the context in which it was made: while Rose LJ asserted in *Sports Direct* that such a result was "entirely consistent with the test for implied override set out by Lord Millett in *B v Auckland*", the analysis in fact undertaken by Lord Denning does not, with respect, involve any detailed textual analysis and is some way from what we would expect to see in 2024, namely an analysis that meets what Rose LJ also described as "the high threshold for the necessary implication of an override". No subsequent decision has ever revisited how the court in *Parry-Jones* reached the result it did as a matter of statutory construction, seemingly content to accept that it is correct. This remains unfortunate, especially given the approach actually adopted by Lord Millett in *B v Auckland* – a case decided on comparable facts, albeit under New Zealand legislation – where he considered the question of statutory override in that case over several

> paragraphs of his judgment (in which *Parry-Jones* did not feature).'

89. The other was the, also painstaking, treatment of the issue in Thanki and Oppenheimer et al., *The Law of Privilege* at paragraphs 4.99 – 4-109. It is helpful to quote paragraph 4.105:

> 'While *Sports Direct* provides a definitive statement on the issue of a "no infringement" exception, and can also be said to constitute a powerful reaffirmation of the status of legal professional privilege as a fundamental substantive right, no matter how disruptive it may prove in individual cases to regulators, the decision's full implications are still to be worked through, in particular in the context of the regulation of lawyers, where a number of important questions remain to be resolved. First, there is a question as to the status of *Parry-Jones* itself, given that its reinterpretation by Lord Hoffmann (described by Rose LJ as the retrofitting of a new *ratio decidendi* into *Parry-Jones*) has been rejected. The issue did not arise directly for decision in *Sports Direct* and the Court of Appeal limited itself to stating that *Parry-Jones* continues to stand as authority for the propositions that (i) rule 11 of the Solicitors' Accounts Rules 1945 conferred on the Law Society a power to compel the production of documents in the hands of the solicitor even though the clients of the solicitor could assert privilege in those documents; and (ii) rule 11 was not ultra vires the scope of the rule-making powers in section 29 of the Solicitors Act 1957. However, there must be some doubt as to whether such an override could correctly have been found in that case, given the subsequent decisions in *Morgan Grenfell* and particularly *B v Auckland Law Society* in which the Privy Council found that similar statutory powers of the Auckland District Law Society did not meet the test for the statutory override of privilege (whether underlying client privilege or otherwise). While *Parry-Jones* concerned legislation which is no longer in force, there can be no doubt that *Sports Direct* is a decision with potentially significant implications for the regulation of solicitors.'

Analysis

90. The SRA puts forward two bases on which it contends that it has power to require production of documents subject to the client's privilege. The first is what may be called 'statutory override': namely that s. 44B provides that power and overrides the client's LPP. The second, and alternative, argument, is what has been called in some authorities a 'no infringement' argument: namely that LPP is not infringed, or is permissibly infringed, if the relevant documents / information are provided to a legal regulator for the purposes of investigations such as those conducted by the SRA. I will deal with the two arguments in turn.

Statutory override

91. The starting point is the terms of s. 44B itself and their proper construction. I will consider this first without reference to the Parliamentary material as to the passage of the 2007 Act to which the Claimants referred. I will then consider whether this material has any materiality to the analysis. I will then consider whether the decided authorities bind or should persuade me to a different construction of s. 44B.

The construction of s. 44B

92. Section 44B is in wide and general terms as to the documents / information which the SRA can require to be produced or provided. It is common ground that it does not make any express provision in relation to LPP. There is no express 'override' of LPP.

93. Given that LPP has been recognised as a fundamental right, including in the cases to which I have referred above, the principle of legality is brought into play. I accept that that principle is, as the SRA says by reference to <u>AKJ v Commissioner of Police of the Metropolis</u> [2014] 1 WLR 285 at [28], only one tool of statutory interpretation, but it is nevertheless an important one in relation to the statutory provisions under consideration.

94. There is, furthermore, no real doubt or dispute as to what the consequence is of the application of the principle of legality. This is that, as described in <u>Morgan Grenfell</u>, a fundamental right will only be considered as overridden by express words or by necessary implication. Lord Hobhouse said in that case that a necessary implication 'is one which necessarily follows from the express provisions of the statute construed in their context'. That statement needs, I accept, to be modified to include reference to the purpose, as well as the context, of the legislation: see <u>R (Black) v Justice Secretary</u> [2018] AC 215 at [36(4)] per Lady Hale. Otherwise it remains an accurate statement. Further, as Lord Hobhouse also said, a necessary implication is to be distinguished from what would have been sensible or reasonable for Parliament to have included, or what, had it thought about it, it would probably have included.

95. There was equally no dispute, and I accept, that the test suggested by Lord Millett in <u>B v Auckland</u> is a useful one to employ. That test is to write in the words 'not being privileged documents' and ask not 'does that produce a reasonable result?' or 'does it impede the statutory purpose for which production may be required?' but 'does that produce an inconsistency?' or 'does it stultify the statutory purpose?'

96. The SRA therefore has to argue and does argue that, applying those tests, it is necessarily implied in s. 44B that it can require the production of documents subject to the client's LPP. As I have said above, the SRA's argument has to be that the implication only relates to documents/information subject to the client's LPP, and not to the solicitor's own LPP. That, it might be said, makes the implication a more difficult one to make out, as it is a more complicated proposition to read into the terms of the section. The SRA's argument that there is such an implication had a number of strands. I identified six points, which overlap, but which I will seek to deal with separately and in turn.

97. In the first place, the SRA contended that as a matter of the background and approach to the legislation, it is necessary to take into account that the regulation and investigation of complaints about solicitors is in furtherance of the same essential public policy as is the recognition of LPP: namely the proper administration of justice and the

maintenance of the rule of law. It is of little use, the SRA says, to protect the ability of clients to have free and uninhibited communication with their lawyers if their lawyers are incompetent, or fail to adhere to the standards to be expected of them.

98. I accept the point that the regulation, and if necessary investigation, of solicitors serves an important policy purpose and is designed to facilitate the proper administration of justice and maintain the rule of law. I accept further that an understanding of that as being a policy goal of the regulation of solicitors may be of assistance in construing the provisions relating to that regulation. But I do not accept what I understood to be the logic of the SRA's argument here, namely that it is more readily to be inferred that Parliament intended to override LPP by s. 44B because such an override would be in furtherance of the same ultimate object as gives rise to LPP itself. While the ultimate justification for LPP may be that it too facilitates the proper administration of justice and the maintenance of the rule of law, it is now a very well-established privilege, with its own defined boundaries, and has been recognised as itself being a fundamental right. It is a right which, when exercised, is very often in tension, if not conflict, with the emergence of the truth and the aim of cases being decided correctly on the basis of all the relevant evidence. The court cannot assume *a priori* that it is more likely that this discrete and recognised right would be overridden by Parliament in support of the policy of upholding the proper administration of justice than (say) in support of some other policy.

99. The second argument, and one on which the SRA placed weight, is that the implication is supported by a consideration of the relationship of s. 44B with the powers exercisable on an intervention under s. 35. When there is an intervention, the SRA's powers are those in Part II of Schedule 1, including paragraph 9. The documents which may be required to be produced or delivered under paragraph 9, in the case of an intervention, clearly include documents subject to the client's LPP. That, indeed, is accepted by the Claimants, and an intervention could not work otherwise. The SRA argues that it is therefore significant that what s. 44B does is to apply paragraph 9 to the power to obtain documents under s. 44B.

