Neutral Citation Number: [2020] EWHC 2607 (Ch)

Claim No: BL-2017-000368

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

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

Date: 5 October 2020

Before :

LORD JUSTICE NUGEE

- -

Between :

THE FINANCIAL REPORTING COUNCIL LTD — **Applicant**

- and -

FRASERS GROUP PLC
(*formerly Sports Direct International Plc)* — **Respondent**

- -
- -

Mark Simpson QC and **Rebecca Loveridge** (instructed by **Legal Services, Financial Reporting Council**) for the **Applicant**

Richard Lissack QC and Adam Sher (instructed by **Reynolds Porter Chamberlain LLP**) for the **Respondent**

Hearing date: 28 July 2020

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Approved Judgment

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

Covid-19 Protocol: this judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10 am on Monday 5 October 2020.

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LORD JUSTICE NUGEE

Lord Justice Nugee:

Introduction

1. This application raises the question whether 3 documents in the hands of the Respondent are privileged from production to the Applicant on the grounds of litigation privilege.

2. The Applicant is the Financial Reporting Council Ltd (**"the FRC"**). The Respondent is now called Frasers Group plc, but until December last year it was called Sports Direct International plc, and I will refer to it, as the parties did, as **"SDI"**.

3. I heard the application on 28 July 2020, and gave a brief unreserved judgment at the conclusion of the argument in which I held that the relevant documents were not privileged. I did however offer the parties the opportunity to have a longer reserved judgment expressing my reasons in more detail, an offer which both parties said they wanted to take up. This judgment therefore explains in more detail why I reached the conclusion I did.

Background

4. A convenient introduction to the background can be found in the judgment of Arnold J, as he then was, on the first hearing of this application, *The Financial Reporting Council Ltd v Sports Direct International plc* [2018] EWHC 2284 (Ch), at [1]-[5] as follows:

> "1. This is an application by the Applicant ("the FRC") pursuant to Regulation 10 and Schedule 2, paragraph 2 of the Statutory Auditors and Third Country Auditors Regulations 2016, SI 2016/649 ("SATCAR") and paragraph 10(b) of the FRC's Audit Enforcement Procedure ("AEP") for an order requiring the Respondent ("SDI") to provide the FRC with certain documents, as detailed below. This is believed to be the first application of its type to have reached the courts.
>
> 2. The FRC is a regulatory body with certain responsibilities for, among other things, the regulation of statutory auditors and audit work. Its functions include carrying out investigations into statutory auditors and audit work and imposing and enforcing sanctions. Its powers in this regard are derived from SATCAR and AEP. Schedule 2 to SATCAR provides the FRC with statutory powers of investigation, obstruction of, or failure to comply with, which may be remedied in the civil courts and/or constitute a criminal offence.
>
> 3. The FRC is presently conducting an investigation ("the Investigation") into the conduct of Grant Thornton UK LLP ("GT") and an individual at GT ("Subject A") in relation to the audit of the financial statements of SDI for the year ending 24 April 2016 ("the 2016 Financial Statements"). The Investigation arose out of reports about SDI's subsidiary Sportsdirect.com Retail Ltd ("SDR") engaging Barlin Delivery Ltd ("Barlin") to provide delivery services to SDR's customers. The owner and a director of Barlin during the relevant period was John Ashley, the brother of Mike Ashley. Mike Ashley is the founder of SDI and a director and majority shareholder of SDI during the relevant period. It appears that Barlin was engaged as part of a structure adopted by SDR on the advice of Deloitte LLP in an effort to ensure that SDR

paid VAT on its sales to EU customers in the UK rather than in the country of each relevant EU customer ("the Enhanced Structure"). The FRC is considering, among other things, the conduct of GT and Subject A in relation to the non-disclosure of the relationship between SDR and Barlin as one between related parties in the 2016 Financial Statements.

4. To this end, the FRC has exercised its power pursuant to paragraph 1(3) of Schedule 2 to SATCAR and rule 10(b) of the AEP to issue notices ("Rule 10 Notices") to SDI requiring the provision of certain documents because they are likely to shed light on what GT understood SDI to have been advised in relation to the introduction of Barlin as part of the Enhanced Structure. The FRC contends that SDI has failed to comply with the Rule 10 Notices in certain respects, and therefore seeks an order of the court compelling compliance by SDI. SDI disputes that it has failed to comply with the Rule 10 Notices.

