



TC06704

Application number: TC/2017/08911

Corporation tax – information notice seeking documents concerning property transactions to assist in establishing location of central management and control of company – conveyancing file of solicitors acting on purchase – legal professional privilege – Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DAC BEACHCROFT LLP

Applicant

-and-

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: JUDGE KEVIN POOLE

Sitting in Chambers on 30 August 2018

Decided, by consent of the parties, on the basis of written representations from the parties and without a hearing.

DECISION

Introduction

1. This decision concerns an application by DAC Beachcroft LLP (“the applicant”) pursuant to regulation 5 of the Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009 (SI 2009 No. 1916) (“the RDPC Regs”) for the resolution of a dispute as to whether certain documents sought by HMRC under a third party notice from the applicant (under paragraph 2 of Schedule 36 Finance Act 2008) are privileged from disclosure by virtue of paragraph 23 of that Schedule.

2. The documents in question all form part of the conveyancing files of a predecessor firm of the applicant which are now in the applicant’s possession and relate to the predecessor firm’s involvement in acting as conveyancing solicitors for the purposes of the acquisition of three properties in London and subsequent disposal of two of them. The three properties were purchased in the names of three separate offshore companies (which I shall call “OC1”, “OC2” and “OC3”), but HMRC have been made aware of the involvement of a different offshore company (“OC4”) in at least two of the purchases, and seek to establish whether or not that company is centrally managed and controlled in the UK.

3. The applicant asserts such entitlement as the former clients may have to claim legal professional privilege in respect of the documents sought by HMRC, so precluding them from providing copies of the privileged documents to HMRC pursuant to the information notice that has been served.

4. Both the applicant and HMRC have expressed themselves content for the application to be determined without a hearing on the basis of written submissions which have been made by both parties.

The facts

5. This application relates to documents brought into existence as part of the conveyancing files of KSB Law LLP (also known as Kingsford Stacey Blackwell) (“KSB”) when acting as conveyancing solicitors on the purchase of three properties in London and the subsequent sale of two of those properties.

6. The addresses of the properties are not relevant for present purposes and I shall call them “No. 1”, “No. 2” and “No. 3”.

7. KSB acted on the purchase of No. 1 in 2000, and on the purchase and sale of No. 2 and No. 3 in 2006-07. OC1 was registered at HM Land Registry as registered proprietor of No. 1, and OC2 and OC3 were similarly registered in relation to No. 2 and No. 3 respectively.

8. HMRC understood, from a disclosure report made to them under the Liechtenstein Disclosure Facility, that OC4 had loaned the purchase price to OC1 and OC2 to finance the purchases of No. 1 and No. 2 respectively. From copies of the purchase contracts provided to HMRC by the applicant, it is apparent that OC4 was the

contractual purchaser for both No. 2 and No. 3, but those purchases were subsequently completed in the names of OC2 and OC3.

9. The detailed facts of the purchases and sales are not relevant. I have been provided with schedules of the documents in respect of which privilege is claimed in relation to the three properties (which together amount to 137 documents), together with copies of the documents in question.

10. In seeking to establish where the central management and control of OC4 resided, HMRC wrote to the applicant on 2 May 2017, informing it that they were proposing to issue a third party information notice seeking “All correspondence including emails between [KSB and the relevant individual within it]” and any other party (including the “vendor/supplier/purchaser” and certain named persons) in connection with:

15 “1. The purchase and refurbishment of [No. 1] acquired through [OC1] and all financial arrangements in connection with the funding of these transactions

2. The purchase and sale of [No. 2] acquired and sold through [OC4] or [OC2] and all financial arrangements in connection with these transactions

20 3. The purchase and sale of [No. 3] acquired and sold through [OC3] and all financial arrangements in connection with these transactions”

11. The applicant responded on 23 May 2017, confirming that it had located “three closed and archived files which we have retrieved from storage.” It also said this:

25 “... whilst the Tribunal may order us, as the successor practice to KSB Law, to disclose confidential correspondence passing between KSB Law and the “vendor/supplier/purchaser or their legal representatives”, all correspondence passing between KSB Law and the clients of KSB Law, including the clients’ agents (where the purpose of communicating was to obtain legal advice) and the clients’ other solicitors will be the subject of Legal Professional Privilege and cannot be disclosed without the consent of the former clients.”