100. The SRA also refers, in this context, to the fact that paragraph 3 of Part I of Schedule 1 provides for the SRA to be able to intervene when it is satisfied that there has been undue delay on the part of the solicitor in connexion with any matter or trust; and that where there has been an intervention under that paragraph the relevant power to give a notice requiring the production or delivery of documents is that under paragraph 9(1)(b) of Part II, which has the limitation to documents 'in connection with the trust or other matters of which the [SRA] is satisfied (whether or not they relate also to other matters).' Thus, in a case of what is often called a 'limited intervention' pursuant to paragraph 3, the SRA may require production or delivery of the solicitor's documents relating to a particular matter, and again, those documents would include documents subject to the client's LPP. The power under s. 44B to give notice to produce documents is to produce the same type of documents as may be required to be produced on a limited intervention: Parliament has, the SRA argues, taken the limited intervention power available in cases of delay, and made it available, in almost exactly the same words, in cases of an investigation as well. It would, the SRA says, produce an inconsistency with the position applicable on an intervention if s. 44B were to be construed as not permitting a notice requiring the production of documents subject to LPP.

101. This is an important point, and it was forcefully made by Ms Oppenheimer KC. It seemed to me to have two aspects. One, which might be called the narrower aspect, is the argument that, to accept that s. 44B does not provide for an override of LPP creates an inconsistency within the Act, because the documents which can be required and which are referred to in paragraph 9 must include documents subject to LPP (as they undoubtedly do in an intervention) and cannot without inconsistency exclude such documents on an investigation. I do not, however, consider that there is an inconsistency in the Act in this respect. The reason for this is that, while the powers exercisable under s. 44B are specified by reference to the powers which had already been enacted as exercisable on an intervention, the documents which may be ordered to be produced under s. 44B are governed by the terms of that section itself. Thus, under s. 44B(1), what the SRA may require a person to produce are the documents or information 'specified in the notice'. Further, under s. 44B(7), sub-paragraph (1) of paragraph 9 (i.e. including both 9(1)(a) and (b)) does not apply to the powers to obtain documents under s.44B. Sub-paragraphs (2) and (4) to (12) do apply to s. 44B powers 'as they apply in relation to the powers conferred by paragraph 9(1)', but by s.44B(7)(b) 'any reference in [paragraph 9] to any such documents as are mentioned in paragraph 9(1) of that Schedule is to be construed as a reference to any documents to which a notice under this section applies'. In other words, the documents which are being referred to when paragraph 9 is applicable in a s. 44B case are those referred to in the notice given pursuant to that section. What matters therefore is what documents may be required under that section. The fact that, when applicable in the case of an intervention, paragraph 9 would apply to documents subject to LPP does not dictate that s. 44B should permit notices which require the production of such documents, and is not inconsistent with a reading of s. 44B which does not permit such notices. The statutory structure is, as Mr Rushbrooke KC submitted, to start with s. 44B(1), and see what documents may be required to be produced under that section; and then to apply the enforcement provisions in sub-paragraphs 9(2) and (4)-(12), as adapted, to those documents.

102. The second aspect may be said to be a somewhat wider one. The thrust of the point here is that Parliament did not make explicit reference to the override of LPP in the case of the exercise of intervention powers; it used, however, very similar language for the powers exercisable pursuant to s. 44B as for the powers exercisable on a limited intervention. It should, therefore, be inferred that Parliament intended the same result in the two cases.

103. While I see the force of this point, I do not consider that it means that a statutory override of LPP is necessarily to be implied into s. 44B. It is accepted that it is a necessary implication into s. 35 and paragraph 9 as applicable to a s. 35 intervention, but that is because, in that case, an intervention could not be carried out if there was no access to documents subject to a client's LPP. The SRA can only effectively intervene by taking over (or requiring the delivery to an appointed person of) all the firm's files (or, in the case of a limited intervention, the entirety of the files relating to the matter). The SRA or the appointed person must be able to look at all the documents in order to be able to decide how the business of the firm (or the particular matter(s)) should be conducted or carried on. That is not the case in relation to an investigation under s. 44B. As I say further below in the context of the argument on 'stultification', an inability of the SRA to require the production of documents subject to LPP may make investigations, in some cases, more difficult, less effective or ineffective, but these, in

my view, are impediments to investigations and do not mean that s. 44B cannot operate. The basis of the implication in relation to s. 35 interventions is not present in the case of s. 44B.

104. The SRA's third argument is that there are other features of the statutory scheme which militate in favour of the implication for which it contends. One point on which it relies is s. 147 of the 2007 Act, which introduced a power for the Ombudsman to require the production of documents and information to allow the investigation of matters referred to it. That section, however, by s. 147(6), contains an express proviso to the effect that the Ombudsman cannot require the production of documents or information that a party could not be compelled to produce in High Court proceedings. The SRA therefore contends that it must be inferred that the omission of such a proviso from s. 44B was deliberate and was because Parliament did intend that LPP could be overridden in the case of an investigation by the SRA.

105. This point goes, as I see it, at most to what might be a sensible or reasonable inference to draw from the terms of the different provisions of the Act, and does not give rise to a necessary implication. The terms of section 147 might be explicable on the basis that it was not concerned only with LPP, but was intended, more generally, to make clear that the documents and information which the Ombudsman could compel to be produced should not extend beyond those which could be compelled in the High Court; and, insofar as the provision covered materials subject to LPP, was a provision for the avoidance of doubt.

106. A similar point to that in relation to s. 147 of the 2007 Act was made by the SRA as to s. 46(11) of the 1974 Act. This provides that, in relation to applications or complaints made to the SDT, an applicant or complainant or any person with respect to whom the application or complaint is made may issue writs of subpoena *ad testificandum* or *duces tecum* 'but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action'.

107. The SRA contends that the fact that Parliament chose to specify that protection in s. 46 but did not specify it in s. 44B suggests that a different result was intended. Again, I do not consider that this is a powerful answer to the basic point that, if Parliament intends to override or curtail a fundamental right, it should do so expressly. The fact that it may have expressly preserved that right in other circumstances does not indicate that if it fails to mention it at all a different result is intended: this may be due to the 'full implications of [the] unqualified meaning [having] passed unnoticed in the democratic process', as it was put by Lord Hoffmann in ex parte Simms (cited above).

108. On the other hand, s. 46(11) does appear to me to create an anomaly if the SRA is right about s.44B. It would not be even-handed and would be potentially productive of unfairness if the SRA could obtain privileged documents either from the solicitor or (if an order is made under s. 44BB) from a third party which could be used in proceedings before the SDT, but the solicitor would not be able to compel the production of privileged documents from others.

109. The SRA also referred to the terms of paragraph 12 of Schedule 1, which is one of the paragraphs applicable to s. 44B. That provides that the powers conferred by Part II of Schedule 1 in relation to, inter alia, documents 'shall be exercisable notwithstanding any lien on them or right to their possession.' The SRA says that this shows that it 'was

clearly contemplated by Parliament that client files (necessarily privileged) would be included within the scope of the powers conferred by s. 44B'.