5. The documents which are the subject of the application are as follows:

   i) A fax which was sent by SDI's Head of Finance (Herbert Monteith) to a representative of GT (David Cox) on 15 July 2015 ("the Fax")….

   ii) Any documents which SDI disclosed to Grant Thornton in 2015 which record the advice Deloitte provided to SDI in or around 2015 regarding the distance and/or internet selling arrangements of SDI and/or its affiliates, the VAT implications of those arrangements and/or one or more of Etail Services Ltd, SDI (Brook EU) Ltd, SDI (Brook ROW) Ltd, SDI (Brook UK) Ltd and Barlin ("the Deloitte Material"). The Deloitte Material was the subject of a Rule 10 Notice dated 5 May 2017. The FRC contends that SDI has not complied with this Rule 10 Notice. SDI disputes this. The resolution of this dispute depends on whether or not the Rule 10 Notice required SDI to produce a group of "potentially responsive" documents which it has collated.

   iii) [Certain documents referred to as "the Additional Documents"]."

I am now only concerned with the Deloitte Material and with the single question whether that material is the subject of litigation privilege.

5. As appears from the extract from Arnold J's judgment, the Deloitte Material was requested by the FRC from SDI by notice dated 5 May 2017. After considerable correspondence which it is not necessary to detail, the FRC brought this application by Application Notice dated 15 November 2017. The application was initially heard by Arnold J on 24-25 July 2018. He handed down judgment in September 2018, which is the judgment I have already cited from.

6. In his judgment Arnold J held that the reason put forward by SDI for not producing any of the Deloitte Material was not well-founded (at [13]-[19]). He then went on to consider the Additional Documents, in respect of some of which SDI asserted legal advice privilege. Having dealt with a question as to whether certain attachments were privileged, he rejected an argument that SDI had waived privilege (at [43]-[56]) but held that provision of the documents to the FRC would not infringe any legal advice privilege that SDI had (at [57]-[85]). This last issue has been referred to as **"the infringement issue"**.

7. He therefore indicated (at [93]) that he would order SDI to disclose the Deloitte Material and the Additional Documents (the issue as to the Fax had fallen away). But when judgment was handed down on 11 September 2018, Mr Richard Lissack QC, who appeared for SDI (as he did before me), indicated in the course of his submissions on consequential matters that SDI was minded to assert a claim to litigation privilege over the Deloitte Material. The Order made by Arnold J therefore ordered SDI to disclose the Deloitte Material but contained an exception for any material as to which SDI asserted privilege, and gave directions for any such claim to privilege to be determined at a further hearing.

8. SDI then did assert such a claim, but it also appealed, with his permission, Arnold J's decision on the infringement issue to the Court of Appeal, and by a further Order made by consent on 16 October 2018 the further hearing of the question whether the Deloitte Material was privileged was stayed pending the decision of the Court of Appeal on the infringement issue. This was because if the Court of Appeal dismissed the appeal, SDI would be obliged to produce the material whether or not it was privileged.

9. The appeal on the infringement issue was heard at the end of January 2020 and judgment handed down on 18 February 2020: *The Financial Reporting Council Ltd v Sports Direct International Ltd* [2020] EWCA Civ 177. The Court of Appeal allowed the appeal. That meant that the privilege issue in relation to the Deloitte Material did have to be resolved after all. That is the question that has been argued before me, by Mr Mark Simpson QC, appearing with Ms Rebecca Loveridge, for the FRC, and by Mr Richard Lissack QC, appearing with Mr Adam Sher, for SDI. The hearing was, in the way that has by now become familiar, conducted as a fully remote hearing, and I am grateful to the parties and their legal teams for co-operating in this being conducted in an efficient and effective manner.

Facts

10. I heard no oral evidence and evidence was given by witness statements. The witnesses for SDI were as follows:

    (1) Mr Herbert Monteith, who made a witness statement dated 23 April 2018 in opposition to the application. He was then Head of Finance (Interim) for SportsDirect.com Retail Ltd (**"SDR"**), a subsidiary of SDI (see Arnold J's judgment at [3]). Mr Monteith had held that position since 2017, and before that had been Financial Controller for SDR. He is a qualified accountant.