12. Further correspondence followed. In a letter dated 16 June 2017, the applicant said this:

35 “In relation to the privileged documents, you have invited us to provide a list of documents to which privilege attaches. However, as discussed in our letter dated 23 May 2017, all the correspondence passing between KSB Law and their clients including the clients’ agents (where the purpose of communicating was to obtain legal advice) and the clients’ other solicitors is privileged.”

13. Following an *ex parte* hearing in private on 25 July 2017, I approved the issue of a third party notice to the applicant, in the terms requested by HMRC. The notice included text informing the applicant that it did not have to provide any information or

produce any document if legal professional privilege could successfully be claimed in relation to that information or document. Further detail was given of what should be done if legal professional privilege was being claimed.

14. On 11 October 2017, the applicant wrote to HMRC sending them various
5 correspondence from the old KSB conveyancing files for the three properties. The last paragraph of this letter read as follows:

10 “Finally, in terms of items which are privileged we have listed those items in the attached schedules. As discussed in our previous correspondence, legal advice privilege attaches to all confidential correspondence passing between a client and its lawyers in connection with the provision of legal advice. As such all correspondence passing between KSB Law and their clients, including the clients’ agents, is privileged.”

15. By letter dated 1 November 2017, HMRC responded, disputing that privilege applied to any of the documents. They gave their reasons:

15 “It would appear that the services of KSB Law were required in connection with the purchase or sale of 3 residential properties namely..... It would appear that the principal solicitor acting in these transactions was [X] with some assistance from [Y].

20 [X’s] stated areas of practice are commercial property, conveyancing – residential, Landlord and tenant – residential, Private client – probate and Private client – wills. In that regard it would appear that [X] was providing services as a conveyancing solicitor in respect of residential properties.

25 The only unusual feature with these transactions was that the ultimate entity purchasing or selling the properties was a non UK registered company. However [X] does not state that any areas of his practice are in respect of international law or company law so I do not see what specific legal advice [X] or [Y] would be giving in regard to a conveyancing transaction.

30 I do not agree that all correspondence passing between KSB Law and the client, be it or their appointed agents is necessarily protected by legal and professional privilege. If such correspondence contains no legal advice or that advice is capable of being redacted then it is covered by the Tribunal approved notice.

35 The fact that you have claimed that all such correspondence is privileged and have provided no explanation [as] to why specific documents are privileged and have therefore provided no direct communications between KSB Law and the “client” suggests to me that you have misapplied the test of legal professional privilege as to cover all
40 communications whether they contain legal advice or not.”

16. By application dated 30 November 2017, the applicant applied to the Tribunal pursuant to Regulation 5(5) of the RDPC Regs for resolution of the dispute as to the scope of the legal professional privilege applying to the correspondence being sought.

The law

5 *The legislative provisions*

17. The documents being sought from the applicant are being sought through a third party information notice issued under paragraph 2 of Schedule 36 Finance Act 2008.

18. The main relevant provision for this application is paragraph 23 of Schedule 36 Finance Act 2008, which provides, so far as relevant, as follows:

10 “23 – (1) An information notice does not require a person –

(a) to provide privileged information, or

(b) to produce any part of a document that is privileged.

15 (2) For the purpose of this Schedule, information or a document is privileged if it is information or a document in respect of which a claim to legal professional privilege, or (in Scotland) to confidentiality of communications as between client and professional legal adviser, could be maintained in legal proceedings.”