110. I consider this to be a weak inference. Not all documents over which a solicitor may exercise a lien will be subject to LPP. Furthermore, the fact that Parliament has provided that documents may have to be produced by a solicitor notwithstanding that the solicitor might have a lien over them, including against the client, does not support the inference that it was intended that the client should not be able to assert its right to refuse production because of LPP.

111. The third strand of the SRA's argument is based on what is often called the *Barras* principle, after Barras v Aberdeen Steam Trawling and Fishing Co Ltd [1933] AC 402. *Bennion, Bailey and Norbury on Statutory Interpretation* (9th ed.) at 24.6 explains this as follows:

> 'The legislature is normally presumed to legislate in the knowledge of, and having regard to, relevant judicial decisions. In construing a word or phrase in one statute reliance may therefore be placed on how the word or phrase has been construed in an earlier statute, although previous judicial interpretations should be viewed as no more than a starting point.'

112. The SRA's argument is that Parliament must be presumed to have passed the 1985 and 2007 Acts in the knowledge of the decision in Parry-Jones (and in the case of the 2007 Act also of Simms) and should be presumed to have intended, by using the words in s. 44B (in each version), the same result as in Parry-Jones, namely that LPP should not be a bar to production of the relevant documents.

113. I cannot accept that the *Barras* principle provides any useful guidance in this case. Parry-Jones was a decision as to s. 29 Solicitors Act 1957 and rule 11 of the Solicitors' Accounts Rules 1945. Section 29 of the 1957 Act was the precursor of s. 32 of the 1974 Act and not, directly, of s. 44B; and the Solicitors' Accounts Rules 2019 are made under s. 32 and certain other sections of the 1974 Act, not including s. 44B. The wording of the provisions relevant in Parry-Jones was not identical to that in s. 44B (in either version). Furthermore, it is difficult to say that in Parry-Jones any particular construction was placed on any particular words or phrases which also appear in s. 44B.

114. Moreover, if it is to be presumed that Parliament, at the time of the 1985 and 2007 Acts, knew of and had regard to relevant judicial decisions, it would have known that, by the time of the 2007 Act: (1) it was clearly established that LPP was not confined to being a privilege relevant to judicial or quasi-judicial proceedings (Daly); (2) it was also established that LPP was a 'fundamental human right', which would not be regarded as overridden by general words in a statute (Morgan Grenfell); and (3) the reasoning in Parry-Jones had been criticised by the House of Lords as difficult (ibid). If Parliament is taken to have known those matters, then for it to have used general words which made no reference to LPP would appear to me to suggest, if anything, that it intended not to override LPP by the general words of s. 44B.

115. A fourth strand of the SRA's argument as to necessary implication, which overlaps with other aspects of that argument, refers to the 1985 Act, and the terms of s. 44B which it

inserted into the 1974 Act. This section was clearly the direct predecessor of s. 44B as it was inserted into the 1974 Act by the 2007 Act. The SRA's argument is that the 1985 Act can be seen to have provided for the override of LLP, and the version of s. 44B inserted into the 1974 Act by the 2007 Act should be construed to have a similar effect in relation to this point.

116. In this regard the SRA makes reference to the statements made to each of the House of Lords and House of Commons by the government ministers responsible for the relevant Bill, and which I have quoted above. The SRA contends that these statements are admissible pursuant to Pepper v Hart. The SRA calls attention to the fact that both the Lord Chancellor and the Attorney General referred to an extension of the power to compel a solicitor to produce his 'case files' from cases in which there had been undue delay to cases of investigation. That, the SRA says, makes it explicit that what is being extended to investigations is the power already applicable on a limited intervention, which always included a power to require delivery of documents subject to a client's LPP.

117. It may be that it was the intention of the framers of the 1985 Act that it should be the same power as could be exercised on a limited intervention, and exercisable in relation to essentially the same documents, which was being extended to a case of investigation. However, the fact remains that there was no express statement in the 1985 Act that this would involve an overriding of a client's LPP in a new category of case, and one where the client might well have a greater desire to preserve his LPP than in a case of a transfer of files in the case of undue delay. Certainly that was not made explicit by the ministers, who did not refer to LPP at all. Accordingly, and applying the principle of legality, in my view the 1985 Act was and is not to be construed as overriding LPP. If that is right, then the reference to the terms of the 1985 Act does not, ultimately, assist the SRA.

118. A fifth strand of the SRA's argument relates to the safeguards which the SRA maintains, and which the courts may order, to prevent any documents subject to LPP and which may be obtained in an investigation from becoming public or being used otherwise than for the purposes of the investigation. The SRA points out that it is a public body, which is subject to public law obligations and constraints. Furthermore under s. 28 of the 2007 Act it (and other regulators) is specifically required to act in a way compatible with the regulatory objectives set out in Schedule 1 to the 2007 Act and to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted, and which otherwise represent best regulatory practice. The safeguards which are regularly employed include anonymisation of reports of tribunal decisions, tribunal hearings being heard in private in appropriate cases, and the limitation of access within the SRA to material which may be subject to LPP. It points out, further, that there can be a challenge to a s. 44B notice, which can be brought before the courts.

119. These safeguards were referred to by the SRA in the context of arguments about article 8, but it also made it clear that they were relied on in the present context of necessary implication as well. In the present context, the argument was that, when Parliament was enacting s. 44B (both in 1985 and 2007) it would have been known to Parliament that there would have been a range of ways in which access to and use of documents subject to LPP could be confined and limited so as to fulfil the purpose of the investigation, but involve no wider infringement of the confidentiality of those documents. This, the SRA says, needs to be taken into account when considering

whether there is a necessary implication of an override of LPP: it would have been obvious that any such override would not result in unconstrained use or publicity of documents subject to the client's LPP.

120. I did not find this argument convincing. There is no basis for considering that the existence of the possible safeguards if LPP was overridden was a factor in Parliament's decision to pass s. 44B. Had it been considered that it was important that there should be safeguards in place in order to ensure that there was no undue invasion of the client's LPP or confidence, then it is to be expected that Parliament would have enacted or provided for the making of rules requiring such safeguards specifically in relation to documents subject to LPP. The absence of any such provisions tends in my view to indicate that Parliament did not intend by what it enacted to override LPP.

121. The sixth strand of the SRA's argument is that it would stultify the statutory purpose of s. 44B if it did not permit the SRA to require the production of documents subject to LPP. The SRA submits, correctly in my view, that stultification of the statutory purpose, referred to by Lord Millett in B v Auckland must be taken as stultification of at least a 'major plank' of that statutory purpose: see R (Black) v Justice Secretary at [49] per Lady Hale. The SRA argues that a major plank of the purpose of the section would be stultified. As I have already set out, the SRA says that there are a number of types of case, especially involving complaints by non-clients, where it cannot investigate the conduct of the solicitor properly without having access to the documents which are subject to the client's LPP.

