30.5.2003

IN THE GRAND COURT OF THE CAYMAN ISLANDS

Cause NOs. 425, 616 & 624 of 2002

BETWEEN:

(1) J.P. MORGAN MULTI-STRATEGY FUND, L.P.
(2) J.P. MORGAN MULTI-STRATEGY FUND II, L.P.
(3) J.P. MORGAN MULTI-STRATEGY FUND, LTD.
(4) J.P. MORGAN MULTI-STRATGEY FUND II, LTD.
(5) J.P. MORGAN MULTI-MANAGER STRATEGIES FUND
(6) LOCKHEED MARTIN CORPORATION MASTER RETIREMENT TRUST
(7) HFI INVESTMENTS, LLC — Plaintiffs

AND

(1) THE MACRO FUND LIMITED
(2) THE MACRO FUND (U.S.) LIMITED
(3) IIU CAPITAL LIMITED — Defendants

BEFORE THE HONOURABLE MR. JUSTICE KELLOCK (IN CHAMBERS)
APPLICATION HEARD APRIL 9 AND 10, 2003

APPEARANCES:
Mr. Andrew Jones, Q.C., and Mr. Mac Imrie instructed by Maples and Calder for the Defendants (1) and (2)

Mr. Kenneth Farrow for Defendant (3) (the Applicants)

Ms. Sonia Proudman, Q.C., and Ms. Ingrid Pearce instructed by Walkers for the Plaintiffs (the Respondents)

REASONS FOR JUDGMENT

The defendants seek an order requiring the plaintiffs (collectively "JP Morgan") to return to them all copies of the letter sent by facsimile on March 8, 2002 by the third defendant ("IIU") to its London solicitors. A copy of this facsimile (hereinafter "the fax") was improperly removed from

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IIU's files and given to the plaintiffs who intend to make use of it at the trial of this action. The injunction is sought to prevent that use.

The Facts

The plaintiffs are investment funds managed by J.P. Morgan Alternative Asset Management Inc. ("JPMAAM"). They say that they invested several million U.S. dollars in shares of the first two defendants which are also investment funds. The plaintiffs and JPMAAM were incorporated either in the U.S.A., the Cayman Islands or Luxembourg. The first two defendants were incorporated in the Cayman Islands and IIU was incorporated in the United Kingdom. Within a year after the plaintiffs invested in the defendant funds, they sought to redeem those investments. As a result, the dispute which led to this litigation arose. The defendants take the position that redemptions made within a year following the date of the initial investment are subject to an early redemption charge of ten per cent of the amount to be withdrawn. This requirement is (the defendants say) part of the investment contract evidenced by the defendants funds' Articles of Incorporation, a Prospectus and the Application Forms which were required for each of the plaintiffs' investments. The plaintiffs position is that their investments were made on the faith of a special arrangement evidenced by a "side letter", signed by the then CEO of IIU (David Morrison) on behalf of the defendants, which exempted the plaintiffs from the early redemption charge. The plaintiffs say that the fax supports their case rather than the position now being put forward by the defendants. According to the plaintiffs, they were moved to invest in the defendant funds on the strength of David Morrison's expertise and it was for that reason that they required the "side letter" so that they could withdraw their money without penalty if at any time Morrison ceased to control the defendants investment decisions.

It is common ground that Morrison was dismissed from his employment by IIU in February 2002. The plaintiffs thereupon sought to redeem their investments and were met with the defendants claim for redemption charges. It is clear that less than twelve months had elapsed from the date the plaintiffs investments were made.

In late March 2002, Joel Katzman of JP Morgan sent a message by fax to one Dermot Desmond (the beneficial owner of IIU) with the notation "hope we can resolve this in a mutually satisfactory manner". This notation was clearly a reference to the dispute over whether or not early redemption fees were payable. Attached to the JP Morgan fax was a copy of another fax message dated March 8, 2002 from IIU to its London solicitors (Simmons & Simmons) with an unsigned copy of the alleged side letter. This is the document which the defendants seek an order requiring the plaintiffs to return to them.

According to the second Affidavit of Christopher McHugh (a Director of the defendant funds) IIU's fax message of March 8, 2002 to Simmons & Simmons ("the fax") was a request for advice from that firm in relation to the primary issue in this litigation. The JP Morgan fax to Desmond alerted IIU to the fact that its internal documents had in some way been removed from IIU's files and a copy of the fax had found its way into the plaintiffs possession. IIU, therefore, undertook an investigation as to how these documents came into the plaintiffs hands. This investigation and the result thereof is described in paragraph 19 of Mr. McHugh's second Affidavit as follows:

> "I was personally involved in that investigation, along with Mr. Atkinson (who at that stage was still employed by IIU). We discovered that, after his termination, and some time shortly before Mr. Katzman sent his fax to Mr. Desmond, Mr. Morrison had

telephoned his former secretary at IIU and asked her to enter Mr. Atkinson's office to retrieve from Mr. Atkinson's files a copy of the side letter. Without Mr. Atkinson's knowledge, the secretary covertly did so one evening when the other staff members had left. She located an unsigned version of the side letter in a file in a closed drawer, to which was attached the Privileged Fax. The secretary then faxed both the Privileged Fax and the unsigned side letter to Mr. Morrison's fax machine. During her explanation, she also said that she knew Mr. Morrison wanted the side letter to try to protect a JP Morgan analyst named Srjdan Teslic, and that she had not sent Mr. Morrison any other documents. The secretary, Rachel Kirkbride, resigned from IIU immediately after explaining her actions to Mr. Atkinson during the IIU investigation."

On March 28, 2002, Simmons & Simmons wrote to JP Morgan. I will set out this letter in full:

"J P Morgan Partners
New York
U.S.A.

Strictly Private & Confidential
To be read by Addressee only

Dear Sir

IIU Capital Ltd.

We act for IIU Capital Limited and have been instructed in respect of your fax to our client dated 27 March 2002. Your fax contained a legally privileged document which constitutes our client's confidential information.

Our client has made internal enquiries and is satisfied that the document contained in your fax of 27 March 2002 was not forwarded to you by any authorised member of its personnel.

Accordingly, we require that you provide by close of business on Monday, 01 April the identity of the person or persons who provided to you the copy of the fax from our client to this Firm dated 08 March 2002 and that you explain in full the circumstances in which you obtained the document.

We also require that you:

(A) confirm whether you have received any other documents form the same source relating to our client, its business or its clients; and

(B) return to us or procure the destruction of all copies of the fax of 08 March 2002 and any other confidential documents of our client which may be in your possession, custody or control.

Our client wishes to register its serious concern about these events and fully expects you to take action to provide it with the information and to return the documents requested without delay.

Yours faithfully

Simmons & Simmons"

On April 3, 2002, Simmons & Simmons wrote again to JP Morgan requesting a reply to their earlier letter.

On April 12, 2002, Seward & Kissel LLP (JP Morgan's New York attorneys) replied to Simmons & Simmons advising that they (Seward & Kissel) were satisfied that the fax had been sent to JP Morgan "by a person with authority to do so". The Seward & Kissel letter then quotes from a portion of the fax but that quotation has been deleted from the copy of the letter contained in the court's bundle. Seward & Kissel then said:

> "we would view any attempt by IIU Capital or the Macro Fund to suppress, destroy or hide evidence of the parties September 28, 2002 Agreement in connection with an actual or potential legal proceeding as an attempt to perpetrate a fraud upon the court and would be independently actionable. Accordingly, demand is hereby made for IIU Capital and the Macro Fund to preserve all documents and evidence concerning the parties September 28, 2001 Agreement."

September 28, 2001 appears to be the date of the "side letter" relied upon by the plaintiffs.

It is to be noted that Simmons & Simmons assertion that the fax was a privileged document was not disputed by JP Morgan's attorneys. There is no evidence of any waiver of privilege on the part of the defendants.

On April 30, 2002, Simmons & Simmons replied to Seward & Kissel respecting the request for an explanation as to how the alleged privileged documents came into JP Morgan's hands, pointing out that Seward & Kissel had failed to address that issue. In November 2002, Ernst & Young (the defendants Auditors) were asked to determine whether or not any information had been removed without authorization from the defendants computer system and whether or not there was any evidence of the alleged "side letter" in that system. Ernst & Young reported that while they found references to the "side letter", a copy of it could not be found and while documents had been deleted from the computer system, it was not possible to determine who was responsible.

The Managing Director of JPMAAM, James Welch swore an Affidavit on March 27, 2003 in order "to explain to the court how a copy of the fax dated March 8, 2002 from IIU to their London lawyers, Simmons & Simmons ("the fax") came into the possession of JPAAM." It will be recalled that JP Morgan was asked for that explanation by Simmons & Simmons in its letter of March 28, 2002. The Welch Affidavit purports to provide the requested explanation almost a year later.

I will set out here, paragraphs 4, 5 and 6 of the Welch Affidavit:

> "Following David Morrison's departure from IIU and the JP Morgan plaintiffs' decision to redeem their respective interests in

> the Macro Funds, I asked Srdjan Teslic to carry out an internal search of JPMAAM's records to locate a copy of the executed side letter, which JPMAAM had entered into with the defendants on behalf of the JP Morgan plaintiffs. However, a copy could not be found. During the middle to end of March 2002, I subsequently spoke with David Morrison. In that conversation, I told David Morrison that I was having a hard time trying to find a copy of the executed side letter and I asked him if he had a copy. David confirmed that he had signed the letter, but did not have a copy in his possession.
>
> David Morrison also mentioned to me, either in that conversation or in another telephone conversation shortly thereafter, that he had another document that he thought I might find of interest. David Morrison asked me if I would like him to fax this document to me. I replied that I would. David Morrison then asked me if I would cut off the top of the fax when I received it from him, so that it would not be obvious where the fax had come from. I assumed from this comment that David Morrison did not want anyone to know that he had sent the fax, since I was aware at the time that David Morrison was having a difficult time with Dermot Desmond. I agreed to do this and shortly after, some 10-15 minutes later, I received the fax from David Morrison. The fax consisted of one page of information; there may have been a cover sheet as well. A copy of the side letter, signed or unsigned, was not attached to the fax.
>
> Prior to its receipt, I did not know anything about the contents of the fax, who it was addressed to or who the author of the fax was. All David Morrison told me was that I might find the fax "interesting". I was not aware, when I received the fax of how David Morrison came to be in possession of the fax, although David Morrison subsequently told me that he had been given the fax by his former secretary at IIU."

This explanation leaves a great deal to be desired. For example, there is no indication as to whether the contact between Welch and Morrison had been initiated by Welch or by Morrison.

Joel Katzman (the President of JPAAM) exhibits to his Affidavit a note of a meeting between Morrison's former secretary at IIU (Rachel Kirkbride) and two other persons in which she admits

that she obtained for Morrison an unexecuted copy of the side letter from IIU's files after Morrison's employment with IIU had been terminated. However, she denied having provided Morrison with any other document from IIU' s files.