19. Regulation 3 of the RDPC Regs provides as follows:

“Application of these Regulations

20 3. These Regulations apply where there is a dispute between HMRC and a person to whom an information notice has been given either—

(a) during the course of correspondence, or

(b) during the course of an inspection of premises under Schedule 36,

25 as to whether a document is privileged.”

20. Regulation 5 of the RDPC Regs provides, so far as relevant, as follows:

“Procedure where information notice given in correspondence is in dispute

30 5.—(1) The following procedure applies where there is a dispute falling within regulation 3(a).

(2) On receipt of the information notice, the taxpayer, third party or person acting on their behalf—

(a) by the date given in the notice for providing information or producing documents, specify in a list each document, required under the information notice, which is in dispute, with a description of the nature and contents of that document;

5 (b) serve that list on HMRC.

(3) But no description of a document or type of document is required where such description would itself give rise to a dispute over privilege.

10 (4) Within twenty working days of receiving the list referred to in subparagraph (2), HMRC must notify the person who served the list of any documents on the list that it requires to be produced and which it considers are not privileged.

15 (5) On receipt of notification under paragraph (4), the taxpayer, third party or person acting on their behalf must make an application to the First-tier Tribunal to consider and resolve the dispute and must include copies of the documents which remain in dispute with that application.

(6) The taxpayer, third party or person acting on their behalf shall provide HMRC with proof of service under paragraph (2)(b).

20 (7) Service for the purposes of paragraph (2)(b) must take place within a reasonable time to be agreed between the taxpayer, third party or person acting on their behalf and HMRC but in any event no later than twenty working days after the date given in the notice for providing information or producing documents.

25 (8) An application under paragraph (5) must be made within a reasonable time to be agreed between the taxpayer, third party or person acting on their behalf and HMRC but in any event no later than twenty working days of the date of the notification required under paragraph (4).”

21. Regulation 8 of the RDPC Regs provides as follows:

“Finding of the First-tier Tribunal

30 8. When an application is made under regulation 5(5) or 6(5), the First-tier Tribunal shall—

(a) resolve the dispute by confirming whether and to what extent the document, is or is not privileged;

(b) direct which part or parts of a document (if any) shall be disclosed.”

35 22. The general law as to privilege must therefore be applied by the Tribunal by reference to each of the documents included in the material submitted to the Tribunal, so that the Tribunal should determine what documents (or parts of documents) are not subject to privilege and accordingly direct that they should be disclosed. The legislation

is drafted on the assumption that privilege does not necessarily apply to the whole of a document.

The general law as to privilege

23. Both parties referred extensively in their written submission to *Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 (“*Three Rivers No 6*”).

24. The applicant also referred at length to *The Director of the Serious Fraud Office v Eurasian National Resources Corporation* [2017] (QB) (8 May 2017) and it also included reference to the Law Society’s guidance on the area:

10 **“Advice within a transaction**

15 All communications between a lawyer and his client relating to a transaction in which the lawyer has been instructed for the purposes of obtaining legal advice are covered by advice privilege, notwithstanding that they do not contain advice on matters of law and construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client...

 This will mean that where you are providing legal advice in a transactional matter (such as a conveyance) the advice privilege will cover all:

- 20 • communications with,
- instructions from, and
- advice given to

25 the client, including any working papers and drafts prepared, as long as they are directly related to the performance of your professional duties as legal adviser.”

25. HMRC, as well as referring to *Three Rivers No 6*, chiefly cited the decisions of the Court of Appeal in *Balabel and another v Air India* [1988] Ch 317 and of the Supreme Court in *R (oao Prudential plc and another v Special Commissioner of Income Tax and another)* [2013] UKSC 1.

30 26. The most authoritative recent statement of the law on legal privilege is contained in *Three Rivers No 6*. It is clear that, as stated by Lord Carswell at [105], legal professional privilege is sub-divided into litigation privilege and legal advice privilege (“LAP”). As the documents and communications with which I am concerned in this case relate to uncontentious conveyancing, they would not fall under the former

35 head. The question is whether they are subject to LAP.