122. I remind myself that the test enunciated by Lord Millett in B v Auckland distinguishes between the 'impeding' of the statutory purpose and its 'stultification'. As he also says, the circumstances in which there would be 'stultification' in that sense will be rare. The test is therefore clearly intended to be a stringent one. I am not satisfied that it is met here. In the first place, it is not clear to me whether the investigation of the type of cases in which the SRA says it cannot properly investigate without reference to documents / information subject to LPP was a 'major plank' of the statutory purpose. There are many cases where the SRA can investigate without relying on a statutory override of LPP. Most cases of client complaints (where there is likely to be a waiver); cases of workplace bullying and harassment, and other cases which do not involve communications involving the client's LPP; and cases involving the iniquity exception, fall into this category. In cases of a complaint by an opposing party, the communications between the parties will be available and are likely, in many instances, to comprise the material which is relevant to an allegation of abuse of process. There is no indication that Parliament regarded investigation of the type of case which was not of these sorts but which involved consideration of documents / information subject to LPP to be a 'major plank' of the purpose of s. 44B. Had it done so, then it is all the more surprising that it did not make specific provision for LPP.

123. In any event, I am not persuaded that what would be involved in a finding that s. 44B did not constitute a statutory override of LPP would constitute 'stultification' of any part of the purpose of providing for proper investigation of solicitors, as opposed to 'impeding' that purpose. For reasons I have given, it appears that whether or not there is a statutory override of LPP will make no difference to the ability of the SRA properly to investigate most cases where an investigation is required. Even where documents / information subject to the client's (unwaived) LPP might be relevant, it may not be crucial or decisive. In my view, the fact that there may be some proportion of a limited

category of cases in which the investigation cannot be performed as thoroughly as is desired by the SRA, or even cannot be performed at all, falls within the category of there being an impediment to the fulfilment of the statutory purpose, rather than its stultification.

124. My conclusion in relation to the construction of s. 44, prior to considering the Parliamentary material relating to the 2007 Act or authority, is that it does not provide for the override of LPP. To summarise, this is because:

(1) It does not expressly provide for that, notwithstanding the status of LPP as a fundamental right.

(2) It could easily have been provided for had that been intended.

(3) It is not easy to see how, by a process of implication, the provision to be implied is such as to override the client's LPP, but not the solicitor's own LPP.

(4) The other provisions of the statutory scheme do not compel a conclusion that s. 44B does provide for a statutory override. On the contrary, I consider that s. 46(11) tends to suggest the opposite.

(5) I am not persuaded by the various other arguments advanced by the SRA as to necessary implication, for the reasons given above.

125. Finally on this point, I should add that the conclusion expressed in the previous paragraph is in my view reinforced by the terms of other sections added by the 2007 Act, and in particular s. 44BB. If, as the SRA contends, s. 44B permits a notice requiring the production of documents subject to LPP, then s. 44BB must permit the High Court to order persons other than the solicitor under investigation, including the client, to provide information and documents subject to the client's LPP. This would be a power exercisable in the case of an investigation by the SRA, which could be based solely on a failure by the solicitor to comply with 'any rules made by [the SRA]' (s. 44B(3)(b)). Thus, on the SRA's case, the 1974 Act, as amended by the 2007 Act, empowers the court to order a client to produce its privileged documents, not because of any supposed wrongdoing by the client, but in order to further an investigation of the solicitor. If right, that would indeed be a strong power to have been conferred on the Court, given that LPP is 'a fundamental condition on which the administration of justice as a whole depends' (<u>R v Derby Magistrates' Court</u> at 507 D/E) and is 'a fundamental human right long established in the common law' (<u>R (Morgan Grenfell)</u> at [7]). It would be striking, to my mind even more so than in relation to s. 44B, for this power to have been conferred without any express reference to the overriding of LPP.

Is the Parliamentary material relating to the 2007 Act relevant?

126. Thus far, I have not considered the Parliamentary material, relating to the passage of the 2007 Act, relied upon by the Claimants. They contended that the Parliamentary materials relating to the passage of the 2007 Act which I have identified above are admissible either on the basis of an established category of permissible use of Parliamentary material other than by application of <u>Pepper v Hart</u>, or, if necessary, by way of an application of <u>Pepper v Hart</u>. The SRA contended that the material is

inadmissible. Further, if it was admissible, the SRA contended that it does not help the Claimants.

127. As to the question of admissibility, the Claimants' case was that it is established that, in a case where there is a question as to whether fundamental rights have been affected by legislation, and the principle of legality is in play, it is permissible for the courts to look at the debates in Parliament to see whether there is evidence of a clear intention to override the fundamental right.

128. The Claimants relied on Morgan Grenfell in this connexion. Lord Hoffmann's speech, with which other members of the Appellate Committee of the House of Lords agreed, indicates that he had looked at the relevant Parliamentary material, even though the party introducing it did not contend that it was sufficiently unambiguous to be admissible under Pepper v Hart (at [34]-[35]); had found in it 'no indication that the House was being told that the intention was to abolish or restrict [LPP]'; and had concluded that it 'does not assist in showing a clear intention to override a fundamental human right'.

129. The Claimants further contended that the purpose of this additional basis of looking at Parliamentary material was explained and its existence confirmed by the decision of the Supreme Court in R v Forsyth [2011] 2 AC 69 at [10] where the court had said:

> '[10] The essential reason why the court in *A v HM Treasury* was prepared, indeed anxious, to examine the parliamentary material surrounding the passage of the 1946 Act was to make sure that there had in fact been nothing said by those introducing the Bill to suggest that the executive power being conferred was intended to permit fundamental human rights to be overridden. In short, Hansard was being examined to confirm the absence of a clear statement of such intention, the argument there being that a power of the width contended for by the minister needed to have been conferred unambiguously.'

130. I accept this argument on behalf of the Claimants. I consider it to be established that the court can, in a case in which it is contended that a provision was intended to override fundamental rights or permit fundamental rights to be overridden, look at Parliamentary material to see whether there was or was not a clear statement that it was intended that the right should be overridden.

131. There was a further argument between the parties, if any Parliamentary material relating to the 2007 Act was to be reviewed, as to what that material might embrace. Material was placed before me which was said to indicate the nature of the reasoning behind the Law Society's proposals for amendments to the Bill, and the views of officials at the Department of Constitutional Affairs to the effect that a section enacting an express override of LPP was unnecessary because the power contained in the proposed s. 44B already, by reference to Parry-Jones, permitted the obtaining of documents subject to LPP if the documents were used only for the purposes of the investigation. In my view, the court should not be looking at such material, given that it was not specifically referred to in the debates in Parliament, for the purpose of explaining or glossing what was actually said in Parliament. In the present case, therefore, what it is permissible for the court to look at is the nature of the amendments proposed by Lord Kingsland,

and Lady Ashton's response, as part of a more general review as to whether there was or was not any clear indication of an intention to interfere with a fundamental right.

132. On the basis of that material, and answering that question, the position appears to me to be this. A proposal was made for a provision which would unequivocally have permitted the SRA to require the production of documents which were confidential or subject to LPP. The minister, however, said that the proposed amendment was not accepted by the government, because of 'real sensitivities in relation to allowing a regulator to override professional privilege or have unfettered access to material of a confidential nature in the way proposed.' While the minister indicated that as of 6 March 2007 the government's position was not necessarily immutably fixed, the amendment was withdrawn, the issue not reverted to, and no provision such as had been proposed by Lord Kingsland was included in the 2007 Act.

133. What had happened thus demonstrates no clear intention to override LPP. The material indicates, if anything, an absence of an intention to override LPP. This therefore does not cause me to doubt, and if anything reinforces me in, my construction of s. 44B, expressed above.