I have the distinct impression that the Welch and Katzman Affidavits do not provide all the information the plaintiffs have of the circumstances surrounding their contacts with Morrison. I was, however, advised that Morrison is at least a potential witness at trial for the plaintiffs. Mr. Katzman swears in his Affidavit that he instructed Welch to carry out a search of JPMAAM's records in an attempt to locate an executed copy of the side letter but one could not be found. He then swears:

> "accordingly, when James Welch passed me the fax I sent this to Mr. Desmond by fax on 27 March, 2002 to demonstrate that IIU believed an agreement had been reached with JPMAAM as to the JP Morgan plaintiffs' right to redeem their respective interests in the Macro Funds without penalty and that the side letter had indeed been signed."

The Affidavits filed on this Application contain a great deal more about the side letter, but whether or not an agreement was or was not made and what the terms of it might be are not issues that I should attempt to decide on the basis of conflicting Affidavit evidence. I am also of the view that I need not base my decision on this Application on a finding as to whether or not the plaintiffs induced Morrison to obtain a copy of the fax or whether or not the plaintiffs ought to have known that the fax was privileged as soon as they saw it as this is not a case in which a privileged document has been disclosed by the beneficiary of the privilege by mistake. The evidence admits of no conclusion other than that the fax which found its way into JP Morgan's hands was stolen and the plaintiffs would have been aware that such was the case from the date

they first laid eyes on it. Morrison was dismissed by IIU in February 2002 and the fax was dated March 8, 2002. Morrison could not have obtained a copy of it in his capacity as CEO of IIU or with IIU's approval. His request to Welch to remove the heading from the fax makes that abundantly clear.

I have not seen the fax, as counsel for the defendants took the deliberate decision not to disclose it. However, the defendants are not obliged to disclose it and it seems highly unlikely that the fax was other than a communication from a client (IIU) to its solicitors (Simmons & Simmons) in their professional capacity as it is common ground that the content of the fax relates to the core issue in this litigation, i.e. whether or not a side letter agreement was made.

The Application to me is based on the assertion that the fax is a privileged communication from a client to the client's solicitor seeking legal advice. Accordingly, it belongs to the first category of solicitor/client privilege known as "legal advice privilege", which is to be distinguished from the second category of that privilege known as "litigation privilege" (see *Phipson on Evidence*, 15th Ed. (2000) paragraph 20-04 and paragraph 20-05).

Privilege is fundamentally a rule of evidence and once privilege is established it entitles one party to withhold relevant evidence (*Phipson* paragraph 20-01).

Questions as to the admissibility of evidence are questions of law.

> "Under the head of admissibility falls such questions as to whether a Declaration is part of the *res gestae*, a fact sufficiently similar to show knowledge or system, a communication privileged, a

> confession voluntary...a witness competent, privileged to refuse to answer..." (*Phipson* paragraph 1-23)

One would therefore expect that if this is an accurate statement of the law, the question as to whether the fax was or was not privileged would be a question to be determined by the trial judge at trial just as the question as to whether a confession is voluntary is so decided. If the privilege issue is an issue to be determined by the law of evidence then it would seem that the appropriate time for determining such an issue is the time when one party or the other seeks to adduce the evidence whether oral or documentary. After all the law of evidence is almost entirely taken up with rules of admissibility. This logic unfortunately runs afoul of the decision of the English court of Appeal in *Calcraft* v. *Guest* [1898] 1 Q.B. 759 in which the court, while acknowledging that if a document is once privileged it is always privileged, nevertheless held that copies of certain documents which the court regarded as privileged were admissible, even though the court made no explicit finding that privilege had been waived.

The cases decided subsequently have accepted the *Calcraft* v. *Guest* doctrine but sought to overcome it by the grant of injunctions requiring the return of copies of privileged documents to the beneficiary of the privilege so that such copies could not then be tendered in evidence by other persons. The matter is put in these words by the editors of *Phipson*:

> "The fact that a document may be privileged does not affect its admissibility as privilege may be waived. Where one party has obtained privileged material, even improperly, the evidence remains admissible even though an injunction may be granted in advance of its use to prevent it." (*Phipson,* paragraph 20-03)

I have had difficulty understanding this statement because it was not suggested in *Calcraft* that the privilege had been waived. *Calcraft* suggests (as does the statement from *Phipson*) that a

privileged document may be admitted in evidence even if the privilege has not been waived. The two sentences in the passage quoted from *Phipson* seem to be contradictory.

It is of course trite law that relevant evidence (which is therefore *prima facie* admissible) does not become inadmissible by reason of the fact that it has been unlawfully obtained. However, it would not be unreasonable to expect that a privileged document (if once privileged always privileged) would remain so unless and until the privilege is waived expressly or by necessary implication. There is no doubt that the *Calcraft* decision has made this (and many other similar applications) necessary. Indeed, there are statements in the cases indicating that the loss of possession of a privileged document leads to the loss of the privilege itself. An injunction, (as the solution to the *Calcraft* problem), was first sought and granted in *Lord Ashburton* v. *Pape* [1913], 2 Ch. 469 another decision of the court of Appeal. For many years following the invention of the injunction remedy, it was thought that a separate action had to be instituted in order to obtain the necessary relief. That is no longer the case. The injunction which the defendants seek is sought in an application in this action in which it is expected that the plaintiffs will seek to use the fax as evidence. The plaintiffs do not take issue with the procedural point. The defendants therefore contend that the plaintiffs should be ordered to return all copies of "the fax and thereby be restrained from producing the privileged fax in evidence..."[1]

The Summons when issued last December sought additional relief including an order requiring the plaintiffs to provide a "full account of the way in which they came to be in possession of the fax". I am advised that in light of the Affidavit material provided by the plaintiffs for the

[1] Paragraph 4.5 of the defendants' Skeleton Argument

purposes of this Application (which I have referred to in part above) the only relief now sought is that set out in paragraph 2 of the Summons as follows:

> "An order requiring deliver (of the fax and) of all such privileged and confidential documents as are within the possession, power, custody or control" of the plaintiffs.

The evidence before me indicates that the plaintiffs' Cayman attorneys and their leading counsel have resisted the temptation to look at the facts. This is no doubt because, had they become aware of its contents, an order might be made preventing them from acting further for the plaintiffs. (See *Ablitt* v. *Mills and Reeves*, The Times, October 25, 1995, where Blackburn J. made such an order.)

However, JP Morgan and their New York attorneys are familiar with the contents of the fax and as I have noted earlier, the plaintiffs have not challenged the defendants' assertion that the document was initially privileged. The plaintiffs' case is that the benefits of that privilege have been lost as a result of the fact that a copy of the fax has found its way into their hands and that the injunction sought should be refused because otherwise this case may proceed to trial on a false basis. I am somewhat handicapped as I have not had sight of the fax, but nonetheless I can come to no other conclusion on the evidence than that the fax was, when sent to Simmons & Simmons a privileged communication.

The Issues

The questions to be determined now are:

- Whether or not the defendants' privilege in the fax has somehow been lost.
- Whether the privilege has been lost or not, whether the injunction sought should be granted.

- Even if the privilege has not been lost, should the privilege be overridden by the public interest in ensuring that the court is in a position to have all of the relevant evidence at trial.

In a number of cases the court's have undertaken a "balancing exercise" weighing the relative strength of one public policy rule or principle against another. For example, in *Lion Laboratories Ltd.* v. *Evans* [1985] 1 Q.B. 526 the Court of Appeal held that the public interest in being informed that the blood alcohol readings obtainable through the use of the plaintiff's breathalizer machine were unreliable outweighed the plaintiff's right to protect the confidentiality of their internal documents. This "balancing" often occurs in cases in which one party or the other seeks an injunction which, as an equitable remedy, is to be granted or refused based upon the exercise of the court's discretion. But there are also cases where the balancing occurs in other contexts.

It therefore seems that the "balancing" may be done as part and parcel of the exercise of the court's discretion to grant or refuse an equitable remedy or it may be done in order to decide which public policy principle is paramount and thus determine whether the party seeking to protect a supposed right has that right in the circumstances. In other words, the balancing may occur in determining the right or in determining the remedy but the cases do not seem to discuss or establish at what stage the balancing is to occur. The public interests in protecting confidences on the one hand and freedom of speech or information on the other are quite understandable. So is the public interest in ensuring, so far as is possible, that courts are not required to decide cases on the basis of incomplete or otherwise misleading evidence. The rule that makes relevant evidence admissible even if it has been unlawfully obtained is based upon that principle. However, it is not easy to understand why a stolen privileged document should be admissible when the beneficiary of the privilege has not waived it and is in no way responsible

for the loss of position of it. *Calcraft* seems to be the source of this doctrine but neither *Calcraft* nor any of the cases which have been cited to me (or which I have been able to find) discuss, let alone provide a rationale for what appears to me to be a mystifying rule. Surely there can be no public interest in encouraging the obtaining of privileged documents by fraud or theft. But a rule which mandates the loss of privilege by such means promotes that conduct. It is not at all obvious why the *Calcraft* doctrine forms a necessary part of or a corollary to the rule that unlawfully obtained evidence is nevertheless admissible.

In any event, I am required in this case to consider whether or not the public interest in fair trials should override solicitor/client privilege or if the privilege in the fax has been lost thorough its disclosure. In either case the injunction sought should be refused.

THE LAW

The Derby Magistrates' Case

I will begin the analysis with reference to a recent and binding authority. In *Regina* v. *Derby Magistrates' Court* [1996], 1 A.C. 487 the House of Lords reviewed the history of solicitor/client privilege in the context of a murder case.

The applicant in that case had confessed to a murder, retracted his confession and then been tried and acquitted. The applicant's stepfather was then charged with the same murder. In his statement retracting the confession the applicant implicated the stepfather and repeated these allegations in his evidence at the stepfather's committal hearing. Counsel for the stepfather sought in cross-examining the applicant to ask him to disclose the instructions he had given to his solicitor at the time he was defending himself against the murder charge. The stepfather also

sought the evidence of the solicitor. The Magistrate "having weighed the public interest in protecting solicitor and client communications against the public interest in securing all relevant evidence was available to the defence" issued a summons to the solicitor. A second summons was issued to the applicant himself. The applicant was unable to persuade the Divisional court to quash either summons. *Derby Magistrates'* was thus concerned with what is now known as "legal advice" privilege. The House of Lords held that the public interest in solicitor/client privilege was paramount. Accordingly, the appeal was allowed and the Magistrates' decisions were quashed.

It was argued for the stepfather that the applicant had no continuing interest in keeping his communications with his solicitor secret (he could not be tried again for the murder) and therefore the public interest in the availability of evidence for the stepfather's defence outweighed and overrode the applicant's claim to solicitor and client privilege. Counsel for the stepfather relied on *R.* v. *Barton* [1973], 1 W.L.R. 115 in which the court had held that natural justice required the admission of such evidence and *R.* v. *Ataou* [1988], Q.B. 798 which followed *Barton*. Consequently, the House of Lords was asked to undertake the balancing exercise carried out in *Lion Laboratories*.