    (2) Mr Richard Burger, formerly a partner at Reynolds Porter Chamberlain LLP (**"RPC"**), SDI's solicitors, who made a witness statement dated 23 April 2018 in opposition to the application.

    (3) Mr Robert Waterson, who made three witness statements dated 16 July 2018 (in opposition to the application), 17 September 2018 (asserting litigation privilege over the Deloitte Material) and 20 July 2020 (updating matters for the present hearing). He was a legal director at, and (by the time of his third statement) a partner of, RPC, specialising in contentious tax matters. As set out in more detail below, SDR instructed RPC in relation to its VAT

arrangements in 2014, and Mr Waterson was asked to work on this, subject to the supervision of a partner.

(4) Mr Justin Barnes, a non-practising lawyer who provides consultancy services to the Sports Direct group, and who made a short witness statement dated 17 September 2018 confirming the facts stated in Mr Waterson's second statement.

11. For the FRC there was one witness statement, dated 15 November 2017, in support of the application from Mr David Salcedo, a solicitor and senior lawyer in the Enforcement Division of the FRC, but this was confined to setting out the background to, and reasons for, the application and Mr Salcedo had no direct evidence to give as to SDI's claim to privilege.

12. As appears from Arnold J's judgment at [3], the background concerns "distance selling" and specifically arrangements adopted by SDI in relation to VAT on sales to customers in the EU. These arrangements were intended to ensure that VAT was payable in the UK rather than in the particular Member State where the customer was situated.

13. Where VAT is payable depends on where the place of supply is. The rules in relation to the place of supply are found in Title V of the Principal VAT Directive (Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax); Chapter 1 of Title V concerns the place of supply of goods, and Section 2 of Chapter 1 (Arts 32 to 36) the place of supply of goods with transport. The basic rule in Art 32 is that supply takes place where the goods are located when dispatch or transport to the customer *begins*; Art 33, however, by way of derogation from Art 32, provides that the place of supply of goods dispatched or transported by or on behalf of the supplier from a Member State other than that in which dispatch or transport of the goods ends shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer *ends*, subject to certain conditions. In effect therefore if a supplier in the UK sells goods to a consumer in another Member State, and itself dispatches the goods to the consumer, *prima facie* VAT would be payable in that Member State rather than the UK; the same would be true if the carriage of goods was carried out "on behalf of" the supplier. It can be seen that whether Art 33 applied in any particular case might depend on how broad an interpretation should be given to the concept of goods being transported "by or on behalf of" the supplier.

14. SDI's subsidiary SDR sold goods online. By mid-2009 its international online sales had increased substantially and advice was taken from Deloitte LLP (**"Deloitte"**) as to how to structure SDR's VAT arrangements. Deloitte devised a structure (**"the 2010 Structure"**) which would, it was hoped, enable VAT to be payable in the UK on international sales rather than in the customer's Member State. That had the advantage for SDR of being administratively much simpler than SDR (or associated companies) having to register, and account, for VAT in each Member State. It may also have been designed to reduce the amount of overall VAT chargeable, but I was not asked to decide whether this is so. I will proceed on the basis that there were perfectly valid commercial reasons why SDR would prefer to pay VAT only in the UK rather than in each Member State. It is not necessary to set out the details of the 2010 Structure, but in essence the idea was that a customer who bought goods from

SDR's website would be offered a delivery service from a separate company, Etail Services Ltd (**"Etail"**), which although part of the same corporate group was not part of the same VAT group. In this way it was hoped that the transport of the goods would not be carried out "by or on behalf of" SDR within the meaning of Art 33, and hence the default rule in Art 32 would apply under which the supply by SDR would take place in the UK. In early 2010 SDR discussed the proposed structure with HMRC, who confirmed that as far as they were concerned, the place of supply of goods under the 2010 Structure would indeed be the UK. SDR therefore implemented the 2010 Structure in or around April 2010 and accounted to HMRC for VAT on the basis that VAT was payable in the UK.