Binding or persuasive authority to the contrary?

134. The SRA contends, however, that this court is bound by authority to conclude that s. 44B does provide for a statutory override of LPP. To recap, its contention is that in Parry-Jones the Court of Appeal held that antecedent analogous legislation justified the infringement of privilege; that that conclusion has been held, by the Court of Appeal in Sports Direct, to be based on a legislative override; that the Divisional Court's decision in Simms confirms that the Parry-Jones approach applies to the 1974 Act; and that the conclusion that s. 44B provides for a legislative override is therefore binding unless and until the matter is reconsidered by the Supreme Court.

135. The starting point is Parry-Jones. It has not been overruled. On the contrary, in Morgan Grenfell Lord Hoffmann made clear that the House was not saying that it was wrongly decided. It is therefore binding as to what it decides and as to its *ratio decidendi* insofar as that has not been disapproved by subsequent binding authority.

136. The narrow points which Parry-Jones actually decided and for which it continues to stand as authority, as was stated by Rose LJ in Sports Direct are, first, that rule 11 of the Solicitors' Accounts Rules 1945 conferred on the Law Society a power to compel the production of documents in the hands of the solicitor even though the clients of the solicitor could assert privilege in those documents, and second that rule 11 was not *ultra vires* the scope of the rule-making powers in s. 29 of the Solicitors Act 1957. Neither of those points is before me in this case. I am not concerned with rule 11 of the Solicitors' Accounts Rules 1945, nor, indeed, with any identically or nearly identically expressed successor.

137. I have to consider, however, whether there is a wider *ratio decidendi* of that case which can be said to bind me in this one. In identifying the *ratio decidendi* of Parry-Jones (and the other authorities cited, where this is in issue), what the court is looking to identify is "any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him", bearing in mind that 'necessary' does not mean logically or causally necessary, but necessary

in the sense that justification for the conclusion would be weaker if a different rule were adopted: see Churchill v Merthyr Tydfil County Borough Council [2024] 1 WLR 3827 at [17]-[18].

138. It is also necessary to consider that a court is not bound by a proposition of law stated in a previous case, even if it is part of the *ratio decidendi* of that case, if it was not disputed in that earlier case, including where it was merely assumed to be correct: see FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd [2020] Ch 365 at [136].

139. The difficulty of identifying a *ratio decidendi* in Parry-Jones has been referred to by Lady Dorrian in Murray at [30]. As she there says, the distinction between general duties of confidence as opposed to LPP is not clearly drawn. Furthermore, the judgments, and most explicitly Diplock LJ's judgment, proceed on the basis that LPP is not relevant when one is not concerned with judicial or quasi-judicial proceedings. That view of LPP has been authoritatively repudiated and revised since Parry-Jones. As Lord Hoffmann said in paragraph [30] of Morgan Grenfell, '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.'

140. I do not consider that it is possible to discern in Parry-Jones any 'rule of law' by which the words of a statute in the terms of s. 44B must or can be construed as overriding LPP, if LPP were otherwise applicable. But, if that is wrong, and there is such a rule of law expressly or impliedly treated as a necessary step in the conclusion reached, that was not, apparently, a proposition as to which there was dispute. It was not part of Mr Parry-Jones's argument, as recorded on pp. 5 - 6 of the report, that a rule expressed in general terms such as rule 11 did not override privilege. Indeed, on p. 6, it appears that he accepted that 'wide powers' were conferred on the Law Society. His argument was rather that rule 11 was *ultra vires*, and that it should have *implied into it* the privilege contained in rule 5. There certainly does not appear to have been any argument based on the general principle of legality, which, in any event, can be said to have been in a less developed state in 1967 than it has subsequently become. I do not consider, therefore, that, even if, contrary to my view, the proposition which I have referred to can be discerned as being part of the *ratio decidendi* of the case, it would be binding on me, for the reason I have identified above by reference to the decision in FSHC Group.

141. The SRA contends, however, that the matter does not rest with what can be said to be the *ratio decidendi* of Parry-Jones taken by itself. It points to the final sentence of paragraph [40] of Rose LJ's judgment in Sports Direct, where she said that the result in Parry-Jones was 'entirely consistent with the test for implied override set out by Lord Millett in [B v Auckland], as the Divisional Court in Simms … later held'. It submits that that decides, in a manner which is binding on this court, that the terms of rule 11 of the Solicitors' Accounts Rules 1945 effected a statutory override of LPP notwithstanding the stringency of the requirement for a clearly demonstrated legislative intention to do so as recognised in B v Auckland. The logic of the argument, therefore, is that, given that it is thus established that the terms of rule 11 of the Solicitors' Accounts Rules 1945 satisfied the test recognised in B v Auckland, it is impossible to say that s. 44B does not do so.

142. I do not accept this argument. I agree with what is said in Thanki on *The Law of Privilege* at footnote 275 to paragraph 4.105, as follows:

> 'It is evident that the Court of Appeal in *Sports Direct* couched its decision so as not to engage with that wider issue [viz. as to the issue of LPP in relation to the regulation of solicitors]. While Rose LJ noted (at para. 40) after commenting on what *Parry-Jones* stood as authority for, that "Such a result is entirely consistent with the test for implied override set out by Lord Millett in *B v Auckland*, as the Divisional Court in *Simms* … later held", it cannot be said to be any part of the ratio of *Sports Direct* itself that r 11 of the Solicitors Accounts Rules 1945 (the rule at issue in *Parry-Jones*) overrode client privilege.'

143. What Sports Direct decided, in relevant part, was that there was no principle that where documents subject to LPP were handed over to a regulator there was no infringement or only a technical infringement of LPP. It was not a necessary part of the reasoning of the Court of Appeal that such an override had been provided for by rule 11 of the Solicitors' Accounts Rules. Further, to put it another way, the justification for the Court of Appeal's decision in Sports Direct, which in my respectful view was in any event overwhelming, would be no weaker if the last sentence of paragraph [40] had been omitted.

144. The SRA also relied on the decision in Simms. As I have said, that was a case which involved the powers of the SRA to obtain documents on an intervention, not under s. 44B. The only reference to s. 44B (then in the form added by the 1985 Act) is in paragraph [47], where the Divisional Court says that it 'should also be noticed' that the powers under subparagraphs (2) to (12) of paragraph 9 of Schedule 1 apply in the case of an investigation, enabling the Society to require the production or delivery of 'all relevant documents in the possession of the solicitor or his firm'. It is not clear that that paragraph involves the expression of the view that s. 44B also overrode LPP. Be that as it may, I regard it as clear that paragraph [47] does not form part of the *ratio decidendi* of the case, which did not involve the power under s. 44B. Once again, I do not consider that paragraph [47] was a necessary part of the Divisional Court's reasoning, or that the justification for its conclusions would have been weaker had it been omitted. Further there seems to have been no argument directed to whether s. 44B by necessary implication overrode LPP.