Lord Taylor of Gosforth C.J. gave the primary judgment with which the other Law Lords agreed. Lord Taylor identified the important question in the appeal as:

> "whether when there is a claim for privilege in respect of confidential communications between solicitor and client there is a balancing exercise to be performed at all."

It was argued by counsel for the applicant before the House of Lords that there was no hint of such a balancing exercise in the long history of legal professional privilege (i.e. legal advice privilege) prior to the decision in *R.* v. *Barton*.[2]

Lord Taylor reviewed the history of legal professional privilege tracing it back to *Berd* v. *Lovelace* a case decided in 1577 and noted in *Holdsworth: A History of English Law* 3rd Ed. Vol. 9. page 201.[3]

Lord Taylor said that the privilege was originally based on the honour of the attorney which is the conclusion reached by *Wigmore*.[4] Lord Taylor then sets out the authorities which define the modern rule of legal advice privilege and the rationale for it beginning at page 505:

> "Although the rule was thus established by the end of the 18th century, the reason for the rule was not fully developed until two cases heard and decided by Lord Brougham L.C., one after the other, at the beginning of 1833. In *Greenough* v. *Gaskell* [1833] 1 M & K. 98, the question was whether the privilege was confined to cases where legal proceedings were already in contemplation. Lord Brougham L.C. held it was not. As to the reason for the rule, Lord Brougham L.C. said, at page 103:
>
> > 'The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers. But it is out of regard to the interests of justice, which cannot be upholden

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[2] There is however, a hint of "balancing" in the cases concerning deeds which were relied on in *Calcraft*, but those cases did not involve "legal advice privilege".

[3] *Wigmore* traces the history to the reign of Elizabeth I "where the privilege already appears to be unquestioned" citing the same case. (*Wigmore on Evidence* 1961, §. 2290).

[4] *Wigmore* points out that under the original theory the privilege did not at all exempt the client. The pledge of secrecy which bound the attorney had not been taken by the client and therefore the "point of honour" was not the client's to make. (*Wigmore* § 2290). This fact and the Discovery rules which prevailed in the old Courts of Chancery are essential background to an understanding of *Calcraft*.

> and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.'

In *Bolton* v. *Liverpool Corporation* [1833] 1 M. & K. 88, the defendant in civil proceedings sought inspection of the plaintiff's case to counsel to advise (though not apparently the advice itself) and filed a bill of discovery in equity for that purpose. Not surprisingly the defendant failed. Lord Brougham L.C. said, at page 94:

> 'It seems plain, that the course of justice must stop if such a right exists. No man will dare to consult a professional adviser with a view to his defence or to the enforcement of his rights The very case which he lays before his counsel, to advise upon the evidence, may, and often does, contain the whole of his evidence, and may be, and frequently is, the brief with which that or some other counsel conducts his cause. The principle contended for, that inspection of cases, though not of the opinions, may always be obtained as a right, would produce this effect, and neither more nor less, that a party would go into court to try the cause, and there would be the original of his brief in his own counsel's bag, and a copy of it in the bag of his adversary's counsel.'

Numerous cases throughout the 19th century repeated the same themes. Thus in *Holmes* v. *Baddeley* [1844] 1 Ph. 476, 480-481 Lord Lyndhurst L.C. said:

> 'The principle upon which this rule is established is that communications between a party and his professional advisers, with a view to legal proceedings, should be unfettered; and they should not be restrained by any apprehension of such communications being afterwards divulged and made use of to his prejudice. To give full effect to this principle it is obvious that they ought to be privileged, not merely in the cause then contemplated or depending, but that the privilege ought to extend to any subsequent litigation with the same or any other party or parties...The necessary confidence will be destroyed if it be

known that the communication can be revealed at any time.'

In *Anderson* v. *Bank of British Columbia* [1876] 2 Ch. D. 644, 649 Sir George Jessel M.R. said:

> '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, the he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him, should be kept secret, unless with his consent...that he should be enabled properly to conclude his litigation.'

In *Southwark* v. *Vauxhall Water Co.* v. *Quick* [1878] 3 Q.B.D. 315, 317-318 Cockburn C.J. said:

> 'The relation between the client and his professional legal adviser is a confidential relation of such a nature that to my mind the maintenance of the privilege with regard to it is essential to the interests of justice and the well-being of society. Though it might occasionally happen that the removal of the privilege would assist in the elucidation of matters in dispute, I do not think that this occasional benefit justifies us in incurring the attendant risk.'

In *Pearce* v. *Foster* [1885] 15 Q.B.D. 114, 119-120 Sir Balliol Brett M.R. said:

> 'The privilege with regard to confidential communications between solicitor and client for professional purposes ought to be preserved, and not frittered away. The reason of the privilege is that there may be that free and confidential communication between solicitor and client which lies at the foundation of the use and service of the solicitor to the client; but, if at any time or under any circumstances such communications are subject to discovery, it is obvious that

> this freedom of communication will be impaired. The liability of such communications to discovery in a subsequent action would have this effect as well as their liability to discovery in the original action.'

In *Calcraft* v. *Guest* [1898] 1 Q.B. 759, 761, Sir Nathaniel Lindley M.R. said: "I take it that, as a general rule, one may say once privileged always privileged. I do not mean to say that privilege cannot be waived..."

I may end with two more recent affirmations of the general principle. In *Hobbs* v. *Hobbs and Cousens* [1960] P. 112, 116-117 Stevenson J. said:

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

In *Balabel* v. *Air India* [1988] Ch. 317 the basic principle justifying legal professional privilege was again said to be that a client should be able to obtain legal advice in confidence.

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

The following principles have therefore been recognized or established by the House of Lords in *Derby Magistrates';*

(a) a client must "be able to make a clean breast of it" (*Anderson* v. *Bank of British Columbia*);

(b) "though it might occasionally happen that the removal of the privilege would assist in the elucidation of matters in dispute, I do not think that this occasional benefit justifies us in incurring the attendant risk" (*Southwark* v. *Vauxhall Water Co.* v. *Quick*);

(c) "if at any time or under any circumstances such communications are subject to discovery, it is obvious that the freedom of communication will be impaired" (*Pearce* v. *Foster*); and

(d) "there is ...an abundance of authority in support of a proposition that once legal professional privilege attaches to a document...that privilege attaches for all time and in all circumstances" (*Hobbs* v. *Hobbs and Cousens*).

While those statement may be consistent with the theory that privilege is a rule relating to compulsory disclosure rather than admissibility it seems to me that the evil the quoted passages identify will occur just as surely if the privilege is lost as the result of theft or fraud.

While Lord Taylor cited *Calcraft*, his reference to it was restricted to part of one sentence in the judgment of Lindley M. R. to the effect that while privilege may be waived "once privileged always privileged".

At page 508 Lord Taylor mentioned the argument put forward in favour of balancing the public interest in the maintenance of legal advice privilege against other public policy objectives and said:

> "Mr. Richards, as *amicus curiae*, acknowledged the importance of maintaining legal professional privilege as the general rule. But he

submitted that the rule should not be absolute. There might be occasions, if only by way of rare exception, in which the rule should yield to some other consideration of even greater importance. He referred by analogy to the balancing exercise which is called for where documents are withheld on the ground of public interest immunity, and cited the speech of Lord Simon of Glaisdale in *D* v. *National Society for the Prevention of Cruelty to Children* [1978] A.C. 171, 233, and in *Waugh* v. *British Railways Board* [1980 A.C. 521, 535. But the drawback to that approach is that once any exception to the general rule is allowed, the client's confidence is necessarily loss. The solicitor, instead of being able to tell his client that anything which the client might say would never in any circumstances be revealed without his consent, would have to qualify his assurance. He would have to tell the client that his confidence might be broken if in some future case the court were to hold that he no longer had "any recognisable interest: in asserting his privilege. Once can see at once that the purpose of the privilege would thereby be undermined.[5]

As for the analogy with public interest immunity, I accept that the various classes of case in which relevant evidence is excluded may, as Lord Simon of Glaisdale suggested, be regarded as forming part of a continuous spectrum. But it by no means follows that because a balancing exercise is called for in one class of case, it may also be allowed in another. Legal professional privilege and public interest immunity are as different in their origin as they are in their scope. Putting it another way, if a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the 16th century, and since then has applied across the board in every case, irrespective of the client's individual merits."

Lord Taylor concluded his judgment as follows (again at page 508):

"One can have much sympathy with McCowan L.J.'s approach, especially in relation to the unusual facts of this case. But it is not for the sake of the applicant alone that the privilege must be upheld. It is in the wider interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors. For this reason I am of the opinion that no exceptions should be allowed to the absolute nature of legal professional privilege, once established. It follows that *Reg.* v. *Burton* [1973] 1 W.L.R. 115 and *Reg.* v. *Ataou* [1988] Q.B. 798 were wrongly

[5] It seems to me that these statements are inconsistent with the suggestion that privilege in a document can be lost if it is stolen.

> decided and ought to be overruled. I therefore considered these appeals should be allowed on both grounds and the case remitted to the High court, with a direction that the decisions of the stipendiary magistrate and the justice of the peace dated 21 June and 8 August 1994 be quashed.

Lord Lloyd of Berwick agreed with Lord Taylor's judgment and said (at page 509):

> "For the reasons which he (Lord Taylor) gives, I regard *Reg.* v. *Ataou* [1988] Q.B. 798 as having been wrongly decided. This is not, I think, because of any inherent difficulty in the balancing exercise proposed in that case. The task is no harder in the case of legal professional privilege than it is in other cases, for example, where there is a claim to withhold documents on the ground of public interest immunity: see *D* v. *National Society for the Prevention of Cruelty to Children* [1978] A.C. 171, 231-233, *per* Lord Simon of Glaisdale."

Lord Nicholls of Birkenhead referred (at page 510) with approval to the Australian case of *Grant* v. *Downs* where the court said:

> "The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision."

At page 511-512 Lord Nicholls described the balancing exercise as a "seductive submission" but one that should be resisted. He said:

> "Inherent in the suggested balancing exercise is the notion of weighing one interest against another. On this argument, a client may have a legitimate, continuing interest in non-disclosure but this is liable to be outweighed by another interest. In its discretion

> the court may override the privilege against non-disclosure. In *Reg.* v. *Ataou* the court of Appeal expressed the matter thus, at page 807: "the judge must...balance whether the legitimate interest of the defendant in seeking to breach the privilege outweighs that of the client in seeking to maintain it."
>
> There are real difficulties here. In exercising this discretion the court would be faced with an essentially impossible task. One man's meat is another man's poison. How does one equate exposure to a comparatively minor civil claim or criminal charge against prejudicing a defence to a serious criminal charge? How does one balance a client's risk of loss of reputation, or exposure to public opprobrium, against prejudicing another person's possible defence to a murder charge? But the difficulties go much further. Could disclosure also be sought by the prosecution, on the ground that there is a public interest in the guilty being convicted? If not, why not? If so, what about disclosure in support of serious claims in civil proceedings, say, where a defendant is alleged to have defrauded hundreds of people of their pensions or life savings. Or in aid of family proceedings, where the shape of the whole of a child's future may be under consideration? There is no evident stopping place short of the balancing exercise being potentially available in support of all parties in all forms of court proceedings. This highlights the impossibility of the exercise. What is the measure by which judges are to ascribe an appropriate weight, on each side of the scale, to the diverse multitude of different claims, civil and criminal, and other interests of the client on the one hand and the person seeking disclosure on the other hand?
>
> In the absence of principled answers to these and similar questions, and I can see none, there is no escaping the conclusion that the prospect of a judicial balancing exercise in this field is illusory, a veritable will-o'-the-wisp. That in itself is a sufficient reason for not departing from the established law. Any development in the law needs a sounder base than this. This is of particular importance with legal professional privilege. Confidence in non-disclosure is essential if the privilege is to achieve its raison d'etre. If the boundary of the new incursion into the hitherto privileged area is not principled and clear, that confidence cannot exist."