27. The facts of *Three Rivers No 6* were long and complex, but essentially these. The Bank of Credit and Commerce International (“BCCI”) had collapsed spectacularly

into insolvency in 1991. The government established an inquiry under Bingham LJ (“the Bingham Inquiry”) to investigate the supervision of BCCI under the Banking Acts, to consider whether the action taken by all the UK authorities was appropriate and timely, and to make recommendations. Bingham LJ described his terms of reference as calling for consideration of five broad questions. These were “(1) What did the United Kingdom authorities know about BCCI at all relevant times? (2) Should they have known more? (3) What action did the United Kingdom authorities take in relation to BCCI at all relevant times? (4) Should they have acted differently? (5) What should be done to prevent or minimise the risk of such an event recurring in the future?”

28. The Bank of England (“the Bank”) set up an internal unit (the Bingham Inquiry Unit or “BIU”) to deal with the inquiry on its behalf and appointed external solicitors and counsel to provide advice on all dealings of the Bank, its officials and employees with the inquiry. The external lawyers gave advice as to the preparation and presentation of the Bank’s evidence to the inquiry, and as to the submissions to be made to the inquiry.

29. The Bingham Inquiry report was published in October 1992 and, shortly afterwards, a large number of depositors with BCCI commenced proceedings against the Bank in an attempt to recoup their losses. The Bank was statutorily exempt from liability for anything done or omitted in the discharge of its regulatory functions, except in the case of bad faith. In order to overcome this “high hurdle”, the claimants sought disclosure of a large number of documents which had been brought into existence by employees and former employees of the Bank for the purpose of being passed to the external solicitors as part of the process of preparation of the Bank’s evidence and submissions to the Bingham Inquiry. It was agreed that documents emanating from or prepared by independent third parties and then passed to the external lawyers were not privileged; it was only the status of documents prepared by Bank employees that was in question.

30. At first instance, in *Three Rivers District Council and others v Governor and Company of the Bank of England (No 5)* [2002] EWHC 2730 (Comm) (“*Three Rivers No 5*”), Tomlinson J held that all the disputed documents were privileged:

“In my judgment an internal confidential document, not being a communication with a third party, which was produced or brought into existence with the dominant purpose that it or its contents be used to obtain legal advice is privileged from production.”

31. He went on to decide that where documents had been prepared by ex-officers or ex-employees of the Bank who were concerned with the supervision of BCCI and who in that capacity acquired relevant knowledge which was confidential to the Bank, the privilege extended to those documents as the individuals in question did not count as “third parties” for the purposes of privilege.

32. The Court of Appeal however disagreed. It held that material prepared “for the dominant purpose of putting relevant factual material before the inquiry in an orderly and attractive fashion” was not prepared “for the dominant purpose of taking legal advice upon such material” and so could not attract privilege. It also considered that

information provided by an employee of the Bank (even including its Governor) to its solicitors did not attract privilege. It therefore declared that:

5 “the only documents or parts of documents coming into the Bank’s possession between the closure of BCCI on 5 July 1991 and the issue of the present proceedings in May 1993 which the Bank is entitled to withhold from inspection on the grounds of legal advice privilege are:

10 (1) communications passing between the Bank and its legal advisers (including any solicitor seconded to the Bank) for the purposes of seeking or obtaining ‘legal advice’; (2) any part of a document which evidences the substance of such a communication.”

33. Leave to appeal this decision to the House of Lords was refused.

34. The matter did not end there, however. After the conclusion of those proceedings, the Bank began the task of disclosing the required documents. But it disclosed none of the communications between the BIU and the external lawyers, or drafts of (or internal memoranda relating to) the “overarching statement” that had been submitted on behalf of the Bank to the Bingham Inquiry. Two reasons were given for this non-disclosure. First, the claimants’ counsel had told the Court of Appeal that the claimants were not seeking disclosure of any communications between the BIU and the external lawyers; and second, because the phrase “legal advice” in the Court of Appeal’s declaration should be interpreted widely so as to cover all advice and assistance from the external lawyers, even if given only for “presentational purposes”, i.e. to present matters to the Inquiry in the most orderly and attractive fashion.