145. I did not understand it to be in issue that a puisne judge is not, strictly, bound by decisions of a Divisional Court, which is a court of at least two judges held for the transaction of business of the High Court, and thus, strictly, a court of co-ordinate jurisdiction. It is of course, however, the position that a puisne judge will generally follow decisions of a court of co-ordinate jurisdiction unless there are powerful reasons not to. It has also been said that it is difficult to imagine circumstances in which a single judge would depart from a decision of a Divisional Court: see Dean Francis v DPP [2025] RTR 2 at [67], referring to R v Greater Manchester Coroner, ex p. Tal [1985] QB 67. For the reasons I have given, I do not consider that the present case is one in which I am departing from any part of the *ratio decidendi* of Simms. But if I am wrong about this, I consider that this is one of the, doubtless very exceptional, cases in which I should do so. Simms was a case in which the appellant was not represented; the argument on the point, to the extent that there was any, was very much more limited than it has been before me; the reasoning in Simms has been criticised (as a decision 'in somewhat unsatisfactory terms': Passmore, *Privilege* (5th ed.), 1-220); and, to the

extent that it can be said to be authority for s. 44B constituting a statutory override of LPP, I consider it to be wrong. To be clear, however, I do not question the correctness of the result in Simms or its conclusions that (1) the documents in question were not privileged at all; and (2) that in any event paragraph 9(1) of Schedule 1 to the 1974 Act, applicable on an intervention, by necessary implication overrode LPP.

146. In relation to the first instance cases postdating Sports Direct relied on by the SRA, Da Rocha Afodu, Williams and Sa'id, they are plainly not binding on me. In the latter two, only one side was represented in relation to the argument before the court; and there was no argument as to whether s. 44B created a statutory override. In Da Rocha-Afodu, it is not clear that the judge, by his reference to paragraph [32] of Lord Hoffmann's speech in Morgan Grenfell, was intending to adopt an analysis of statutory override, as opposed to a 'no infringement' analysis. The issue of whether, given the legality principle, there could be a statutory override does not seem to have been the subject of any argument, which may in part be because the appellant appeared in person. I therefore do not consider that I am departing from the *ratio decidendi* of that case. If I am, it is because, in the light of the much more extensive argument in this case, I consider, with respect, that it is wrong as to statutory override. In the circumstances I do not consider that any of the three cases, or the three cases together, constitute an established body of authority at first instance which I should not depart from.

147. For these reasons I do not consider that there is any authority binding on me which compels me to reach a conclusion other than that which I have reached in construing s. 44B itself.

'No infringement'

148. As I have already referred to, the SRA, by way of alternative argument, contends that, even if there is no statutory override of LPP by s. 44B, the provision of documents and information subject to LPP to the SRA is not an infringement, or is a permissible infringement, of LPP. The foundation of this case is paragraph [32] of Lord Hoffmann's speech in Morgan Grenfell. The SRA accepts that this court is bound by Sports Direct, and does not challenge it before this court, though it reserves its position should the case proceed to an appeal. But it contends that, in relation to legal regulators, the 'no infringement' reasoning remains applicable. This, it argues, is shown by the fact that Lumsdon in the Divisional Court was referred to by the Court of Appeal in Sports Direct and not disapproved, and is further demonstrated by its adoption, along with statutory override reasoning, in Da Rocha-Afodu and Williams.

149. I can deal with this point briefly, because in my judgment I am bound by Sports Direct to reject it. It was part of the *ratio decidendi* of that case that there is no principle that, where documents are handed over to a regulator, there is no, or only a technical, infringement of any LPP to which they may be subject: see in particular paragraphs [23]-[24]. As is apparent from those paragraphs, if there is no statutory override by the particular statute in question, then LPP would be infringed by such documents being supplied to a regulator.

150. I do not consider that it can be said that legal regulators are in a different position from other regulators. There is no indication of that, or why that should be the case, in Sports Direct. What Rose LJ says about Lumsdon in the Divisional Court is simply that she did not see that it, or how it was treated by the Court of Appeal in that case, was support

for the existence of the no infringement exception (paragraph [43]). That does not, in my judgment, constitute any acceptance of the correctness of the relevant reasoning in Lumsdon in the Divisional Court, or of the continued applicability of a no infringement exception in the case of legal regulators.

151. It would, furthermore, in my view, be anomalous and contrary to other authority for LPP to be subject to an exception in the case of a legal regulator. The privilege has been said to apply 'for all time and in all circumstances': Hobbs v Hobbs and Cousens, quoted above. As it was put by Lewison LJ, with whom Floyd and Hamblen LJJ agreed, in Addlesee at [29]:

> '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 CJ explained, the lawyer's mouth "is shut forever".'

The emphasis is Lewison LJ's own.

152. I have thus reached the same conclusion in relation to the 'no infringement' argument as was reached in Murray at [30].

Article 8 of ECHR

153. As I have indicated above, the Claimants make an alternative case that if s.44B, on its ordinary construction, abrogates the client's LPP, the statutory scheme would be incompatible with art. 8 of the ECHR, and that as it is possible to construe s. 44B in a way compatible with art. 8, the Court is obliged to do so pursuant to s. 3(1) HRA 1998.

154. As I have concluded that s. 44B does not, on its ordinary construction, abrogate LPP, this issue does not arise for decision, and I will say no more about it.

Overall Conclusion

155. I have thus concluded that s. 44B does not permit the SRA to require the production of documents subject to the client's unwaived LPP. At best, from the SRA's point of view, its terms might be said to be equivocal. That is not enough to override the fundamental right of LPP. It is not 'compellingly clear' that there is an override of LPP implied into s. 44B. The SRA has not surmounted the 'high threshold' for a necessary implication. There is no authority which binds this court to reach the conclusion that there is such an implication. But this court is bound to find that there is no 'non-infringement' or permissible infringement exception to LPP in the case of documents required by a legal regulator.

156. I should emphasise that, in reaching these conclusions, I have not had to consider, and express no view, on the question of whether it would be desirable for the SRA to have the power for which it contends. That is, ultimately, a matter for Parliament.

Annex 1

SCHEDULE 1
INTERVENTION IN SOLICITOR'S PRACTICE

PART I
CIRCUMSTANCES IN WHICH SOCIETY MAY INTERVENE

1(1) Subject to sub–paragraph (2), the powers conferred by Part II of this Schedule shall be exercisable where—

(a) the Society has reason to suspect dishonesty on the part of—

(i) a solicitor, or

(ii) an employee of a solicitor, or

(iii) the personal representatives of a deceased solicitor,

in connection with that solicitor's practice or former practice or in connection with any trust of which that solicitor is or formerly was a trustee or that employee is or was a trustee in his capacity as such an employee;

(aa) the Society has reason to suspect dishonesty on the part of a solicitor ("S) in connection with—

(i)the business of any person of whom S is or was an employee, or of any body of which S is or was a manager, or

(ii)any business which is or was carried on by S as a sole trader;

(b) the Society considers that there has been undue delay on the part of the personal representatives of a deceased solicitor who immediately before his death was practising as a sole solicitor in connection with that solicitor's practice or in connection with any trust;

(c) the Society is satisfied that a solicitor has failed to comply with rules made by virtue of section 31, 32 or 37(2)(c);

(d) a solicitor has been made bankrupt or has made a composition or arrangement with his creditors;

(e) a solicitor has been committed to prison in any civil or criminal proceedings;

(ee) the Society is satisfied that a sole solicitor is incapacitated by illness, injury or accident to such an extent as to be unable to attend to his practice;

(f) a solicitor lacks capacity (within the meaning of the Mental Capacity Act 2005) to act as a solicitor and powers under sections 15 to 20 or section 48 of that Act are exercisable in relation to him;

(g) the name of a solicitor has been removed from or struck off the roll or a solicitor has been suspended from practice.

