



Neutral Citation: [2023] UKFTT 00222 (TC)

Case Number: TC08743

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Determined on the papers

Appeal reference: TC/2022/11946

Procedure – Application under Regulation 5(5) of the Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009 – Whether certain documents requested in information notices issued by the Respondents under paragraph 35 of Schedule 36 to Finance Act 2008 are subject to legal professional privilege – Yes – Application allowed

Judgment date: 22 February 2023

Before

TRIBUNAL JUDGE BROOKS

Between

**(1) REFINITIV UK HOLDINGS LIMITED
(2) THOMSON REUTERS GROUP LIMITED**

Applicants

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

With the consent of the parties, and as it considered it was able to do so, the Tribunal determined the application without a hearing under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (determination with or without a hearing) having first read the application, dated 6 July 2022, and HMRC’s written submissions in response, dated 9 September 2022.

DECISION

INTRODUCTION

1. This is the joint application (the “Application”) by both applicants, Refinitiv UK Holdings Limited (“Refinitiv”) and Thomson Reuters Group Limited (“TR”), under Regulation 5(5) of the Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009 (the “2009 Regulations”), for the Tribunal to consider and resolve the dispute between them and the respondents (“HMRC”) as to whether certain documents (the “Disputed Documents”) requested in information notices issued by HMRC, under paragraph 35 of Schedule 36 to the Finance Act 2008 on 25 March 2022 (the “Schedule 36 Notices”), are subject to legal professional privilege.

LAW

Schedule 36 Notices and Privilege

2. Under Schedule 36 to the Finance Act 2008 HMRC may issue an information notice requiring a person or a third party to provide information that is “reasonably required” for the purpose of checking a person’s tax position. An information notice can also be issued, as in the present case, pursuant to paragraph 35 of schedule 36, where an undertaking is a parent company in relation to its subsidiary.

3. However, paragraph 23 of Schedule 36 provides that an information notice does not require a person to provide privileged information or part of document that is privileged.

4. Paragraphs 23(2) and (3) provide:

(2) For the purposes 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.

(3) The Commissioners may by regulations make provision for the resolution by the tribunal of disputes as to whether any information or document is privileged.

5. The 2009 Regulations were made by HMRC under the power granted by paragraph 23(3) of Schedule 36.

6. Regulation 5(1) of the 2009 Regulations sets out the procedure to be followed where a dispute as to whether a document or information is privileged arises, as in this case, during the course of correspondence. Regulation 5 continues:

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

(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;

(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.

(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.

(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).

(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.

(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).

7. Where the Tribunal receives such an application under Regulation 5 it must, under Regulation 8 of the 2009 Regulations, resolve the dispute by confirming whether and to what extent the document, is or is not privileged and, if not privileged, direct which part or parts of a document (if any) shall be disclosed. The Tribunal must, pursuant to Regulation 9, also ensure that any document in dispute, or any copy of such document, is not inappropriately disclosed to any person pending its consideration of the status of that document.

Legal Professional Privilege

8. It is common ground that it is for the person claiming privilege, both legal advice privilege and litigation privilege to establish it (see Beatson J in *West London Pipeline Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm) at [86]). The burden of proof is therefore on the applicants who contend that legal advice and litigation privilege apply to the Disputed Documents in this case.

Legal Advice Privilege (“LAP”)

9. LAP applies to confidential communications between a client and their lawyer for the dominant purpose of giving or receiving legal advice together with secondary evidence of the content of such communications and documents that betray the trend of the advice (see *R (Jet2.com Ltd) v Civil Aviation Authority* [2020] QB 1027 at [96]). Privilege may also attach to documents sent as part of a “continuum of communications” between a lawyer and client aimed at keeping both informed so that advice may be sought and given as required.

10. As Taylor LJ observed in *Balabel v Air India* [1988] Ch 317 at 330:

“... In most solicitor and client relationships, especially where a transaction involves 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. ... 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, that will 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.”

11. Although it is not necessary for the lawyer to be in private practice (advice from an in-house lawyer may be protected by LAP), it is necessary for the lawyer to be acting in his or her capacity as a lawyer. As Lord Scott said, at [38] in *Three Rivers District Council v Governor of the Bank of England (6)* [2005] 1 AC 610 (“*Three Rivers (6)*”):

“If a solicitor becomes the client’s “man of business”, and some solicitors do, responsible for advising the client on all matters of business, including investment policy, finance policy and other business matters, the advice may lack a relevant legal context. There is, in my opinion, no way of avoiding difficulty in deciding in marginal cases whether the seeking of advice from or the giving of advice by lawyers does or does not take place in a relevant legal context so as to attract legal advice privilege. In cases of doubt the judge called upon to make the decision should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law. If it does not, then, in my opinion, legal advice privilege would not apply. If it does so relate then, in my opinion, the judge should ask himself whether the communication falls within the policy underlying the justification for legal advice privilege in our law. Is the occasion on which the communication takes place and is the purpose for which it takes place such as to make it reasonable to expect the privilege to apply? The criterion must, in my opinion, be an objective one.”