15. HMRC could not however bind, or even speak for, tax authorities in the other Member States. On 30 June 2014 SDR received an e-mail from the French tax authorities asking which corporate entity invoiced customers who bought from a Sports Direct website in France, and whether the relevant entity paid English or French VAT. The e-mail is very short: it does not threaten litigation or make any assertion that SDR's distance selling arrangements resulted in VAT being properly payable in France; it simply asked a number of questions. In its entirety it read as follows:

> "Bonjour,
>
> Je vous contacte concernant les ventes à distance pour les particuliers français (site Internet: http://fr.sportsdirect.com).
>
> J'aimerais savoir qui facture les particuliers français pour les ventes par Internet:
>
> - SportsDirect.com Retail Ltd
>
> - Sportsdirect.com France S.A. FR27379062813
>
> - Une autre compagnie
>
> Ces particuliers français payent une TVA française ou anglaise ?
>
> Vous trouverez en pièce jointe les seuils fiscaux concernant les ventes à distance.
>
> Cordialement"

Nevertheless Mr Monteith's evidence is that it came to his attention at around the same time that other tax authorities were also scrutinising and challenging similar structures adopted by other retailers, and that in those circumstances this initial request for information from the French tax authorities indicated to him that a full enquiry would follow; that it seemed inevitable to him, given the large amounts of VAT involved, that SDR's sale process would be challenged; and that he knew that SDR intended to defend any challenge from a tax authority. He says that SDR therefore operated on the basis that it would be involved in tax litigation in the near future.

16. At some time thereafter in 2014 SDR instructed both RPC and Deloitte. No retainer letter for either has been disclosed, and the precise date (or dates) of instruction has been left somewhat unclear from the evidence. Mr Simpson pointed out that the FRC

was initially led to think that the instruction was almost immediately after 30 June 2014: a letter from Mr Burger of RPC dated 26 July 2017 referred to SDI having instructed RPC and Deloitte "from July 2014 through 2015" and asserted litigation privilege over correspondence and advice between SDI, RPC and Deloitte "from 1 July 2014 onwards". The evidence served in April 2018 did not specifically contradict this: Mr Burger said that SDR instructed RPC and Deloitte "during the summer of 2014" and Mr Monteith that SDR instructed Deloitte "shortly after receipt of the French tax enquiry", and also instructed RPC. Mr Waterson's first witness statement (in July 2018) did not add anything on the date of instruction, although he did refer to having devised and put in place a protocol dated 10 November 2014 designed to formalise the arrangements for information to be shared between RPC and Deloitte. In his second witness statement in September 2018 however he said that RPC and Deloitte were instructed by Mr Barnes on behalf of SDR in September 2014.

17. I have set this out because Mr Simpson made a point of taking me through it, but I do not see that it is of any real significance. The relevant question (see below) is whether the 3 documents which constitute the Deloitte Material were produced for the sole or dominant purpose of litigation *then* in contemplation, and since there is no doubt that RPC had by then been instructed, I do not see that it matters precisely when they were, or whether they had previously led the FRC to think something else. I will proceed on the basis that I have no reason to doubt Mr Waterson's statement that both RPC and Deloitte were instructed in September 2014.

18. Mr Monteith says that their instructions were as follows:

> "Both Deloitte and RPC were instructed to advise and assist [SDR] in preparing to: (i) respond to a likely challenge to [SDR]'s VAT arrangements from the French tax authority; (ii) minimise the risk of litigation with other tax authorities; and (iii) put [SDR] in the strongest possible position to defend any challenges that were made."

19. Mr Waterson says that the instructions came via Mr Barnes, who often gave instructions to RPC on behalf of SDI, and that his understanding from Mr Barnes was that although SDR did not consider that its distance selling arrangements (that is, the 2010 Structure) were in breach of European law, it was aware that other retailers with similar structures were beginning to be challenged by EU tax authorities and that it appeared very likely to SDR that it would soon find itself in the same position as these other retailers and that the French tax authority would be the first to seek to challenge its VAT arrangements following its initial enquiry. Mr Waterson, a specialist in tax litigation with specific experience of tax litigation involving EU law, was involved at the start of the retainer. He understood that SDR instructed RPC and Deloitte to protect its position as far as possible in relation to the anticipated adversarial litigation.

20. There were a number of things that RPC and Deloitte gave advice on. One was the lodging of protective claims with HMRC for repayment of overpaid VAT in case it turned out that SDR should have been paying VAT in other Member States rather than the UK. I am not concerned with that part of their advice. Another was no doubt how best to defend the 2010 Structure. Again I am not directly concerned with that. But a third aspect of their advice, with which I am concerned, was how to improve or change the arrangements so as to make them more robust and less likely to be successfully challenged.