(h) the Society is satisfied that a . . . solicitor has abandoned his practice;

(i) . . . .

(j) any power conferred by this Schedule has been exercised in relation to a sole solicitor by virtue of sub–paragraph (1)(a) and he has acted as a sole solicitor within the period of eighteen months beginning with the date on which it was so exercised;

(k) the Society is satisfied that a person has acted as a solicitor at a time when he did not have a practising certificate which was in force;

(l) the Society is satisfied that a solicitor has failed to comply with any condition, subject to which his practising certificate was granted or otherwise has effect, to the effect that he may act as a solicitor only—

(i) in employment which is approved by the Society in connection with the imposition of that condition;

(ii) as a member of a partnership which is so approved;

(iii) as a manager of a body recognised by the Society under section 9 of the Administration of Justice Act 1985 and so approved; or

(iv) in any specified combination of those ways.

(m) the Society is satisfied that it is necessary to exercise the powers conferred by Part 2 of this Schedule (or any of them) in relation to a solicitor to protect—

(i) the interests of clients (or former or potential clients) of the solicitor or his firm, or

(ii) the interests of the beneficiaries of any trust of which the solicitor is or was a trustee.

(1A) In sub-paragraph (1) " manager " has the same meaning as in the Legal Services Act 2007 (see section 207 of that Act).

(2) . . . .

2 On the death of a sole solicitor paragraphs 6 to 8 shall apply to the client accounts of his practice.

3 The powers conferred by Part II of this Schedule shall also be exercisable, subject to paragraphs 5(4) and 10(9), where—

(a) the Society is satisfied that there has been undue delay—

(i) on the part of a solicitor in connection with any matter in which the solicitor or his firm is or was acting on behalf of a client or with any trust, or

(ii) on the part of an employee of a solicitor in connection with any trust of which the employee is or was a trustee in his capacity as such an employee; and

(b) the Society by notice in writing invites the solicitor to give an explanation within a period of not less than 8 days specified in the notice; and

(c) the solicitor fails within that period to give an explanation which the Society regards as satisfactory; and

(d) the Society gives notice of the failure to the solicitor and (at the same or any later time) notice that the powers conferred by Part II of this Schedule are accordingly exercisable.

4 (1) Where the powers conferred by Part II of this Schedule are exercisable in relation to a solicitor, they shall continue to be exercisable after his death or after his name has been removed from or struck off the roll.

(2) The references to the solicitor or his firm in paragraphs 5(1), 6(2) and (3) 6A, 8, 9(1) (5) and (6) and 10(2) and (7) include, in any case where the solicitor has died, references to his personal representatives.

PART II
POWERS EXERCISABLE ON INTERVENTION

Money

5 (1) The High Court, on the application of the Society, may order that no payment shall be made without the leave of the court by any person (whether or not named in the order) of any money held by him (in whatever manner and whether it was received before or after the making of the order) on behalf of the solicitor or his firm.

(2) No order under this paragraph shall take effect in relation to any person to whom it applies unless the Society has served a copy of the order on him (whether or not he is named in it) and, in the case of a bank or other financial institution, has indicated at which of its branches the Society believes that the money to which the order relates is held.

(3) A person shall not be treated as having disobeyed an order under this paragraph by making a payment of money if he satisfies the court that he exercised due diligence to ascertain whether it was money to which the order related but nevertheless failed to ascertain that the order related to it.

(4) This paragraph does not apply where the powers conferred by this Part of this Schedule are exercisable by virtue of paragraph 3.

6 (1) Without prejudice to paragraph 5, if the Society passes a resolution to the effect that any sums of money to which this paragraph applies, and the right to recover or receive them, shall vest in the Society, all such sums shall vest accordingly (whether they were received by the person holding them before or after the Society's resolution) and shall be held by the Society on trust to exercise in relation to them the powers conferred by this Part of this Schedule and subject thereto and to rules under paragraph 6B upon trust for the persons beneficially entitled to them.

(2) This paragraph applies—

(a) where the powers conferred by this paragraph are exercisable by virtue of paragraph 1, to all sums of money held by or on behalf of the solicitor or his firm in connection with

(i) his practice or former practice,

(ii) any trust of which he is or formerly was a trustee, or

(iii) any trust of which a person who is or was an employee of the solicitor is or was a trustee in the person's capacity as such an employee;

(b) where they are exercisable by virtue of paragraph 2, to all sums of money in any client account; and

(c) where they are exercisable by virtue of paragraph 3, to all sums of money held by or on behalf of the solicitor or his firm in connection with the trust or other matter in connection with which the Society is satisfied there has been undue delay as mentioned in sub-paragraph (a) of that paragraph.

(3) The Society shall serve on the solicitor or his firm and on any other person having possession of sums of money to which this paragraph applies a certified copy of the Council's resolution and a notice prohibiting the payment out of any such sums of money.

(4) Within 8 days of the service of a notice under sub–paragraph (3), the person on whom it was served, on giving not less than 48 hours' notice in writing to the Society and (if the notice gives the name of the solicitor instructed by the Society) to that solicitor, may apply to the High Court for an order directing the Society to withdraw the notice.

(5) If the court makes such an order, it shall have power also to make such other order with respect to the matter as it may think fit.

(6) If any person on whom a notice has been served under sub–paragraph (3) pays out sums of money at a time when such payment is prohibited by the notice, he shall be guilty of an offence and liable on summary conviction to a fine not exceeding **[**level 3 on the standard scale**]**.

6A(1)

Without prejudice to paragraph 5, if the Society passes a resolution to the effect that any rights to which this paragraph applies shall vest in the Society, those rights shall vest accordingly.

(2) This paragraph applies to any right to recover or receive debts due to the solicitor or his firm in connection with his practice or former practice.

(3) Any sums recovered by the Society by virtue of the exercise of rights vested under sub-paragraph (1) shall vest in the Society and shall be held by it on trust to exercise in relation to them the powers conferred by this Part of this Schedule and, subject to those powers and to rules under paragraph 6B, upon trust for the persons beneficially entitled to them.

(4) The Society shall serve on the solicitor or his firm, and any person who owes a debt to which the order applies, a certified copy of the Society's resolution.

6B (1) The Society may make rules governing its treatment of sums vested in it under paragraph 6 or 6A(3).

(2) The rules may in particular make provision in respect of cases where the Society, having taken such steps to do so as are reasonable in all the circumstances of the case, is unable to trace the person or persons beneficially entitled to any sum vested in the Society under paragraph 6 or 6A(3) (including provision which requires amounts to be paid into or out of compensation funds (within the meaning of section 36A)).

7 (1) If the Society takes possession of any sum of money to which paragraph 6 or 6A(3) applies, the Society shall pay it into a special account in the name of the Society or of a person nominated on behalf of the Society, or into a client account of a solicitor nominated on behalf of the society, and any such person or solicitor shall hold that sum on trust to permit the Society to exercise in relation to it the powers conferred by this Part of this Schedule and subject thereto and to rules under paragraph 6B on trust for the persons beneficially entitled to it.