Litigation Privilege

12. The scope of litigation privilege was summarised by Lord Carswell at [102] of *Three Rivers (6)* as applying to:

“... communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connexion with existing contemplated litigation ... 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) litigation must be a adversarial, not investigative or inquisitorial.”

13. It is clear from *Re Duncan* [1968] P 306 that the litigation in contemplation is not restricted only to domestic proceedings.

14. In *The Financial Reporting Council Ltd v Frasers Group Plc (formerly Sports Direct International Plc)* [2020] EWHC 2607 (Ch) (“*Frasers Group*”), Nugee LJ considered whether reports in relation to the implementation of a new corporate structure were written for the sole or dominant purpose of litigation. In doing so he assumed that litigation challenging the effectiveness of the corporate structure was in reasonable contemplation at the time the reports were written. However, his answer, at [36], was:

“... 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 ... 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.”

BACKGROUND

15. HMRC issued the Schedule 36 Notices during the course of its enquiries into the applicability of the Diverted Profits Tax (“DPT”) provisions at Part 3 of the Finance Act 2015 to arrangements between certain subsidiaries of Refinitiv and a number of subsidiaries of TR

(“TRUK entities”) for the accounting periods ending 31 December 2016, 31 December 2017 and 31 December 2018 during which time Refinitiv was part of TR. The arrangements included the transfer of trademarks and other intellectual property from TRUK entities to the Swiss principal entity, Thomson Reuters Global Resources Unlimited Company (“TRGR”) from 2008 onwards.

16. In October 2013 TR’s Chief Executive Officer (“CEO”) had announced that it would begin a process to help it shift from a “portfolio of businesses” to a true “enterprise”. A Chief Transformation Officer (“CTrO”) was appointed to lead the project transforming the group to an “Enterprise Operating Model (“EOM”).

17. At the same time as the EOM project was being undertaken, the Organisation for Economic Cooperation and Development (“OECD”) had begun to consider new proposed guidelines around base erosion and profit shifting (“BEPS”) and the need to align profits with value creating activities. Having been apprised of these developments the CEO considered that the ongoing transition to EOM provided an opportunity to ensure that TR's transfer pricing was fully aligned with how the business operated and was consistent with the emerging thinking from the OECD. It therefore undertook a project from late 2014 to ensure tax was adequately considered as part of the overall EOM transition. This tax-focused sub-project was referred to as “Project Vista”.

18. Subsequent to the commencement of the tax analysis, TR management began to use the project name, “Vista”, more generally to refer to the overall project to transition to the EOM. The Disputed Documents, which are sought by HMRC, relate specifically to the design phase of Project Vista.

19. Before and during the project to transition to the EOM, TR was engaged in tax disputes in various jurisdictions around the world related to transfer pricing. This included substantive litigation in the US Tax Court. Because of this existing and anticipated litigation in the US and other jurisdictions and the consideration by the OECD BEPS project of new guidelines to align profit and value creating activities, TR engaged advisers to ensure that it was properly prepared for litigation in regard to its ongoing transfer pricing.

20. The Application explains that:

“Project Vista, including the conversion to EOM, was a commercially sensitive project, in particular, because it contemplated structural changes to the Group. Project Vista operated on a strictly confidential basis within a designated group of individuals at TR, including senior personnel such as TR’s General Counsel (“GC”), the CEO, the CTrO, and other members of TR’s Executive Committee. TR instructed three external advisers to assist:

1. Deloitte Consulting, to work with TR's senior executives and human resources team in designing the revised global operating model and optimising its organisational impact;
2. Ernst & Young (“EY”), to support TR’s in-house legal team (“TR Legal”) in ensuring that TR’s transfer pricing would align with the EOM and updates made to OECD guidance as a result of the BEPS project; and
3. Covington & Burling LLP (“Covington”), to assist TR Legal in evaluating the EY tax advice and support TR’s General Counsel in preparing legal advice with respect to the Group’s structure for TR’s senior executive decision-makers.

TR senior executives relied on TR Legal to advise on the legal implications of Project Vista. TR Legal instructed EY and Covington to provide advice with respect to the move to the EOM and the effects of the OECD’s BEPS project.