I am aware of course, that *Derby Magistrates'* did not involve a stolen document and that the House of Lords was not called upon to decide any "secondary evidence" issue. The privileged information sought by counsel for the stepfather had not been disclosed. However, it is also

clear that the law Lords were well aware of the *Calcraft* case. The question is whether the introduction of secondary evidence of a privileged document in the circumstances prevailing in *Calcraft* is incompatible with the description of the nature and scope of the privilege set forth not only in *Derby Magistrates'* but in the authorities relied on by the House of Lords in that case. I am not alone in thinking that it is time to re-examine *Calcraft*.[6] I feel obliged to do so in order to see whether or not the decision in *Calcraft* can stand with the judgment of the House of Lords in *Derby Magistrates'*.

Calcraft* v. *Guest

Calcraft involved a dispute over title to a fishery. In that case the plaintiff sued the defendant for trespass and was successful. The defendant appealed but before the appeal was heard, she was provided with copies of documents (which has been found in the home of a descendent of one of the parties to earlier litigation). These included "proofs of witness and rough notes of evidence" used in the defence of an action relating to the same fishery which had been tried in 1787 more than one hundred years before. (This is the only description of the "privileged" documents to be found in the report.) Cozens-Hardy, Q.C., (as he then was) appeared for the defendant/appellant and argued that copies of the documents were admissible citing *Bishop of Meath* v. *Marquis of Westminster* (1836) 4 Cl. & F. 445, 7 E.R. 171 and *Lloyd* v. *Mostyn* [1842] 10 M. & W 478,152 E.R. 558.

There were two questions to be decided in *Calcraft*;

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[6] See *English and American Insurance Co. Ltd.* v. *Herbert Smith* (1998) F.S.R. 232 per Sir Nicolas Browne-Wilkinson at p. 237

1. Whether the proofs of witnesses and notes of evidence (and other documents) were privileged; and

2. If they were, whether secondary evidence could be given of them.

Lindley M.R. gave the judgment in *Calcraft* on behalf of the court of Appeal. At page 761-763 he said:

> "We must be a little cautious in what we say, because we shall have to consider each particular document when it is tendered in evidence, and it may be that some of them are not admissible on other grounds. Therefore, I shall confine my remarks entirely to the question of professional privilege and the right to give secondary evidence of documents so privileged. Now, as regards professional privilege, on looking at the authorities, it appears to me that this case is covered by the case of *Minet* v. *Morgan*, ([1873] 8 Ch. App. 361) and that if there are any documents which were protected by the privilege to which I am alluding that privilege has not been lost. I take it that, as a general rule, one may say once privileged always privileged. I do not mean to say that privilege cannot be waived, but that the mere fact that documents used in a previous litigation are held and have not been destroyed does not amount to a waiver of the privilege."[7]

At page 762:

> "Then comes the next question. It appears that the appellant has obtained copies of some of these documents, and is in a position to give secondary evidence of them; and the question is whether he is entitled to do that. That appears to me to be covered by the authority of *Lloyd* v. *Mostyn*. I need not go closely into the facts of that case. That was an action on a bond which was said to be privileged from production on the ground of its having come into the hands of the solicitor in confidence, and the learned judge at the trial allowed the objection, and nobody seems to have quarrelled with it. The plaintiff then tendered in evidence a copy of the bond, and proposed to give secondary evidence of it. This was rejected on the ground that notice to produce was necessary. The plaintiff then proved a notice to produce, the sufficiency of

[7] This statement is consistent with the original rationale for the privilege i.e. the honour of the Attorney. It does not recognize, at least explicitly, the reach of Bills of Discovery in Chancery or the fact that the client was not excused from testifying (see note 4).

> which was disputed. The learned judge being of opinion that the notice was sufficient, held that the copy was admissible, and the jury found a verdict for the plaintiff for the full amount of the bond,..."

The Master of the Rolls then referred to a case said to have been decided in 1809 (*Fisher* v. *Heming*) in which it had been held by Bayley J. that:

> "If a deed deposited confidentially with an attorney has been obtained out of his hands for the purpose of being produced in evidence by another witness, it cannot be received."

Lindley M.R. then said at page 764:

> "Upon that Parke B. (in *Lloyd* v. *Mostyn*) said: "I have always doubted the correctness of that ruling. Where an attorney entrusted confidentially with a document communicates the contents of it, or suffers another to take a copy, surely the secondary evidence so obtained may be produced. Suppose the instrument were even stolen, and a correct copy taken, would it not be reasonable to admit it?" The matter dropped there; but the other members of the court (Lord Abinger, Gurney B., and Rolfe B,) all concurred in that..."

It is important to note that in *Calcraft*:

(a) On the question of admissibility the court relied on *Lloyd* v. *Mostyn*, not *Meath* v. *Winchester* nor *Minet* v. *Morgan*;

(b) there was no discussion in *Calcraft* of the public interest behind legal advice privilege or any other public interest for that matter; and

(c) Proofs of witnesses and notes of evidence would now (if privileged) seem to be the subject of litigation privilege not legal advice privilege.

Both Lord Taylor in *Derby Magistrates'* and *Wigmore* say that the rules surrounding legal professional privilege took a very long time to develop[8]. It will be recalled that the original rationale (the honour of the attorney) was eventually displaced by a completely different rationale. As *Wigmore* has pointed out, under the honour of the attorney theory the privilege did

[8] The rules concerning legal advice privilege took much longer. Indeed it can be said that they are still developing (*Phipson* §20-31 and 20-32).

not exempt the client from testifying as to privileged matters although a party to civil proceedings at common law was not obliged to testify in civil cases at all (*Wigmore* § 2217).

Wigmore points out that one consequence of the slow development of the modern theory of solicitor and client privilege was that:

> "...by reason of the inconsistency of the two theories in some of their practical applications, the older notion, so far as represented in precedents, struggled along for some time by the side of the newer one, like two powerful streams debauching into the same channel; and until the domination of the newer one was finally established throughout its boundaries, a turbid and confused volume of rulings abounded. Probably in no rule of evidence having so early an origin were so many points still unsettled until the middle of the 1800's." (*Wigmore* § 2290)

Then *Wigmore* says:

> "In the next place, the attorney's exemption was by the original theory limited to communications received since the beginning of the *litigation at bar* and for its purposes only. The point of honor would protect him thus far. But it was gradually falling into disfavor as the 1700's progressed (§2286 *supra*), and it would not be recognized further than could be helped. "When the cause is ended." says Chief Baron Bowes in 1843, "he is then only to be considered, with respect to his former employer, as one man to another; and then the breach of trust does not fall within the jurisdiction of this court; for the court can't determine what is honor, but what is law."[9]
>
> Under the influence of the newer theory, an extension of the attorney's exemption of course took place to include communications made, first, during any other litigation; next, in contemplation of litigation; next, during a controversy but not yet looking to litigation; and, lastly, in any consultation for legal advice, wholly irrespective of litigation or even of controversy.[10] But this gradual extension occupied (in England, at least) nearly a

[9] The history of legal advice privilege shows an overlap with one of the requirements for litigation privilege. If Chief Baron Bowes' words are applied to *Calcraft* the proofs of witnesses and notes of evidence would not have retained their privileged status.

[10] This is *Minet* v. *Morgan* [1873].

> hundred years of judicial annals, and the shackles of the earlier precedents were not finally thrown off until the decade of 1870."

Minet v. *Morgan* was decided in 1873, and marked the final stage of the extension of legal advice privilege identified by *Wigmore*. Even so, many of the cases decided before *Minet* v. *Morgan* from which we can trace the gradual disappearance of the requirement that solicitor client communications had to be related to litigation to be privileged, were based on the original honour of the attorney rationale. The need for litigation pending or contemplated is therefor a distinct aspect of the evolution of the privilege. Accordingly, Chief Baron Bowes' statement would apply to the facts in the *Bishop of Meath's* case which I will come to in due course. However, the decision in *Calcraft*, in so far as the admissibility of the privileged documents was concerned, was based on another privilege which must be regarded as distinct from legal advice privilege. The privilege relating to documents of title.

Wigmore deals with the privilege relating to title deeds which was the privilege involved in *Fisher* v. *Heming* referred to by Baron Parke in *Lloyd* v. *Mostyn*. It is this privilege which the court of Appeal in *Calcraft* somehow applied to "proofs of witnesses and rough notes of evidence". At § 2211 *Wigmore* deals with "Documents of title, lien, etc." as follows:

> "The mere fact that a document concerns the property or other private affairs of the witness, or that its disclosure would in his opinion inconvenience him, does not create a privilege. The duty to assist the truth (§2192 *supra*) is paramount and indeed presupposes some sort of sacrifice by the witness. Subject, then, to a general discretion in the court to decline to compel production where in the case in hand the document's utility in evidence would not be commensurate with the detriment to the witness, *any and every document* may be called for, however personal and private its contents may be.
>
> To this conceded general rule, two exceptions have been urged:

(a) The *title deeds to land* were in England at common law always a secret of extraordinary importance (before the modern system of title registration). The landed interests, at the time of the common law's formulation and for long, were overwhelmingly dominant in politics, religion and social intercourse. The safety of those interests was a paramount object. Now, under any title system not founded on compulsory public registration, the secrecy of the title instruments comes to be a vital consideration for the occupants of the land. Their right of possession may be unquestioned, but the instruments under which they claim are constantly defective in some important feature. A boundary may vary, a release be missing, a recital be incorrect. A score of defects of one sort or another might be discoverable in the chain of title. But the possession and the title are as yet unquestioned, and thus the security of title depends practically on preserving these defects from ascertainment by persons opposed in claim, or by blackmailers, who might be only too glad to take advantage of them. It comes therefore to be a fundamental maxim of law that each occupant is entitled to keep secret his documents of title. Without this, almost any title in the country might lie in jeopardy. It is an absolute demand of self-interest that the appearance shall pass for the reality, and that land possessors shall not be obliged to occupy and to invest on sufferance, in the constant risk of an overturn through the disclosure of their defective title in the course of testimony casually required for the benefit of strangers litigant.