21. The way this is described in the evidence is as follows:

(1) Mr Monteith said:

> "28. On the advice of RPC and Deloitte, as part of [SDR's] preparations to defend anticipated challenges to its VAT arrangements, [SDR] altered its online sales Structure in February 2015 regarding arrangements for the delivery of goods ordered by customers on [SDR's] Website.
>
> 29. Although this enhanced structure involved new companies being introduced to [SDR's] online sales Structure, the same principle applied as that underlying the previous Structure in that [SDI's] group would have no involvement in the delivery of goods outside the United Kingdom, so that it would not incur any VAT obligations in other jurisdictions."

(2) Mr Burger said:

> "65. [SDR] also implemented an enhanced version of its online sales structure on 20 February 2015 on the basis of advice from RPC and Deloitte, under which customers would contract with a different entity within the group for the purchase of the product(s) depending on whether they were customers from the UK, the EU or the rest of the world. Under the new structure, all international customers were then offered the option to contract with a company outside [SDR's] corporate group to arrange the delivery of its purchases, which was called Barlin Delivery Limited ("Barlin").
>
> 66. [SDR] wrote to HMRC on 28 September 2015 explaining in detail the arrangement which had been put into place and seeking HMRC's confirmation that VAT would remain due in the UK."

(3) Mr Waterson said:

> "39. As noted at paragraphs 65 to 68 of Mr Burger's witness statement and paragraphs 28 and 29 of Mr Monteith's witness statement, [SDR] made alterations to the Structure in February 2015 on the advice of RPC and Deloitte as part of its preparations to defend anticipated litigation. The Responsive Documents relate to this advice (as explained below). These changes were made to the Structure for the exclusive purpose of responding to the real and present threat of litigation that was anticipated from the French tax authority and other tax authorities. The enhancements did not provide any other benefit to [SDR] (whether commercial or otherwise) as they did not involve any fundamental change in [SDR's] tax obligations as all VAT would still fall due in the United Kingdom thereafter."

22. As appears from these citations, SDI's witnesses described the changes to the 2010 Structure as "enhancements" and the altered structure as an "enhanced structure". I do not think it makes any difference to the analysis whether the changes are better described as resulting in an "enhanced" or "altered" structure, or as a "new" structure. What is clear from the evidence is that one of the reactions to the perceived threat from the French and other EU tax authorities was to put in place a change to SDR's distance selling arrangements, and that this was put in place in February 2015 (in fact

on 20 February). I will call the altered arrangements **"the 2015 Structure"** without attempting to decide whether the 2015 Structure is better described as a new structure or as an alteration or enhancement to the 2010 Structure, something which seems to me of no significance at all. On any view the 2015 Structure was different from the 2010 Structure, and deliberately so. The actual changes can be seen from the letter dated 28 September 2015 that Mr Monteith of SDR wrote to HMRC which is referred to in Mr Burger's evidence: it is not necessary to set them all out in detail but in summary where a customer bought goods from a Sports Direct website, the customer's contract was with one of three new corporate entities (one for the UK, one for the EU and one for the Rest of the World), with SDR selling the goods to that entity; and customers who wanted their goods delivered (rather than going to SDR's warehouse in the UK to pick them up) contracted with a separate company, Barlin Delivery Ltd (**"Barlin"**) (again mentioned in Mr Burger's evidence), for that purpose.

23. Only 3 documents have been identified as falling within the class of Deloitte Material. Each concerns the 2015 arrangements. I have not seen them but they are described in Mr Waterson's evidence, as follows:

> "Deloitte prepared three reports…which sought to summarise the changes to the distance selling structure, the mechanics of how it would operate for VAT purposes and identify certain commercial and legal considerations and questions."

24. Each report took the form of a Powerpoint slide presentation. Mr Waterson's description of the individual reports is as follows:

(1) The first report, titled "Sports Direct Structure", is dated 13 January 2015. It sets out Deloitte's recommendation to adopt the 2015 Structure, with an explanation of the background, and of the steps being taken to mitigate the risk of challenges from EU tax authorities.