In particular, Covington were instructed to (a) provide their independent advice on the move to the EOM, and (b) evaluate EY's advice and advise TR Legal as to the merits of that advice. TR Legal considered the advice received from EY and Covington before advising senior executive decision-makers.”

CORRESPONDENCE AND APPLICATION

21. By letter of 27 March 2020 HMRC requested information and documents from TR in relation to Project Vista. The letter stated that the primary purpose of the request was to enable HMRC to:

“... better consider any applicability of the DPT legislation at Part 3 Finance Act 2015 to arrangements between TRUK entities and TRGR in 2016.”

The letter continued explaining that the purpose of the request specific to Project Vista was:

“... to see and understand they contemporary evidence of the reasons for undertaking [Project Vista] that intended that certain functions would be performed in Switzerland.”

Question 6 of the request for information was for “a timeline of key decisions and implementation of Project Vista”. Questions 7 – 9 requested copies of all contemporaneous documentation and external advice relating to Project Vista.

22. TR responded on 11 September 2020 providing a narrative description of the EOM and Project Vista. However, it did not provide any contemporaneous documents or copies of external advice to HMRC.

23. A further request for information was made by HMRC on 13 January 2021. Question 8 of that request sought copies of “all available contemporaneous documents relating to Project Vista as undertaken by TR’s tax department” and was described in the 11 September 2020 narrative that TR had provided. In addition HMRC requested copies of “any contemporaneous advice documents received from EY and any other advisors who were consulted on the tax impacts/implications of Project Vista”.

24. In its reply, of 5 April 2021, TR identified 41 documents and asserted legal professional privilege in relation to 32 of these. On 19 April 2021 HMRC requested TR to provide a “privilege log” with regard to the documents that had been withheld on the grounds of privilege. This was provided to HMRC on 5 May 2021. However, it did not include document titles or explain why it was contended that legal professional privilege applied.

25. Following requests for further information by HMRC, on 28 October and 3 December 2021, TR, on 3 January 2022, provided HMRC with six further documents relating to Project Vista together with the April 2021 documents and an updated privilege log.

26. The Application explains that:

“... the April 2021 Documents and one of the January 2022 Documents were disclosed to [HMRC] on the basis that they are not subject to LPP and the five remaining January 2022 Documents consist of advice from EY, and are considered to be subject to litigation privilege, but were nevertheless disclosed on a limited waiver basis. The limited waiver disclosure was in response to [HMRC’s] indication during discussions that provision of these documents might be sufficient to prevent the issuance of the Schedule 36 Notices and the ensuing Regulation 5 [of the 2009 Regulations] dispute resolution process.”

27. However, that was not the case and, on 25 March 2022, HMRC issued the Schedule 36 Notices. These contained the following requests:

(1) Please provide all contemporaneous documents relating to “Project Vista” (as undertaken by TR’s tax department and described in the second paragraph on page two of your reply on Project Vista information, received 11 September 2020).

(2) Please provide any contemporaneous advice documents received from EY or any other advisers who were consulted on the tax impacts/implications of “Project Vista”. Please include all advice from Deloitte Consulting in relation to “Project Vista” and/or all other Deloitte Consulting advice for which the output was the “Enterprise Orange Book”.

28. TR responded to the Schedule 36 Notices on 8 April 2022. On 9 May 2022, pursuant to Regulations 5(2) and 5(7) of the 2009 Regulations SI 2009/1916, the applicants served a list of the Disputed Documents on the Respondents (a copy of which is appended to this decision). This list described the nature and contents of the documents over which legal professional privilege is claimed.

29. On 8 June 2022, HMRC notified the applicants under Regulation 5(4) of the 2009 Regulations that it did not have sufficient information to agree that the Disputed Documents were subject to legal professional privilege and therefore require these documents to be produced. This led to the Application being made on 6 July 2022.

DISCUSSION AND CONCLUSION

30. As noted above (at paragraph 18) the Disputed Documents sought by HMRC relate specifically to the design phase of Project Vista and are, it is contended, relevant to HMRC’s consideration of whether the insufficient economic substance condition in s 110 of the Finance Act 2015 is met, in particular whether the s 110(7)(b) exemption applies to specific accounting periods. HMRC submits that the Disputed Documents are also relevant to its consideration as to any impact on the calculation of DPT that the recognition of any employees and substance in TRGR may have.

31. In short, HMRC contend that the Application does not provide sufficient detail to allow HMRC or the Tribunal to assess the claim to privilege in respect of Disputed Documents and that the limited information and documentations provided by suggests that the applicants approach to legal professional privilege is “misguided”.