This principle, then, that the disclosure of *title deeds* in litigation *between other parties* was not compellable, appears to have been always accepted in English courts, coming down as an unquestioned tradition. And it was occasionally extended to documents other than those affecting land, though it seems ever to have been regarded as limited by the trial court's discretion."[11]

Wigmore then cites the following cases which show the exercise of that discretion:

(a) *Copeland* v. *Watts* [1815] 1 Stark. N.P. 95 – "a lease belonging to a third person produced and read, the judge believing that its production would not be prejudicial to the third person's interests."

(b) *Corson* v. *Dubois* [1816] Holt 239 – "Gibbs, C.J. compelled the production of papers of bankruptcy assignees not parties, the production not being prejudicial to them."

[11] "It would be mischievous" said the learned judges of the Common Pleas "If it could be doubted whether or not an attorney consulted upon a man's title to an estate was at liberty to divulge a flaw". per Lord Brougham in *Greenough* 39 E.R. at 620

(c) *Doe* v. *Langdon* [1848] 12 Q.B. 711 – "an abstract held not privileged where no injury could be apprehended by its production."

There can be no doubt that in all of these cases the court balanced the court's need for evidence against the privilege there in question and the risk of harm to the beneficiary of the privilege and concluded there was no risk of harm to the beneficiary.

In *Derby Magistrates'* it was said that the long history of the legal advice privilege did not include any examples of balancing but it is clear that balancing occurred in these cases cited by *Wigmore*. These cases can be easily reconciled with the judgment in *Derby Magistrates'* by recognizing that the "deed" cases were not decisions about legal advice privilege as we now know it. The court's reasoning in *Calcraft* did not involve legal advice privilege as such. It was presumed to be a case involving a privilege similar to, if not identical to, the privilege surrounding title deeds. On its facts *Calcraft* might also have been properly described as a litigation privilege case, as the documents which with the court was there concerned with were proofs of witnesses and notes of evidence. If so, the litigation for which the document had been created had terminated a century before.

As *Phipson* says (paragraph 20-06)

> "The precise definition of litigation privilege is open to debate. Whilst it is treated here under the heading "litigation privilege" on the basis that it protects communications in furtherance of litigation, such communications as between client and lawyer will in any event be protected by legal advice privilege. It has been said that this head of privilege is properly referred to under the heading "communications with third parties" as it is only in those circumstances that the head of privilege adds to legal advice privilege".

It seems to me that there are a number of items that are covered by litigation privilege (e.g. the content of counsel's brief), which can hardly be supported by the overriding public policy underpinning legal advice privilege stated in *Derby Magistrates'* and the cases there relied on. The early cases show an intermingling of what are now seen as two distinct aspects of legal professional privilege i.e. legal advice privilege and litigation privilege. Title, or deed privilege was a third distinct privilege (*Rawston* v. *Preston Corp.* [1885] 30 Ch. D. 116 at 117-118).

It should be recalled that Lindley M.R. began his judgment in *Calcraft* by saying that so far as professional privilege was concerned, "once privileged always privileged". If the rationale for that privilege was the honour of the attorney, then it could not be argued that the attorney's honour was in any way impeached or impaired if a document in the attorney's possession came into the hands of a third party without any fault whatever on the party of the attorney. If that occurred, the professional privilege (at the time it was confined to a prohibition against disclosure by attorneys) no longer applied as the privilege did not, in any event exempt the client himself. Some of the statements in the modern cases to the effect that disclosure by any means destroys the privilege may be a throwback to those times, as that outcome would have been consistent with the original rationale for the privilege. Similarly, if the rationale for "deed" privilege was the need to keep clients' documents secret then it would make no difference whether the document was stolen from the attorney (the client's agent) or the client himself. In either case, the privilege would be lost as the "secret" would be out. Unlike confidential information generally (e.g. trade secrets) the purpose of legal professional privilege is to protect the client against the use of privileged communications in court proceedings rather than from competition or mere embarrassment.

The public interest as explained in *Derby Magistrates'* is in making sure that the client can make a clean breast of it when communicating with his or her lawyer, free from any concern that what the client discloses to the professional legal advisor might be used against the client in court of law. The disclosure of defects in title could well lead to disastrous economic consequences but there is no obvious reason why title documents had to be placed in the custody of lawyers to begin with rather than kept safely by the client. While there is no reason not to regard an attorney's possession of his client's documents as part of the attorney's professional duties or to exclude the attorney's obligations of confidence with respect to the contents of such documents from being generally described as part and parcel of legal professional privilege, there is also no reason to apply the public interest rationale for legal advice privilege to those documents *per se*. There is certainly no trace of the modern rationale for legal advice privilege in the deed cases.

On the other hand in *Marston* v. *Downs* (1834) 6 Car. P.380 172 E.R. 1285 we can see the application of deed privilege in combination with the honour of the attorney privilege and the rules relating to secondary evidence:

> "In an action against a mortgagor the attorney of the mortgagor who has the mortgage deed cannot be compelled to produce it if he objects so to do; nor can he be compelled to give evidence of its contents, but he may be asked for what purpose the money was raised and secondary evidence may be given of the contents of the mortgage deed".[12]

In addition to *Lloyd* v. *Mostyn*, counsel in *Calcraft* cited the judgment of the House of Lords in *Bishop of Meath* v. *Winchester*, [1836] 4 Cl. & F., 445, 7 E.R. 171, and *Minet* v. *Morgan*, [1870] 8 Ch. App. 361.

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[12] The attorney could be required to disclose whether a document in her possession had been executed *Lord Say & Seal's* case [1712] 88 E.R. 617.

The *Bishop of Meath* case is not mentioned in Lindley M.R.'s judgment.

An understanding of both these decisions is in my view essential to an understanding of *Calcraft*.

It is necessary to begin with a reference to the decision of the House of Lords in *Radcliffe* v. *Fursman*, [1730] 2 Bro. P.C. 514, 1 E.R. 1101, in which it was held that a case stated by a client for the opinion of counsel was discoverable in equity.

In *Hughes* v. *Biddulph*, [1827] 4 Russ.190, 38 E.R. 777, Lord Lyndhurst held that *Radcliffe* v. *Fursman* did not extend to require the production of correspondence between solicitor and client relating to litigation in progress or contemplated. (Here we see the intermingling of what are now the rules relating to litigation privilege with legal advice privilege).

In *Minet* v. *Morgan* Lord Selbourne L.C. held that the plaintiff would not be compelled to produce confidential correspondence between himself and his predecessors in title and their respective solicitors with respect to questions connected with the matters in dispute in litigation, even if made before any specific litigation was in contemplation. It is not at all clear how this decision relates to proofs of witnesses but counsel for the party objecting (Cripps, Q.C.) to the admissibility of the privileged documents in *Calcraft* said such were documents confidentially prepared for the purposes of litigation.

It will be recalled that in *Derby Magistrates'* Lord Taylor referred to the judgments of Lord Brougham in *Greenough* v. *Gaskell* and in *Bolton* v. *Liverpool*.

Both of those cases were decided after *Hughes* v. *Biddulph* but before *Minet* v. *Morgan*, (as was the *Bishop of Meath's* case.),

In *Greenough*, Lord Brougham after referring to *Hughes* v. *Biddulph*, said at p. 620 (E.R. Report):

> "... in two cases before Lord Lyndhurst (*Hughes* v. *Biddulph, Vent* v. *Pacey* and one since I sat here (*Bolton* v. *Corporation of Liverpool*) the principle has been acted upon, that even the party himself cannot be compelled to disclose his own statements made to his counsel or solicitor in the suit pending or with reference to that suit when in contemplation. But the party has no general privilege or protection; he is bound to disclose all he knows and believes and thinks respecting his own case; and the authorities therefore are that he must disclose also the cases he has laid before counsel for their opinion unconnected with the suit itself."

> "If it (the privilege) were confined to proceedings begun or in contemplation, then every communication would be unprotected, which a party makes with a view to his general defence against attacks which he apprehends although at the time no one may have resolved to assail him. But were it allowed to extend over such communications, the protection would be insufficient, if it only included communications more or less connected with judicial proceedings; for a person oftentimes requires the aid of professional advice upon the subject of his rights and his liabilities, with no reference to any particular litigation and without any other reference to litigation generally than all human affairs have, insofar as every transaction may, by possibility become a subject of judicial inquiry. "It would be most mischievous" said the learned judges "in the Common Pleas" if it could be doubted whether or not an attorney consulted upon a man's title to an estate was at liberty to divulge a flaw".[13]

(This passage was followed by the paragraph quoted by Lord Taylor in *Derby Magistrates'*).

Lord Brougham concluded his judgment in *Greenough* v. *Gaskell* as follows: (page 625 E.R. Report):

> "The great importance of this question, both in equity and at law, has induced me to go thus largely into it. The rules of evidence are

[13] Here Lord Brougham intermingles concepts relating to deed privilege with legal advice privilege.

> the same on both sides of the Hall[14]; the right which a party has on this side to a discovery from a defendant of what was communicated to him in his professional capacity, and the right which a party on either side has to obtain such information from a witness, are one and the same."

Greenough was a case in which a solicitor was sued for fraud by a third party and the court refused to order the production of entries and memoranda contained in the solicitor's books or communications made or received by him in his professional character. The proceeding was brought by a bill in equity. The point to be kept in mind here is that the court is still distinguishing between what the solicitor can be required to disclose and what the client must disclose, as Lord Brougham recognized that the client could be forced to disclose cases put to counsel "unconnected with the suit itself". Greenough was concerned with what an attorney could be compelled to disclose.

In *Bolton* v. *Liverpool*, [1833] 39 E.R. 614, a bill of discovery was brought in equity in aid of the defence to an action for the recovery of dues. The defendants in their pleading admitted that they had in their custody and relating to the matters in question cases which had been prepared and laid before counsel in contemplation of the then pending litigation and also certain deeds which were the title deeds and documents evidencing their title to the dues in question. Lord Brougham L.C. said at p. 617:

> "Next, with respect to the cases sought to be inspected. These are the cases laid before counsel in contemplation of the action, and pending the proceedings. ... they are sworn in the answer "to have been prepared in contemplation of and with reference to the action and suit". It is suggested that one of them is the very brief for counsel at the trial of the action, to prepare himself against which the plaintiff in equity claims the inspection. And whether this be

[14] The Hall is, of course, Westminster. It seems that the courts of Chancery were located on one side and the common law courts on the other.

> so in point of the fact or not is immaterial, as it may well occur in any cause, if the cases laid before counsel in reference to that cause can be obtained by coming to this court."

(This statement was followed by the passage quoted by Lord Taylor in *Derby Magistrates'*).

Lord Brougham continued after that passage to say (page 618 E.R. Report) referring to the client's disclosure obligations;

> ..."yet violent as such compulsory disclosure may be deemed, and wholly inconsistent with the possibility of safely transacting judicial affairs, if the authorities are in its favour, we must submit. *Radcliffe* v. *Fursman* is the case commonly relied on in these questions. It is a decision of Lord Kings affirmed in the House of Lords. If it had decided the question there would have been no alternative but submission. The report in *Browns Parliamentary Cases* is imperfect and in one respect not correct; for it conveys an inaccurate notion of the nature of the demurrer. But even by the report and certainly by the printed cases, which I have examined together with my noble and learned predecessor, it appears plain that the record did not show any suit to have been instituted or even threatened at the time the case was stated for the opinion of counsel; and the decision being upon the demurrer, the court had no right to know anything which the record did not disclose. All the court knew was that a case had been laid before counsel at some time, in order to satisfy the party consulting, whether his rights had been affected by a certain lapse of time."