(2) The second report, titled "VAT slides", is dated 14 April 2015. This contains a summary of the 2015 Structure (which it is to be noted had by then been implemented on 20 February 2015) and an explanation of how VAT was to be accounted for under this structure.

(3) The third report, titled "Project Fawkes VAT position" is dated 15 July 2015. Despite the different title, it is materially the same as the second report, although some of the figures have been updated.

25. There are a few other factual matters referred to in the evidence, although none of them I think is in the end of significance. In chronological order they are as follows:

(1) On 22 January 2015 SDR filed its first protective claim for repayment from HMRC. It thereafter continued to file protective claims to prevent claims for successive VAT periods becoming time-barred.

(2) On 26 January 2015 SDR received a letter from the Irish Revenue asserting that it should be paying VAT in Ireland on distance selling to Irish customers and referring to Art 33 of the VAT Directive and the domestic Irish legislation transposing it.

(3) On 20 February 2015 SDR put in place the 2015 Structure as already referred to.

(4) On 5 May 2015 the European Commission VAT Committee published a working paper in response to questions that had been separately submitted by the United Kingdom and Belgium on distance selling arrangements. The working paper noted that the distance selling rules in Art 33 were designed to prevent distortion of competition, and that the risks of such distortion were initially associated with mail-order and limited in extent, but the growth of internet selling had significantly increased the scale of the problem. It put forward two possible interpretations of Art 33, a literal (and narrow) interpretation and a broad one, and invited observations.

(5) On 4-5 June 2015 the VAT Committee met and "almost unanimously" agreed that Art 33 should be given a broad interpretation. This conclusion was published in the form of guidance.

(6) In August 2015 the French tax authorities began a formal investigation into SDR's VAT arrangements and SDR engaged French lawyers in response. The French tax authorities later concluded that VAT was indeed payable in France and this is the subject of ongoing litigation.

(7) In January 2016 HMRC responded to Mr Monteith's letter of 28 September 2015, which had asked for confirmation that HMRC agreed that under the 2015 Structure VAT was payable in the UK. HMRC declined to give that confirmation and explained that their position had changed following the publication of the VAT Committee's guidance on Art 33. That decision of HMRC was challenged and has led to litigation in the First-tier and Upper Tribunals.

(8) In May 2017 the Finnish tax authorities, and in June 2017 the Irish Revenue, decided that VAT was payable in their respective countries, which has led to litigation in each case.

(9) On 18 June 2020, shortly before the hearing of this application, the CJEU handed down judgment on a preliminary reference from Hungary which raised the question as to whether Art 33 should be given a literal or broad interpretation: *KrakVet Marek Batko sp.k. v Nemzeti Adó-és Vámhivatal Fellebbviteli Igazgatósága* (Case C-276/18). It is not necessary to analyse the decision, but Mr Waterson gives what appears to be a fair summary of the judgment when he says that it tilts strongly towards a broad interpretation of Art 33 based on "economic and commercial reality", echoing the Opinion of Advocate General Eleanor Sharpston.

Legal principles

26. There was little dispute between the parties on the applicable legal principles. In *Three Rivers DC v Bank of England (No 6)* [2004] UKHL 48, Lord Carswell traced the history of litigation privilege as a separate form of legal professional privilege distinct from legal advice privilege, and summarised the position as follows (at [104]):

> "The conclusion to be drawn from the trilogy of 19th century cases to which I have referred and the qualifications expressed in the modern case-law is that communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied: (a) litigation must be in progress or in contemplation; (b) the communications must have been made for the sole or dominant purpose of conducting that litigation; (c) the litigation must be adversarial, not investigative or inquisitorial."

27. There was substantial argument before me as to the first of these requirements, namely whether at the time of the 3 reports litigation was sufficiently in contemplation, but it seems to me that the real question, and the key to the determination of the application, is the second one. This requires identifying what is meant by "for the sole or dominant purpose of conducting that litigation".

28. That is elucidated by the trilogy of 19th century cases to which Lord Carswell refers, as follows:

(1) In *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 Sir George Jessel MR explained the basis of the privilege as follows (at 649):

> "The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others."

He continued by saying that you had no right to ask a solicitor what information he had obtained for the purpose of the litigation:

> "You cannot ask him what the information he obtained was. It may be information simply for the purpose of knowing whether he ought to defend or prosecute the action, but it may be also obtained in the shape of collecting evidence for the purpose of such prosecution or defence. All that, therefore, is privileged."