35. This led to a further disclosure application, which formed the subject matter of *Three Rivers No 6*.

25 36. At first instance, Tomlinson J decided (at [2003] EWHC 2565 (Comm)), on the basis of the Court of Appeal decision in *Three Rivers No 5*, that advice obtained for “presentational” purposes was not in general advice which attracted LAP; however if the dominant purpose of some communication between the Bank and its external lawyers was “the provision of advice as to the Bank’s legal rights and obligations (as opposed to “the question of how the Bank’s evidence might be presented to the inquiry so as to be least likely to attract criticism”), then privilege would apply to that communication. Accordingly he declared that the only documents or parts of documents that the Bank was entitled to withhold on grounds of LAP were communications between the BIU and its lawyers for the purpose of seeking or obtaining “advice concerning the Bank’s rights and obligations.”

37. The Court of Appeal upheld this decision, at [2004] QB 916, and made clear their view that LAP could only apply to advice being sought from lawyers as to legal rights or liabilities. “Presentational” advice did not qualify for privilege.

40 38. This was the decision that was under appeal in the House of Lords in *Three Rivers No 6*.

39. Lord Scott made it clear (at [20]) that the issue actually before their Lordships on the appeal was a narrow one: whether the communications between the BIU and its external lawyers relating to the inquiry were protected by LAP, the pivotal question being (as he identified at [43]) whether “presentational advice” was “advice as to what should prudently and sensibly be done in the relevant legal context”.

40. In the leading judgment in *Three Rivers No 6*, Lord Scott first said (at [23]) that it was “impossible to express a coherent view” on the scope of LAP without first “taking into account the policy reasons which led to legal advice privilege becoming established in our law in the first place” and “the policy reasons for its retention in our law today”.

41. This called for, first, an examination of “some of the features of legal advice privilege in order to provide a context for the policy reasons underlying the privilege.”

42. He identified four such features (at [24] to [27]) which can be summarised as follows:

(1) LAP arises out of a relationship of confidence between lawyer and client. If the communication or document in question was not confidential, LAP cannot arise in relation to it.

(2) If LAP applies, it applies absolutely. It cannot be overridden by some “supposedly greater public interest”, though it can be waived by the person entitled to it, and it can be overridden by statute.

(3) LAP gives the person entitled to it the right to decline to disclose (or allow to be disclosed) the confidential communication or document to which it applies.

(4) There is an undoubted relationship between LAP and litigation privilege, in the sense that some communications and documents can be subject to both forms; however, litigation privilege can be available for documents or communications which do not involve the seeking and giving of legal advice – for example, correspondence between a lawyer (or her client) and a third party.

43. His exploration of the policy underlying LAP (at [28] to [34]), after reviewing a number of earlier UK cases from the UK, other common law jurisdictions and even the Advocate General’s opinion in a case before the European Court of Justice, led to the following statement of that policy (at [34]):

“... it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyer’s legal skills in the management of their (the clients’) affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else... I for my part subscribe to this idea. It justifies, in my opinion, the retention of legal

advice privilege in our law, notwithstanding that as a result cases may sometimes have to be decided in ignorance of relative probative material.”

44. He then went on to state (at [35]) that any definition of the scope of LAP should
5 “reflect the policy reasons that justify its presence in our law”. In the light of those
policy reasons as identified, he could see no “principled exclusion” from LAP for
communications between lawyer and client in relation to the client’s “public law rights,
liabilities and obligations” (as opposed to private law rights etc). As the advice in *Three
Rivers No 6* was clearly in relation to the Bank’s public law liabilities, that was
10 determinative of the appeal. (Although the Bingham Inquiry was an ad hoc inquiry,
not under any statutory provision, it was still subject to judicial review supervision and
therefore public law rights, liabilities and obligations potentially arose for the Bank in
engaging with the inquiry.) He went on to make wider points, however, in response to
the various representations from interested third party interveners in the appeal (such
15 as the Law Society). He endorsed the comment of Taylor LJ in *Balabel v Air India*
[1988] Ch 317 that the scope of legal advice qualifying for LAP

“... is not confined to telling the client the law; it must include advice as
to what should prudently and sensibly be done in the relevant legal
context.”