It will be recalled that in *Radcliffe* c. *Fursman* the House of Lords held that a case stated for the opinion of counsel was discoverable. Lord Brougham distinguished *Radcliffe* v. *Fursman* on the basis that the case which the House of Lords required to disclose there, was not shown to have been made with reference to any actual or prospective litigation.

At the time these cases were decided, a solicitor could not be compelled to disclose solicitor/client communications whether or not such related to actual or prospective litigation. The honour of the attorney was engaged whether or not he was advising on

litigation. However, at the time Greenough and Bolton were decided, in order for the client to claim exemption from discovery on the basis of the privilege the case stated for the opinion of counsel had to be related to litigation.

In the *Bishop of Meath's* case (decided after *Greenough* and *Bolton)* there was a dispute over an advowson, (the entitlement to the office and emoluments of a Rector or Vicar of a church including the parsonage house). The admissibility of two documents which had been found together in the family mansion of a former Bishop of Meath was in issue. The first document was a deed dated 1637 and the second a case stated for the opinion of counsel in 1695 by a former Bishop. The documents in question had been obtained by the plaintiff (the defendant in error) from a descendant of the author of the case. The deed and case were admitted in evidence over the objection of the defendant (the Bishop and plaintiff in error). The jury found for the plaintiff (the defendant in error)

The House of Lords summoned the judges and sought their opinion which was given by Lord Chief Justice Tindall and adopted by the Lords. Lord Lyndhurst and Lord Brougham both took part. It was held that the deed and the case were both properly admitted in evidence. It appears that it was the earlier decision in the House of Lords in *Radcliffe* v. *Fursman* that dictated the admission of the case. Lord Brougham said regarding *Radcliffe*, that both he and Lord Lyndhurst were unhappy with the decision but "that case gives the law which we could not alter...the law of that case is not to compel the party to produce the case with his answer to explain it but to allow the case to be received in evidence without any explanation". The "answer" referred to by Lord

Brougham was the answer provided by the attorney i.e. the attorney's opinion. In other words, the case was producible and admissible but not counsel's opinion.

At page 181 Lord Brougham said as follows:

> "the rule at law is quite accordant with the principles applied in courts of equity in bills of discovery, in which the plaintiff has a right to wring the conscience, as the phrase is, of his adversary, and to inquire what he said in conversation with others, even with his attorney, on the subject of the suit. An action brought or suit instituted, or about to be brought or instituted, is an exception. But before litigation commences, although you may ask the party himself, and compel him to disclose what he said or stated in writing, you cannot ask the attorney or counsel to disclose what passed in private conversation with the client on the subject of the suit. The case of *Bolton* v. *The Corporation of Liverpool* did not so much turn on its being a case of tolls or matter of public interest as that it was within the common rule of courts of equity as to discovery. The effect of the decision is that you have no right to that which touches the title of your adversary only but that if it is part of your own title or a title in common the production of it may be compelled. In the present case there was no question of compulsory production. The document being produced by the plaintiff, the question was whether it was admissible in evidence against the Bishop's successor. The decisions in courts of equity show, that where a case has been laid before counsel, it is the inveterate practice of those courts, acted upon daily, that in any proceeding, except the suit actually pending, the defendant may be compelled by a bill of discovery to produce the case laid by him confidentially before his counsel but not the answer of the counsel, a rule apparently not very consistent. The exception of *lis mota* is confined to the suit pending or in immediate contemplation. The documents ordered to be produced in a court of equity would be evidence in an action at law".

The case stated for the opinion of counsel in 1695 in *Meath* could hardly have been prepared for the purpose of that case, which was decided by the House of Lords in 1836. In addition, Lord Brougham pointed out that in respect of the deed there was no question of compelling its

production as it was in the hands of the party who sought to use it. Secrecy could no longer be maintained.

The court in *Calcraft* accepted Mr. Cripps submission that the privilege which originally attached to documents prepared for the purposes of litigation did not lose their privileged character once that litigation terminated. This was a submission based on *Minet* v. *Morgan*. Cripps did not refer to *Meath*. The headnote to *Minet* v. *Morgan* reads as follows:

> *Minet* v. *Morgan* [1870] L.R. 8 Ch. App. 361:
>
> "A plaintiff will not be compelled to produce instruments of title which he swears do not, to the best of his knowledge, information and belief contain anything impeaching his case, or supporting or material to the case of the defendant.
>
> A plaintiff will not be compelled to produce confidential correspondence between himself or his predecessors in title and their respective solicitors with respect to questions connected with matters in dispute in the suit although made before any litigation was contemplated."

Lindley M.R. then said that the next question was whether secondary evidence of the proofs of witnesses and notes of evidence might be given and that question was covered by *Lloyd* v. *Mostyn*. (He made no reference to *Meath*). It seems apparent that if *Minet* v. *Morgan* extended the scope of legal advice privilege so that a client could no longer be compelled to produce a request for a legal opinion, whether or not the request was made for advice in respect of litigation actual or contemplated then if the documents in issue in *Calcraft* had been requests for legal advice (or title deeds) they would not be discoverable nor admissible and that is what Mr. Cripps was arguing. However, proofs of witnesses and notes of evidence are not requests for legal advice or title deeds and to be protected under the modern rule the document must have been prepared in contemplation of litigation.

As to the proposition that legal advice privilege relates only to compulsory disclosure and not to admissibility, Lord Brougham said in *Meath*:

> "the documents ordered to be produced in a court of equity would be evidence in an action at law".

Consequently, if the documents were privileged a court would not order their production and *a fortiori* such documents would be inadmissible, as the rules of evidence were the same in the court of Chancery and the common law courts i.e. "on both sides of the Hall".

The court in *Calcraft*, having found the documents to be privileged and found as well that the privilege had not been lost through waiver or otherwise, looked to *Lloyd* v. *Mostyn* as the basis for admitting secondary evidence of them treating the proofs of witnesses and notes of evidence as merely documents given to an attorney for safe keeping like title deeds.

Both *Lloyd* v. *Mostyn* and *Calcraft* v. *Guest* were regarded by the Privy Council as part of the basis for the rule that unlawfully obtained evidence is nonetheless admissible (*Kurama* v. *The Queen* [1955] A.C. 197).

However, there is no discussion in any of these cases, (nor in any case I have been able to find) as to why a privileged communication between a solicitor and his client should be admitted into evidence whether properly or improperly obtained assuming, as the court did in *Calcraft*, that the privilege still exists.

Neither *Lloyd* v. *Mostyn* nor *Calcraft* involved legal advice privilege. The judgment of the Court of Appeal in the latter case, was based on the judgment of Baron Parke in the former, which was directed entirely to the admissibility of a deed, the contents of which had (according to Baron Parke) been divulged by the attorney custodian or had come to light because the deed had been stolen. If "legal advice" is substituted for "deed or document given to an attorney for safe keeping" then, if its contents are divulged by the attorney, the loss of privilege is the result of the attorney's act with actual or ostensible authority and may be characterized as an implied waiver. However, if the document contains counsel's advice then if it is stolen or obtained by fraud the modern authorities suggest that the court will intervene to prevent the admission of the document in evidence (see Slade L.J. in *Guinness Peat Properties Ltd.* v. *Fitzroy Robinson Partnership* [1987] 1 W.L.R. 1027 at pages 1044-145) in which case the court intervenes to protect the beneficiary of the privilege. I do not see how the court can intervene to protect a privilege that has been lost. However, there is no explicit statement in *Calcraft* to suggest that the court thought that the privilege had been lost.

Consequently, as *Calcraft* stands for the proposition that copies of privileged documents are admissible, that is to say that even if the documents remain privileged they are nevertheless admissible if they fall into the wrong hands, then that is a proposition that in my opinion is incompatible with a decision of the House of Lords in *Derby Magistrates'*.

Just as I have been unable to ascertain the reason (if any) for admitting privileged solicitor and client communications into evidence, I have been unable to discover how or why theft or fraud of privileged communications destroys the privilege.

In any event, it is difficult to see Calcraft as a decision relating to the admission in evidence of copies of documents which are protected by the modern rule of legal advice privilege. When the question of admissibility was expressly resolved by the court in *Calcraft* on the basis of *Lloyd* v. *Mostyn* and the rules in force in 1898 relating to document privilege.

To my mind, the judgment of Swinfen Eady L.J. in *Lord Ashburton* v. *Pape* confirms that *Calcraft* was the result of applying the principles of "deed" privilege. (I will discuss *Ashburton* more fully in due course.) However, at page 476 in *Ashburton*, Lord Justice Swinfen Eady identified the confusion "between the right to restrain a person from divulging confidential information and the right to give secondary evidence of documents where the originals are privileged from production", if a party had obtained such secondary evidence. This passage clearly refers to restraining someone (i.e. an attorney) who was under a duty not to divulge confidential information from so doing. In his judgment in *Ashburton*, Lord Justice Swinfen Eady said (echoing the words of Baron Parke in *Lloyd* v. *Mostyn*);

> "The cases[15] are entirely separate and distinct. If a person were to steal a deed, nevertheless in any dispute to which it was relevant the original deed might be given in evidence by him at trial. It would be no objection to the admissibility of the deed in evidence to say you ought not to have possession of it. His unlawful possession would not affect the admissibility of the deed in evidence if otherwise admissible". [1913] 2 Ch. 469 at 476).

As I have said, it seems to me that it would make no difference in such a case whether the deed was stolen from the attorney or the client. Swinfen Eady L.J. is there simply stating the rule that evidence does not become inadmissible by reason of the fact that it has been unlawfully

[15] The "cases" are "the right to restrain a person from divulging confidential information and the right to give secondary evidence of documents where the originals are privileged from production".

obtained. It is one thing to say that a stolen document is admissible; it is quite another to say that a privileged document is admissible when privilege has not been waived simply because the document has been stolen. In *Ashburton* Lord Justice Swinfen Eady was clearly focussed on the fact that there was no privilege in a stolen deed. I do not understand how the rules relating to deed privilege can be applied to legal advice privilege which the House of Lords has now declared to be a "fundamental condition on which the administration of justice as a whole rests". "The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent"[16]. That could not possibly be the case if legal advice privilege could be lost without the client's consent, express or implied. The heart of legal advice privilege which protects solicitor/client communications is that at all times and under all circumstances such communications will be protected from disclosure (Emphasis added). If those words are not taken literally then clients cannot make a clean breast of it secure in the knowledge that such communications can never be disclosed without their consent. If *Calcraft* is still good law then the rule would have to be re-stated as subject to an exception in the event an otherwise privileged communication is stolen from the client or his legal advisor. That would undermine the privilege at least as much as the risk a court might "balance" the privilege against some other consideration. As Lord Taylor said:

> "Once any exception to the general rule is allowed, the client's confidence is necessarily lost".[17]

In *Derby Magistrates'* Lord Taylor relied on passages from the judgments in *Greenough, Bolton and Anderson* v. *Bank of British Columbia*. As I have mentioned, the law of solicitor client privilege was quite different at the time the first two of these cases were decided yet he applied

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[16] per Lord Taylor in *Derby Magistrates'* at page 507-508.
[17] per Lord Taylor in *Derby Magistrates'* at p. 507-508.