In the Court of Appeal, James LJ said, in a well-known pithy summary (at 656):

> "as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief"

and Mellish LJ summarised the principle (at 658) as being that a man:

> "is not bound to communicate evidence which he has obtained for the purpose of litigation."

(2) In *Southwark and Vauxhall Water Co v Quick* (1878) 3 QBD 315, Brett LJ (at 320) picked up what James LJ had said as follows:

> "it is clear that if a party seeks to inspect a document which comes into existence merely as the materials for the brief, or that which is equivalent to the brief, then the document cannot be seen, for it is privileged."

(3) In *Wheeler v Le Marchant* (1881) 17 Ch D 675 Sir George Jessel MR said (at 680):

> "The cases, no doubt, establish that such documents are protected where they have come into existence after litigation commenced or in contemplation, and when they have been made with a view to such litigation, either for the purpose of obtaining advice as to such litigation, or of obtaining evidence to be used in such litigation, or of obtaining information which might lead to the obtaining of such evidence…"

29. In *WH Holding Ltd v E20 Stadium LLP* [2018] EWCA Civ 2652, the Court of Appeal referred (at [18]) to:

> "the recognised categories of advice or information going to the merits of the contemplated litigation."

I am not aware of, nor was I referred to, any more recent pronouncement from the Court of Appeal expanding on these recognised categories.

Were the reports for the sole or dominant purpose of litigation?

30. In the light of these principles, I think it is clear that the 3 reports were not for the sole or dominant purpose of litigation. I will assume that SDI can establish that at the times they were respectively produced (January, April and July 2015) SDR *bona fide* expected there to be litigation over its distance selling arrangements, either in France or in one or more other EU Member States. But that does not seem to me to establish that the reports were written for use in that litigation.

31. The expected litigation would be primarily over the arrangements that SDR had had in place since 2010 (ie the 2010 Structure). The question that would arise in that litigation would be, in effect, whether for the purposes of Art 33, the arrangements that SDR made for a consumer who bought goods from its website to be offered delivery of the goods by Etail meant that the goods were or were not transported "by or on behalf of" SDR, and hence whether VAT was payable in the Member State of destination or in the UK.

32. I regard it as impossible to conclude, on the evidence, that any of the three reports was directed at assisting in that aspect of the litigation. Let me start with the first report. The purpose of this, according to Mr Waterson, was to recommend a new structure. It is obvious that the main – indeed sole – purpose of that was to suggest that there be put in place a new (or revised or enhanced) arrangement which would, it was hoped, have a better chance of falling outside Art 33. The purpose of doing that was not to assist in the litigation about the old structure. It was self-evidently not made with a view to taking advice about the old structure; nor was it made with a view to furnishing evidence, or the means of obtaining evidence, so as to defeat the claim for VAT from EU tax authorities under the old structure.

33. In short the first report with its recommendation to adopt the 2015 structure was not designed to assist SDR to win the litigation about the 2010 Structure; it was a reaction to the threat posed by that claim in an attempt to strengthen SDR's position going forward. In a very broad sense that no doubt, to use Mr Monteith's words, could be said to be "responding to a likely challenge to [SDR's] VAT arrangements from the French tax authority" but it was neither for the purpose of enabling SDR to take advice as to the merits of litigation about the 2010 Structure, or advice as to how best to conduct or settle that litigation claim; nor was it for the purpose of providing evidence for the defence of the claim. Indeed evidence as to the 2015 Structure would in all probability not even be admissible in litigation about the 2010 Structure; and if admitted would be unlikely to be helpful. If anything, by pointing up the changes that had been introduced, it would be likely to be positively unhelpful as it would tend to suggest that the unamended 2010 Structure was ineffective to achieve its aim.

34. In my judgment therefore the evidence makes it clear that the first report was not produced for the purposes of litigation about the 2010 structure. And I do not see that the second or third reports are any different in that respect.

35. Mr Waterson in his third witness statement says that the litigation that "we" (which I think most naturally means RPC but I will assume included SDR) foresaw at the time was not limited to the 2010 Structure but would also inevitably involve the 2015 Structure. He says that, knowing how tax authorities work, he considered it inevitable that once the tax authorities of a Member State had decided to take the point, they would argue for a broad interpretation (ie of Art 33) and this would inevitably result in both versions of the structure being challenged. I will assume that he may be right about this, and that litigation challenging the effectiveness of the 2015 Structure was in reasonable contemplation at the time the reports were written. So can it be said that the reports were written for the sole or dominant purpose of the conduct of *that* litigation?