45. He went on to explain that all that was required for LAP to apply was for the
advice to be sought or given in a “relevant legal context”. The test for this, in principle,
was (at [38]) for the Judge to ask himself “whether the advice relates to the rights,
liabilities, obligations or remedies of the client either under private law or under public
law.” He then gave a number of examples in which LAP would in his opinion clearly
25 apply (dealing with concerns which had been advanced by the various interveners in
the case).

46. Lord Rodger followed a similar line and (at [55]) specifically expressed
disagreement with the Court of Appeal’s doubts about whether LAP should apply to
conveyancing or drawing up a will:

30 “A client’s financial or tax position, or the financial or tax position of
members of his family, may well be relevant to the way in which he asks
his solicitor to structure a property transaction.... People have a
legitimate interest in keeping such matters private.”

47. *Balabel* itself was concerned with the extent to which privilege attached to the
35 correspondence between a client and its lawyer in a conveyancing transaction. The
comments of Taylor LJ at [330D] to [331A] are instructive:

40 “In my judgment, therefore, the test is whether the communication or
other document was made confidentially for the purposes of legal advice.
Those purposes have to be construed broadly. Privilege obviously
attaches to a document conveying legal advice from solicitor to client and
to a specific request from the client for such advice. But it does not follow
that all other communications between them lack privilege. In most
solicitor and client relationships, especially where a transaction involves

5 protracted dealings, advice may be required or appropriate on matters
great or small at various stages. There will be a continuum of
communication and meetings between the solicitor and client. The
negotiations for a lease such as occurred in the present case are only one
10 example. Where information is passed by the solicitor or client to the
other as part of the continuum aimed at keeping both informed so that
advice may be sought and given as required, privilege will attach. A letter
from the client containing information may end with such words as
"please advise me what I should do." But, even if it does not, there will
15 usually be implied in the relationship an overall expectation that the
solicitor will at each stage, whether asked specifically or not, tender
appropriate advice. Moreover, legal advice is not confined to telling the
client the law; it must include advice as to what should prudently and
sensibly be done in the relevant legal context.

15 It may be that applying this test to any series of communications might
isolate occasional letters or notes which could not be said to enjoy
privilege. But to be disclosable such documents must be not only
privilege-free but also material and relevant. Usually a letter which does
20 no more than acknowledge receipt of a document or suggest a date for a
meeting will be irrelevant and so non-disclosable. In effect, therefore, the
"purpose of legal advice" test will result in most communications
between solicitor and client in, for example, a conveyancing transaction
being exempt from disclosure, either because they are privileged or
because they are immaterial or irrelevant."

25 48. This highlights that it is quite possible for individual communications between
solicitor and client in the course of a conveyancing transaction not to be privileged
(otherwise there would have been no need for Taylor LJ to refer to the possibility of
some communications being non-disclosable on grounds of irrelevance rather than
privilege). It is also worth acknowledging that his comment about "irrelevant and so
30 non-disclosable" is referable specifically to the litigation context and not to the present
enquiry.