Lord Brougham'' words in support of the rationale behind the modern rules of legal advice privilege.

Similarly, the words of Jessel R. in *Anderson* were made in a case where the court held that a report made by a local manager of a bank, to the Bank's head office concerning a transaction which was expected to bring litigation against the bank was not privileged and had to be produced as the report had not been prepared on the instructions of a solicitor and counsel.

Consequently, in *Derby Magistrates'* the House of Lords was not quoting from these judgments in support of the propriety of the results in those cases or the rules in force when those cases were decided. For example, the House of Lords was clearly not advocating a return to discovery as practiced "daily" in the old court of Chancery which allowed counsel to wring the conscience of litigants by requiring them to disclose cases stated for the opinion of their legal advisers.

Legal advice privilege now extends to all solicitor/client communications for the purpose of seeking or giving legal advice and it is the rationale for that privilege which the House of Lords has clearly articulated.

I am therefor convinced that as the rules of this privilege reflect that rationale the application of those rules must also implement it.

Derby Magistrates' had nothing to do with the scope of discovery in civil cases. It had to do with whether or not the evidence which the stepfather wished to adduce should be admitted.

It therefore seems to me, that even if legal advice privilege began its life as a rule relating to compulsory disclosure that is no longer the case. It cannot be treated as such without undermining the rationale for it as laid down in *Derby Magistrates'*.

I agree with S. D. McNicol when he says that;

> "the rule in *Calcraft* was "developed at a time when eavesdropping techniques were undeveloped...the advent of modern listening devices and other eavesdropping techniques call for some drastic
>
> re-assessment of the need for a rule such as that in *Calcraft* v. *Guest*. A blanket common law rule which admits secondary evidence of a privileged communication whenever and however that communication comes into the hands of a third party is unacceptable." (S. B. McNicol *Law of Privilege* 1992 at page 91).

Lord Ashburton* v. *Pape

It seems that shortly after *Calcraft* was decided, the English court of Appeal itself became uncomfortable with the implications of that decision.

In *Lord Ashburton* v. *Pape* a clerk of one Nocton, Lord Ashburton's solicitor, gave privileged letters to Pape. Pape was bankrupt and Lord Ashburton was opposing his discharge. Pape's solicitors copied the privileged letters and returned the originals to Nocton. Neville J. made an order requiring Pape to return the copies of the letters so made by him and made a further order restraining Pape from publishing or making use of those copies except for the purposes of the pending bankruptcy proceedings. It was argued on appeal, on Lord Ashburton's behalf, that there had been a breach of confidence on the part of Nocton and that Pape owed the same fiduciary duty to Lord Ashburton as his solicitor. It was therefore argued that no use whatever should be made of the privileged documents. Cozens-Hardy M.R. (who had been counsel in *Calcraft*) said at page 472:

"In my opinion the contention of the appellant is right. Nocton's clerk, of course, has no right whatever to hand over the originals to Pape nor to make any copies of any sort or kind, and Pape, who was really a party to this transaction, was quite clearly under the same obligation, and liable to precisely the same jurisdiction as has long been exercised by this court. I do not go back to *Morison* v. *Moat*....

(Cozens-Hardy M.R. then quotes Kay L.J. referring to that case):

"Then the judgment goes on to give several instances, and many of them are of cases where a man, being in the employment of another, has discovered the secrets of the manufacture of that other person, or has surreptitiously copied something which came under his hands while he was in the possession of that trust and confidence, and he has been restrained from communicating that secret to anybody else, and anybody who has obtained that secret from him has also been restrained from using it." Apart, therefore, from these pending or threatened proceedings in bankruptcy, it seems to me to be perfectly clear that the plaintiff can obtain the unqualified injunction which he asks for. Now, can it make any difference that Pape says "I want, by means of these copies, to give secondary evidence in the bankruptcy proceedings?" In my opinion that is no ground for making any distinction. The rule of evidence as explained in *Calcraft* v. *Guest* merely amounts to this, that if a litigant wants to prove a particular document which by reason of privilege or some circumstance he cannot furnish by the production of the original, he may produce a copy as secondary evidence although that copy has been obtained by improper means, and even, it may be, by criminal means. The court in such an action is not really trying the circumstances under which the document was produced. That is not an issue in the case and the court simply says "Here is a copy of a document which cannot be produced; it may have been stolen, it may have been picked up in the street, it may have improperly got into the possession of the person who proposes to produce it, but that is not a matter which the court in the trial of the action can go into." But that does not seem to me to have any bearing upon a case where the whole subject-matter of the action is the right to retain the originals or copies of certain documents which are privileged. It seems to me that, although Pape has had the good luck to obtain a copy of these documents which he can produce without a breach of this injunction, there is no ground whatever in principle why we should decline to give the plaintiff the protection which in my view is his right as between him and Pape, and that there is no reason whatever why we should not say to Pape in pending or future

> proceedings, "You shall not produce these documents which you have acquired from the plaintiff surreptitiously, or from his solicitor, who plainly stood to him in a confidential relation." For these reasons I think the appeal ought to be allowed so far as it asks, and only so far as it asks, to strike out the exception."

Lord Justice Kennedy said at page 474:

> "I agree that the better view seems to me to be that although it is true that the principle which is laid down in *Calcraft* v. *Guest* must be followed, yet, at the same time, if, before the occasion of the trial when a copy may be used, although a copy improperly obtained, the owner of the original can successfully promote proceedings against the person who has improperly obtained the copy to stop his using it, the owner is none the less entitled to protection, because, if the question had arisen in the course of a trial before such proceedings, the holder of the copy would not have been prevented from using it on account of the illegitimacy of its origin. If that is so, it decides this case. There is no question here as to the facts, and on them it is quite clear these copies ought never to have got into Mr. Pape's possession in any shape or form."

I have already referred to a portion of Lord Justice Swinfen Eady's judgment. The full passage is as follows:

> "Then objection was raised in the present case by reason of the fact that it is said that Pape, who now has copies of the letters, might wish to give them in evidence in certain bankruptcy proceedings, and although the original letters are privileged from production he has possession of the copies and could give them as secondary evidence of the contents of the letters, and, therefore, ought not to be ordered either to give them up or to be restrained from divulging their contents. There is here a confusion between the right to restrain a person from divulging confidential information and the right to give secondary evidence of documents where the originals are privileged from production, if the party has such secondary evidence in his possession. The cases are entirely separate and distinct. If a person were to steal a deed, nevertheless in any dispute to which it was relevant the original deed might be given in evidence by him at trial. It would be no objection to the admissibility of the deed in evidence to say you ought not to have possession of it. His unlawful possession would not affect the admissibility of the deed in evidence if otherwise admissible. So again with regard to any copy he had. If he was unable to obtain or

> compel production of the original because it was privileged, if he had a copy in his possession it would be admissible as secondary evidence. The fact, however, that a document, whether original or copy, is admissible in evidence is no answer to the demand of the lawful owner for the delivery up of the document, and no answer to an application by the lawful owner of confidential information to restrain it from being published or copied."

It seems to me that in *Ashburton*, the court continued to rely upon the applicability of the deed cases[18] relied on by the court in *Calcraft* and in addition, as in *Calcraft* did not explicitly recognize that, while illegal acts in the obtaining of evidence might not be an impediment to its admissibility, the evidence in *Ashburton's* case was covered by legal advice privilege. As in *Calcraft* there is no reference in counsel's argument or in the judgments to any of the cases reviewed by Lord Taylor in *Derby Magistrates'*. There is no discussion in either case as to the logic or rationale for holding that copies of privileged documents are admissible.

What if in *Ashburton*, Pape had subsequently defied the injunction, retained copies of the correspondence and sought to adduce them in evidence in the bankruptcy proceedings. Would the bankruptcy judge have been powerless to prevent their admission? The same argument, i.e. that the unlawful acts preceding the tendering of the evidence do not render the evidence inadmissible could have been made. It is inconceivable that the evidence would have been admitted in those circumstances. While an injunction is a creature of equity, the rules of common law and equity have been fused for over a hundred years. If the injunction may now be sought in the same proceeding in which the evidence issue will ultimately arise, why can it not be dealt with by the trial judge when it does arise. If, in order to refuse to admit the evidence the

[18] The privilege relating to title documents was abolished in England by the *Civil Evidence Act 1968* (17(1) Hals. 4th paragraph 955).

court must find that the party seeking to keep it out would be entitled to an injunction so be it. That does not appear to be a reason to encourage a multiplicity of legal proceedings and require a separate proceeding such as an application for an injunction. After all, according to Lord Brougham the rules of evidence were the same in equity and at common law.

It appears that at least from the time when *Radcliffe* v. *Fursman* was decided in 1730 and sometime in the latter half of the 1800's a client's communications to his lawyers seeking legal advice could be obtained by the opposite party by a bill of discovery in equity and so (as Lord Brougham explained) were admissible in evidence at trial in a common law court. The old discovery rule has long disappeared. Information that was at one time discoverable is now privileged. Consequently, as the rationale for the admission of such evidence has disappeared from the law, the objection to the admissibility of it based on privilege should now be upheld. While *Lord Ashburton* v. *Pape* shows that innovative solutions to legal problems are nothing new there should no longer be a need for a *Lord Ashburton* solution to a *Calcraft* problem because there should no longer be a *Calcraft* problem.

At the time *Lloyd* v. *Mostyn* was decided (1842) the rationale for legal advice privilege (the honour of the attorney) had not been entirely displaced by the modern rationale and cases stated for the opinion of counsel were discoverable in equity. As Wigmore points out the privilege did not exempt the client. Once the document, whether a "case" or a deed, came into the hands of a third party, the use of it (or a copy of it) as evidence did not engage the attorneys honour. In addition, so far as a deed (or similar document) was concerned the court could admit it in evidence so long as the court was of the opinion that its disclosure would not harm the

beneficiary of the privilege. The court was then "balancing" the need for evidence against the potential harm which might result from the disclosure of the document. The court in *Calcraft* relied upon *Minet* v. *Morgan* for the proposition that the proofs of witnesses and notes of evidence had not lost their original character as privileged documents ("once privileged always privileged"). It is far from clear why the court regarded such documents as the equivalent of cases stated for the opinion of counsel but the various privileges at play in those times tended to run together or overlap. *Minet* v. *Morgan* was concerned with discovery rather than the admission of evidence and as a result the court in *Calcraft* looked to *Lloyd* v. *Mostyn* as the governing authority on the question as to whether or not the documents in question in *Calcraft* should be admitted. In *Lloyd* v. *Mostyn* the court held that a copy of the document there in question (a bond) was in an action on that bond admissible and that conclusion was based on one paragraph from the judgment of Baron Parke which bears repeating:

> "Where an attorney entrusted confidentially with a document communicates the contents of it, or suffers another to take a copy, surely the secondary evidence so obtained may be produced. Suppose the instrument were even stolen, and a correct copy taken, would it not be reasonable to admit it?"