36. To my mind the answer is obviously "No". A taxpayer who takes advice as to how to structure his affairs does not do so for litigation purposes. He does so because he wants to achieve a particular result for tax purposes – in this case the result that the transport by Barlin would not be "by or on behalf of" SDR (or other Sports Direct company) for the purpose of Art 33, and hence that VAT would be payable on the sale of goods in the UK and not in France, Ireland, Finland or other Member States. Even if it is contemplated that the particular structure will be likely to be attacked by the relevant tax authorities and that there will be litigation, the advice as to how to implement the new structure – or, if this is preferred, how to revise or enhance an existing structure – is not primarily advice as to the conduct of the future possible litigation. It is primarily advice as to how to pay less tax – or, as the case may be, how to avoid the administrative inconvenience of having to register in every Member State.

37. The way I put it in my oral judgment on 28 July 2020 was as follows:

> "It seems to me that Mr Simpson is right that when a taxpayer adopts certain arrangements, a scheme or structure or whatever, with a view to achieving a particular result, the sole reason for adopting that structure is because they want to have that structure with the consequences, financial or administrative or otherwise, that they hope will flow from it; and that that remains the case however strongly

> they contemplate that the structure will be challenged by the tax authorities, and however strongly they are advised that putting in place this feature or that feature of the scheme would enable such an anticipated challenge to be defeated. They are not putting it in place to assist them with the litigation, they are putting the structure in place because they want the structure. In this case, SDI were putting in place the 2015 structure because they wanted to remain free from the obligation to register in other EU Member States. That is not a litigation purpose, that is a purpose of achieving another result, even if it is anticipated that litigation may be forthcoming.
>
> I think that that falls outside the requirements for litigation privilege which, as it was put by the Court of Appeal in *West Ham* [ie *WH Holding Ltd v E20 Stadium LLP*], is where one seeks information or advice to inform you as to your prospects in litigation, or evidence for use in litigation. They were not taking advice from Deloitte to inform them as to their prospects in litigation, or to be deployed as evidence in litigation; they were taking advice as to how to arrange their affairs to avoid the prospects of unsuccessful litigation. That seems to me to be a quite different thing."

I remain of the same view and, save for one point of detail, do not think it necessary to elaborate.

38. The one point on which I should say a little more is the precise purpose of the three reports. The first report was written for the purpose of recommending that SDR adopt the 2015 Structure. That, for the reasons I have sought to give, does not seem to me to be for litigation purposes. The second and third reports were written after the 2015 Structure had been adopted in February 2015, and so the purpose for which they were written was not precisely the same: it was not to recommend the adoption of the 2015 Structure. The evidence is that they were written for the purpose of explaining how VAT was to be accounted for under this structure. That does not seem to me to be a litigation purpose either: it is not suggested that the second and third reports were written to assist SDR's position in future litigation, but to enable SDR to ensure that they were operating the structure as Deloitte advised they should.

39. In those circumstances none of the 3 reports in my judgment attracts litigation privilege as none of them was written for the sole, or indeed dominant, purpose of litigation.

40. That makes it unnecessary to decide if SDR did reasonably contemplate litigation at the dates when the reports were written. I received extensive and detailed arguments on both sides on this question, but I do not see that any useful purpose would be served by considering it at length. I will simply therefore say that despite the apparently bland nature of the French e-mail enquiry, I am not persuaded that I can properly go behind Mr Monteith's and Mr Waterson's statements that they did anticipate that a challenge from the French tax authorities, if not other EU tax authorities, was likely.

41. Nor is it necessary to deal in any detail with a final point made by Mr Simpson, which is that if all that was contemplated was an investigation by the French tax authorities, that would not be enough. I see no reason to doubt the evidence that it was anticipated that such an investigation would in due course be likely to be followed by

a claim, and that such a claim would be defended by SDR, and that that would lead to litigation.

Conclusion

42. For the reasons I have given I find that the 3 documents are not protected from disclosure by litigation privilege.