35 49. The applicant referred in its submissions to *Eurasian Natural Resources
Corporation*, not as providing any particular guidance relevant to this case, but as
pulling together the authorities on LAP. That case (which considered the extent of legal
privilege in relation to documents produced in the course of investigation of various
serious allegations of corruption, etc) was appealed to the Court of Appeal and
judgment is currently awaited; however I do not consider any of the statements of
principle concerning LAP contained in the judgment of Andrews J to be particularly
contentious, reflecting as they do the approach endorsed by the House of Lords in *Three
40 Rivers No 6*. Much of the dispute in *Eurasian* revolved around the extent to which (a)
evidential notes and reports on matters of fact prepared by lawyers could qualify for
privilege (whether LAP or litigation privilege), (b) forensic accountants' findings could
qualify for litigation privilege and (c) a solicitor's presentation to the client's
board/board committee "indicating or containing the factual evidence" qualified for
45 LAP (or, in default, litigation privilege) (there was a fourth "category" in issue in
Eurasian, but not relevant for present purposes).

Discussion and decision

50. I consider it clear, in the light of the decision in *Three Rivers No 6*, that the communications between KSB and their clients, to the extent they were for the purpose of seeking or giving advice in relation to the various conveyancing transactions, are properly subject to LAP. They involve advice on the clients' respective rights, liabilities, obligations or remedies under private law, and to the extent they do not specifically seek or provide actual legal advice, they largely comprise "that necessary exchange of information of which the object is the giving of legal advice as and when appropriate" (per *Balabel* at [332D]).

51. Also included under the umbrella of LAP are similar communications with the clients' other UK solicitors and with their overseas lawyers in Bermuda (as to the latter, see Lord Neuberger in *Prudential* at [45]). All communication between them and KSB consisted of seeking and giving legal advice specifically for KSB's clients and KSB were in communication with those lawyers on the express instructions of the clients for that purpose.

52. Certain of the correspondence under consideration comprises email exchanges between KSB and individuals who were not clients of KSB. They may have been the personal assistants of one of KSB's clients, the evidence is not clear. It is however clear from the content of the correspondence that those individuals were merely acting as the client's agents in corresponding with KSB for the purpose of obtaining and seeking KSB's advice, and the comments of Jessel MR in *Wheeler v Le Marchant* (1881) 17 Ch 675 at 680-681, referred to by Andrews J in *Eurasian*, make it clear that LAP extends to communication by such means.

53. I therefore consider that all the documents are subject to LAP, to the extent they either seek or give (or evidence the seeking or giving of) legal advice or are part of the "continuum aimed at keeping both [solicitor and client] informed so that advice may be sought and given as required"

54. There are however certain documents contained in the bundle provided by the applicant which do not fall within the description set out at [53] above.

55. First, there are the client care/engagement letters sent by KSB to their clients. In that regard, I respectfully agree with the analysis of Judge Mosedale in *Edward C Behague v HMRC* [2013] UKFTT 596 (TC) at [26]:

"In particular, it is likely that an engagement letter will specify the particular matter or matters on which the solicitor is contracted to provide legal advice. Does this make the whole or part of the letter subject to LPP? It seems to me that it must. The justification for LPP is that:

"a client should be able to obtain legal advice in confidence...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...once any exception to the general rule is allowed, the client's confidence is

necessarily lost.” R v Derby Magistrates Court Ex p B [1996] AC 487 per Lord Taylor.

5 LPP must extend not only to the content of the legal advice but the fact that a person sought legal advice on any particular matter. Therefore, to the extent that an engagement letter sets out what the advice will cover it must be subject to LPP.”

56. The purchase of No 1 was dealt with as a matter of extreme urgency, and no engagement letter appears to have been sent. As to the engagement letters sent in relation to the other two properties, I agree with Judge Mosedale in *Behague* that details of the advice being given should be removed. The more difficult question is whether the identity of the recipients of the client care letters should also be removed – i.e. the identity of the clients the letters were addressed to (in order to conceal the identity of the person or persons being treated by KSB as their client). It is to be expected that HMRC might regard this as a significant piece of information for the purposes of their enquiries. I consider that question to be finely balanced, but ultimately, I consider that in line with the underlying policy of LAP the better view is that the identity of the addressee of the client care letter is not privileged information (particularly in light of the fact that the submissions made by the applicant were forthright in identifying the clients of KSB). It follows that, in relation to the various client care letters included in the disputed documents, they should be disclosed but the sections headed “Scope of Your Instructions”, “Initial Steps” and “Action by You” should be redacted.