32. However, unlike HMRC, I have been provided with copies of the Disputed Documents and am therefore, having regard to principles described above, in a better position to determine whether or not legal professional privilege applies as the applicants contend it does. They say that the Disputed Documents consist of confidential documents, presentations and briefing papers which represent communications and/or form part of the continuum of communications and/or are secondary evidence of the content of such communications and/or are documents that betray the trend for advice between TR’s GC and TR Legal and TR’s senior executive decision makers and reflect the advice of TR’s GC, TR Legal and Covington.

33. Having carefully considered each of the Disputed Documents I have come to the conclusion that, given the comment of Nugee LJ in *Frasers Group* (see paragraph 14, above), which as decision of the High Court is binding on the First-tier Tribunal although not the Upper Tribunal, that litigation privilege cannot apply to the Disputed Documents which are primarily concerned with the implementation of an alternative corporate structure.

34. With regard to LAP it is necessary to consider the question posed by Lord Scott in *Three Rivers (6)* (see paragraph 11, above), ie whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law and, if it does, whether the occasion on which the communication takes place and the purpose for which it takes place is such as to make it reasonable to expect the privilege to apply?

35. Having adopted such an approach in relation to the Disputed Documents (and being mindful of rule 9 of the 2009 Regulations I say no more about them) I am, on balance, satisfied that these do represent communications which are part of the continuum of communications with a dominant purpose of providing legal advice by TR Legal to TR’s senior decision makers.

36. It therefore follows that the Disputed Documents are subject to LAP. Accordingly the application succeeds and applicants are not obliged to disclose any part of the Disputed Documents to HMRC.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

37. 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.

**JOHN BROOKS
TRIBUNAL JUDGE**

Release date: 22nd FEBRUARY 2023

APPENDIX

List of documents on which Privilege (LAP and litigation) is claimed provided to HMRC under Regulation 5(2) of the 2009 Regulations (see paragraph 28, above)

	Date created	Description of Document	Recipient of advice	Nature of Document and reason for application of LPP
1	06/03/15	Briefing paper	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR’s legal team, which was being advised by Covington
2	24/03/15	Presentation	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR’s legal team, which was being advised by Covington
3	14/04/15	Presentation	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR’s legal team, which was being advised by Covington
4	21/05/15	Presentation	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR’s legal team, which was being advised by Covington
5	30/06/15	Briefing paper	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR’s legal team, which was being advised by Covington

6	16/07/15	Presentation	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR's legal team, which was being advised by Covington
7	16/07/15	Briefing paper (part redacted)	Advice was for senior decision makers including CEO, CFO and CTrO	Redacted portions represent privileged communication from TR's legal team, which was being advised by Covington
8	20/02/15	Presentation	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR's legal team, which was being advised by Covington
9	06/03/15	Presentation	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR's legal team, which was being advised by Covington
10	12/03/15	Presentation	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR's legal team, which was being advised by Covington
11	13/03/15	Presentation	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR's legal team, which was being advised by Covington
12	14/04/15	Presentation	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR's legal team, which was being advised by Covington
13	01/06/15	Presentation	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR's legal team, which was being advised by Covington
14	02/06/15	Presentation	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR's legal team, which was being advised by Covington
15	05/06/15	Briefing paper (part redacted)	Advice was for senior decision makers including CEO, CFO and CTrO	Redacted portions represent privileged communication from TR's legal team, which was being advised by Covington
16	7-8/07/15	Presentation	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR's legal team, which was being advised by Covington
17	26/11/14	Document	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR's legal team, which was being advised by Covington
18	12/11/14	Presentation	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR's legal team, which was being advised by Covington
19	25/03/15	Presentation	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR's legal team, which was being advised by Covington
20	27/03/15	Presentation	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR's legal team, which was being advised by Covington

21	01/06/15	Presentation	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR's legal team, which was being advised by Covington
22	01/06/15	Presentation	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR's legal team, which was being advised by Covington
23	17/06/15	Presentation	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR's legal team, which was being advised by Covington
24	17/06/15	Presentation	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR's legal team, which was being advised by Covington
25	26/06/15	Presentation	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR's legal team, which was being advised by Covington
26	24/06/15	Presentation	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR's legal team, which was being advised by Covington
27	27/03/15	Presentation	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR's legal team, which was being advised by Covington
28	03/02/15	Presentation (part redacted)	Advice was for senior decision makers including CEO, CFO and CTrO	Privileged communication from TR's legal team, which was being advised by Covington