(2) A bank or other financial institution at which a special account is kept shall be under no obligation to ascertain whether it is being dealt with properly.

8 Without prejudice to paragraphs 5 to 7, if the High Court is satisfied, on an application by the Society, that there is reason to suspect that any person holds money on behalf of the solicitor or his firm, the court may require that person to give the Society information as to any such money and the accounts in which it is held.

Documents

9 (1) The Society may give notice to the solicitor or his firm requiring the production or delivery to any person appointed by the Society at a time and place to be fixed by the Society—

(a) where the powers conferred by this Part of this Schedule are exercisable by virtue of paragraph 1, of all documents in the possession or under the control of the solicitor or his firm in connection with his practice or former practice or with any trust of which the solicitor is or was a trustee; and

(b) where they are exercisable by virtue of paragraph 3, of all documents in the possession or under the control of the solicitor or his firm in connection with the trust or other matters of which the Society is satisfied(whether or not they relate also to other matters).

(2) The person appointed by the Society may take possession of any such documents on behalf of the Society.

(3) Except in a case where an application has been made to the High Court under sub–paragraph (4), if any person having possession or control of any such documents refuses, neglects or otherwise fails to comply with a requirement under sub–paragraph (1), he shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(4) The High Court, on the application of the Society, may order a person required to produce or deliver documents under sub–paragraph (1) to produce or deliver them to any person appointed by the Society at such time and place as may be specified in the order, and authorise him to take possession of them on behalf of the Society.

(5) If on an application by the Society the High Court is satisfied that there is reason to suspect that documents in relation to which the powers conferred by sub–paragraph (1) are exercisable have come into the possession or under the control of some person other than the solicitor or his firm, the court may order that person to produce or deliver the documents to any person appointed by the Society at such time and place as may be specified in the order and authorise him to take possession of them on behalf of the Society.

(5A) In the case of a document which consists of information which is stored in electronic form, a requirement imposed by a notice under sub-paragraph (1) or an order under sub-paragraph (4) or (5), is a requirement to produce or deliver the information in a form in which it is legible or from which it can readily be produced in a legible form.

(6) On making an order under this paragraph, or at any later time, the court, on the application of the Society, may authorise a person appointed by the Society to enter any premises (using such force as is reasonably necessary) to search for and take possession of

(a) any documents to which the order relates.

(b) any property—

(i) in the possession of or under the control of the solicitor or his firm, or

(ii) in the case of an order under sub-paragraph (5), which was in the possession or under the control of such a person and has come into the possession or under the control of the person in respect of whom the order is made,

which the Society reasonably requires for the purpose of accessing information contained in such documents,

and to use property obtained under paragraph (b) for that purpose.

(7) The Society, on taking possession of any documents or other property under this paragraph, shall serve upon the solicitor or personal representatives and upon any other person from whom they were received on the Society's behalf or from whose premises they were taken a notice that possession has been taken on the date specified in the notice.

(8) Subject to sub–paragraph (9) a person upon whom a notice under sub–paragraph (7) is served, on giving not less than 48 hours' notice to the Society and (if the notice gives the name of the solicitor instructed by the Society) to that solicitor, may apply to the High Court for an order directing the Society to deliver the documents or other property to such person as the applicant may require.

(9) A notice under sub–paragraph (8) shall be given within 8 days of the service of the Society's notice under sub–paragraph (7).

(10) Without prejudice to the foregoing provisions of this Schedule, the Society may apply to the High Court for an order as to the disposal or destruction of any documents or other property in its possession by virtue of this paragraph or paragraph 10.

(11) On an application under sub–paragraph (8) or (10), the Court may make such order as it thinks fit.

(12) Except so far as its right to do so may be restricted by an order on an application under sub–paragraph (8) or (10), the Society may take copies of or extracts from any documents in its possession by virtue of this paragraph or paragraph 10 and require any person to whom it is proposed that such documents shall be delivered, as a condition precedent to delivery, to give a reasonable undertaking to supply copies or extracts to the Society.

Mail and other forms of communication

10 (1) The High Court, on the application of the Society, may from time to time make a communications redirection order.

(2) A communications redirection order is an order that specified communications to the solicitor or his firm are to be directed, in accordance with the order, to the Society or any person appointed by the Society.

(3) For the purposes of this paragraph—

(a)" specified communications " means communications of such description as are specified in the order;

(b) the descriptions of communications which may be so specified include—

(i) communications in the form of a postal packet;

(ii) electronic communications;

(iii) communications by telephone.

(4) A communications redirection order has effect for such time not exceeding 18 months as is specified in the order.

(5) Where a communications redirection order has effect, the Society or the person appointed by the Society may take possession or receipt of the communications redirected in accordance with the order.

(6) Where a communications redirection order is made, the Society must pay to—

(a) in the case of an order relating to postal packets, the postal operator concerned, and

(b) in any other case, the person specified in the order,

the like charges (if any) as would have been payable for the redirection of the communications to which the order relates if the addressee had permanently ceased to occupy or use the premises or other destination of the communications and had applied to the postal operator or the specified person (as the case may be) to redirect the communications to him as mentioned in the order.

(7) The High Court may, on the application of the Society, authorise the Society, or a person appointed by it, to take such steps as may be specified in the order in relation to any website purporting to be or have been maintained by or on behalf of the solicitor or his firm if the High Court is satisfied that the taking of those steps is necessary to protect the public interest or the interests of clients (or potential or former clients) of the solicitor or his firm.

(8) In this paragraph " postal operator " and " postal packet " have the meaning given by section 27 of the Postal Services Act 2011.

(9) This paragraph does not apply where the powers conferred by this Part of this Schedule are exercisable by virtue of paragraph 3.

Trusts

11 (1) If the solicitor or his personal representative is a trustee of a trust, the Society may apply to the High Court for an order for the appointment of a new trustee in substitution for him.

(2) The Trustee Act 1925 shall have effect in relation to an appointment of a new trustee under this paragraph as it has effect in relation to an appointment under section 41 of that Act.

General

12 The powers in relation to sums of money documents and other property conferred by this Part of this Schedule shall be exercisable notwithstanding any lien on them or right to their possession.

13 Subject to any order for the payment of costs that may be made on an application to the court under this Schedule, any costs incurred by the Society for the purposes of this Schedule, including, without prejudice to the generality of this paragraph, the costs of any person exercising powers under this Part of this Schedule on behalf of the Society,

shall be paid by the Solicitor or his personal representatives and shall be recoverable from him or them as a debt owing to the Society.

13A(1)

The High Court, on the application of the Society, may order a former partner of the solicitor to pay a specified proportion of the costs mentioned in paragraph 13.

(2) The High Court may make an order under this paragraph only if it is satisfied that the conduct (or any part of the conduct) by reason of which the powers conferred by this Part were exercisable in relation to the solicitor was conduct carried on with the consent or connivance of, or was attributable to any neglect on the part of, the former partner.

(3) In this paragraph " specified " means specified in the order made by the High Court.

14 Where an offence under this Schedule committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he, as well as the body corporate, shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

15 Any application to the High Court under this Schedule may be disposed of in chambers.

16 The Society may do all things which are reasonably necessary for the purpose of facilitating the exercise of its powers under this Schedule.