57. Included in the disputed documents are the following further documents which I consider do not attract LAP:

25 (1) Letter dated 17 January 2000 from KSB to MQ Services Limited in Bermuda. This company provides administration services and appears to be closely associated with (though not itself) a firm of Bermudan Barristers and Attorneys. The letter enquires about the establishment of offshore companies. If the client had approached that company direct with such an enquiry, there would be no question of privilege attaching to the correspondence. By simply routing the enquiry through KSB I do not consider the cloak of privilege can be acquired. (The response to this letter came to KSB from the Bermudan lawyers associated with MQ Services Limited, and clearly represents legal advice to the client, provided through the agency of KSB; as such, it does in my view attract LAP and therefore does not need to be disclosed.)

40 (2) A fax dated 18 January 2018 addressed by a large firm of chartered surveyors to one of KSB’s clients, and forwarded to KSB with the attached draft survey report in relation to No. 1. This is simply a draft of a report into the physical state of No. 1 and does not contain or evidence any element of advice sought from or given by KSB in relation to the conveyancing transaction on which it was engaged.

(3) Signed form of authority dated 1 February 2000 from OC1 authorising KSB to sign and exchange on its behalf the contract for the purchase of No.

1. This document was clearly brought into existence in order to provide confirmation of KSB's authority and it must have been contemplated that it would have been disclosed to the seller of No. 1 if she had sought to resile from the contract on the grounds that its execution by KSB was not properly authorised. As such, I do not see how it could attract LAP.

(4) Deed of Declaration of Trust dated 14 March 2000 made by OC1. This document represents a significant part of the chain of title of the underlying beneficial ownership of No. 1 and as such does not evidence or embody legal advice any more than, for example, the contract of sale itself (which the applicant does not argue qualifies for LAP).

(5) Fax dated 25 September 2006 from Francesca Brignone, described as "Property Consultant", to KSB regarding the planning permission position of No. 3. This is merely factual information about planning matters relating to No. 3 and as such does not appear to me to qualify for LAP.

(6) Email dated 2 October 2006 from Francesca Brignone to KSB which does not contain or evidence the seeking or giving of any legal advice.

(7) Email dated 4 October 2006 from Francesca Brignone to KSB and undated response, neither of which contains or evidences the seeking or giving of any legal advice.

(8) Email dated 4 October 2006 from KSB to "Francesca", which does not contain or evidence the seeking or giving of any legal advice.

(9) Letter dated 14 June 2007 and enclosures from M Q Services Limited in Bermuda to KSB sending various documents required by prospective purchaser of No. 3 in relation to OC4. This material appears no more qualified for LAP than the evidence gathered from employees and former employees of the Bank of England in *Three Rivers No 6*.

(10) Email correspondence chain spanning the period 20 April 2007 to 30 April 2007 between one of KSB's clients and a large firm of surveyors in relation to the negotiation of a sale of No. 2; while this correspondence forms part of a subsequent email exchange between KSB and the client dated 1 May 2007, it does not itself contain anything other than details of the discussions about the potential sale between the client and the agent. As such, it would not qualify for LAP on its own; and the simple fact of copying it to a solicitor cannot clothe it with privilege which it would otherwise lack. Thus the email dated 1 May 2007 should be disclosed, but with the correspondence between KSB and the client subsequent to 30 April 2007 redacted from it.

58. I consider it appropriate to order that the documents listed above be disclosed by the applicant to HMRC no later than 56 days after the date of release of this decision. If, no later than that date, an application for permission to appeal against this decision is made to the Tribunal, then the time limit for such disclosure shall automatically be

extended until 14 days after this application is the subject of a final ruling (within the meaning of section 316D(5) Finance Act 2004).

59. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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KEVIN POOLE
TRIBUNAL JUDGE
RELEASE DATE: 6 September 2018

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