There is no discussion in *Calcraft* of the rationale behind whatever privilege the court in *Calcraft* held that the documents there in issue were subject to or the reason for the admission of those documents in evidence. However, it is abundantly clear that *Calcraft* did not itself involve the admission into evidence of a case stated for the opinion of counsel.

In *Quinn* v. *Leatham* [1901] A.C. 495 (H. of L.) Lord Halsbury made a statement which has been quoted many times since, at page 506.

> "Now before discussing the case of *Allen* v. *Flood* and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

It seems to me that *Calcraft* cannot be taken as deciding more than it actually decided and that the decision is limited to documents subject to deed privilege or at most litigation privilege.

Deed privilege has been abolished and there is still today a debate as to the merit and scope of litigation privilege as apparent in some of the decisions I will come to. There is no statement in *Calcraft* to the effect that legal advice privilege in a document is lost if an attorney improperly discloses it or the document is stolen. In addition, there is no statement that a document which remains subject to legal advice privilege may (or a copy may) be admitted in evidence despite that privilege. It seems to me that *Calcraft* cannot be regarded as an authority for that proposition and if it has been so regarded, it can no longer be seen as support for a proposition which to my mind is utterly inconsistent with the words used by Lord Taylor in *Derby Magistrates'* i.e.:

> "legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests".

I will not deal extensively with the authorities cited to me which were decided prior to *Derby Magistrates'* but some are of importance.

Cases Decided Before Derby Magistrates'

In *Goddard* v. *Nationwide Building Society* [1987] 1 Q.B. 670 the Court of Appeal, while holding that notes of advice given by a solicitor to a client might although privileged be admissible in evidence, held that that was not an answer to a claim for an injunction by the person entitled to the privilege for the delivery up of copies of the attendance notes containing that advice. It is interesting to note that Lord Justice May queried the application of "deed" privilege to legal advice privilege and at page 685 Nourse L.J. said:

> "Once it is established that a case is governed by *Lord Ashburton* v. *Pape* [1913] 2Ch. 469 there is no discretion in the court to refuse to exercise the equitable jurisdiction according to its view of the materiality of the communication, the justice of admitting or excluding it or the like. The injunction is granted in aid of the privilege which, unless and until it is waived, is absolute. In saying this, I do not intend to suggest that there may not be cases where an injunction can properly be refused on general principles affecting the grant of a discretionary remedy, for example on the ground of inordinate delay."

How can the privilege be described as absolute if it is lost through theft or fraud?

It seems to me, that passage just quoted from Lord Justice Nourse's judgment in *Goddard* anticipates the result in *Derby Magistrates'*. In circumstances such as prevailed in *Goddard* and prevail in the case before me, there is to be no balancing of the public interest behind legal advice privilege and some other public interest. Similarly, there should be no need for injunction proceedings. Either objection to the admission of the evidence is taken when it is tendered or it is not. When does the period of alleged "inordinate" delay begin to run?

In *Webster* v. *James Chapman & Co.* [1989] 3 All E.R. 939, Mr. Justice Scott declined to apply the portion from the judgment of Nourse L.J. I have quoted above on the basis that it did not represent the ratio of the decision in *Goddard*. Mr. Justice Scott then went on to balance the legitimate interests of a plaintiff in seeking to keep the confidential (privileged) information suppressed and the legitimate interests of the defendant in seeking to make use of it and denied the injunction sought.

In *Derby & Co. Ltd.* v. *Weldon* [1991] 1 W.L.R. 73, Mr. Justice Vinelott in a case involving the accidental disclosure of privileged documents said at page 84:

> "Although I differ from Scott J. (in *Webster* v. *Chapman*) on a matter of this kind, with the greatest diffidence and reluctance, I am unable to share his view that the observations I have cited from the judgment of Nourse L.J. in *Goddard's* case [1987] Q.B. 670 were *obiter dicta*. Both Nourse and May L.J. took the view that the principle applied in *Ashburton's* case concerned documents to which legal professional privilege attached, and the injunctions granted in *Ashburton's* and in *Goddard's* cases in so far as they prevented, in *Ashburton's* case disclosure of the contents of the correspondence between Nocton and Lord Ashburton in the bankruptcy proceedings, or in *Goddard's* case using or relying on the solicitors' memorandum in the action, could not, as I see it, have been founded solely on the ground that the information contained in them had been imparted in confidence. If the injunction is sought, in the words of Nourse L.J. "in aid of legal professional privilege," no balancing act is called for. As Croom-Johnson L.J. pointed out in *The Aegis Blaze* [1986] 1 Lloyd's Rep. 203, 211, the balance between conflicting public policy considerations – that of completeness of the evidence before the court and that of legal professional privilege:
>
> > "should not be done in any circumstances where legal professional privilege attaches. The balancing act has already been done by the making of the rule of legal professional privilege; and to do what counsel for the respondents submitted should be done in subsequent litigation would be to deny, in effect, the existence of that rule."

Mr. Justice Vinelott granted the injunction sought and the defendant appealed. In the Court of Appeal, Dillon L.J. said at page 94:

> "The judge granted injunctions requiring the return of all copies and requiring that information contained in the documents should not be used in respect of all the documents except K, L and M. He distinguished those three from others of the 14 on the ground that, though in truth they were privileged as documents prepared with a view to instructing lawyers to advise, it did not appear from the face of the documents that that was the reason why they had been prepared, and therefore it was not immediately obvious that these were privileged documents. With all the others in A to N it was immediately obvious that they were privileged documents.
>
> The plaintiffs say that although they made a mistake, they should be allowed to have K, L and M in addition to those that they got back under the judge's order. The first and second defendants say that the judge was right about K, L and M, but the judge should also have refused to require the defendants to return document E, even though that is on its face a privileged document, because the judge should have carried out a balancing exercise in respect of each privileged document before ordering copies to be returned, and the importance to the defendants at the trial of the action of document E, and the importance of having all the salient facts available at the trial in the interests of justice, override its privileged, or previously privileged, nature.
>
> We have been referred in the course of argument to all the principle authorities which are concerned with what may happen where a copy of a privileged document gets into the hands, by one route or another, of the other party to the litigation, such as *Calcraft* v. *Guest* [1898] 1 Q.B. 759 and *Lord Ashburton* v. *Pape* [1913] 2 Ch. 469 where the court in advance of the trial granted an injunction, following the authorities on restraining disclosure of confidential information, to restrain a party from making any use of privileged documents which he had got either by fraud or by trick.
>
> Mr. Lyndon-Stanford has submitted, in a very carefully reasoned exposition of the authorities, that in truth, save for certain views expressed by Slade L.J. in *Guinness Peat Properties Ltd.* v. *Fitzroy Robinson Partnership* [1987] 1 W.L.R. 1027, the authorities in this court all lead to the view that the correct position in law is that if one party has disclosed privileged documents by mistake, then on application to the court the mistake can and will be set aside, and

> the other party will be ordered to return all copies of the documents in question and not make use of any information contained in them.

He continued at page 99:

> "Mr. Chambers says, "Even so, they should only be required to return documents which are on their face privileged." I do not see why the relief should be so limited. They are seeking to take advantage of an obvious mistake and they should give up all the documents which they have obtained as a result of that mistake. Accordingly they must also give up documents K, L and M.
>
> Mr. Chambers submits that there should be a balancing exercise in respect of document E. Document E records certain advice given by the plaintiff' solicitors at a time a compromise agreement was entered into, which the plaintiffs are claiming to have set aside in the action on grounds of fraud. I see no reason why any such balancing exercise should be carried out. The court does not, so far as privileged documents are concerned, weigh the privilege and consider whether the privilege should outweigh the importance that the document should be before the court at the trial, or the importance that possession of the document and the ability to use it might have for the advocate; and, again, where the privilege is being restored because the inspection was obtained by fraud or by taking advantage of a known mistake, there is to my mind no logic at all in qualifying the restoration of the status quo by reference to the importance of the document. "You have taken advantage of an obvious mistake to obtain copies of documents; we will order you to return all the ones that are unimportant but you can keep the ones that are important" would be a nonsensical attitude for the court to adopt."

Butler-Sloss L.J. and Legatt L.J. agreed. The appeal was dismissed.

Consequently, the court of Appeal in *Derby* & Co. Ltd. v. *Weldon* held that in cases such as this "the court does not...weigh the privilege and consider whether the privilege should outweigh the importance that the document should be before the court at the trial". In other words, *Derby & Co. Ltd.* v. *Weldon* anticipated *Derby Magistrates'* and applied the same rule to a case in which the privileged document had been disclosed. Based on *Goddard* and *Derby & Co.* v. *Weldon*

there is no need to appeal to the doctrines relating to the protection of confidential information generally the court acts in aid of legal professional privilege.

In *Derby & Co. Ltd.* v. *Weldon* the court made specific mention of the remarks made by Slade L.J. in *Guinness Peat Properties Ltd.* v. *Fitzroy Robinson Partnership* [1987 1 W.L.R. 1027 at 1043 i.e. "ordinarily..a party to litigation who sees a particular document referred to in the other sides list without privilege being claimed and is subsequently permitted inspection of that document is fully entitled to assume that any privilege which might otherwise have been claimed for it has been waived let there be no doubt about that". Lord Justice Slade went on to say that nevertheless, even if inspection of the document had taken place during the course of discovery the court was not powerless to intervene by way of injunction in the exercise of the equitable jurisdiction exemplified by *Ashburton* and other cases.

In *Pizzey* v. *Ford Motor Co. Ltd.* (The Times March 8 1993) (C. of A.) there was an inadvertent disclosure of documents protected by litigation privilege. In the judgment (given by Lord Justice Mann) it was said that if *Webster's* case had not been overruled in *Derby & Co.* v. *Weldon* it "ought to be disapproved now". Mann L.J. also held that a reliance by the Judge below on "balancing" was "in light of the authorities a misplaced reliance". In that case it was held that the privilege was lost upon disclosure, because a reasonable solicitor on the other side would not have realized that a mistake had been made. The court held that the appeal turned on the application of the judgment of Slade L.J. in *Guinness Peat.* I take that to mean that the court in *Pizzey* held that the privilege had been waived. Such waiver would have to be implied as it was certainly not express. However, as has been pointed out, a solicitor, like any agent, is clothed

with ostensible authority and that authority must extend to the preparation of lists of documents. If the privilege has been lost the court cannot act "in aid" of it.

It is now necessary to examine the cases decided since *Derby Magistrates'*.

Cases Decided After Derby Magistrates'

The first of these is *Telesystem International Wireless Incorporation et al.* v. *CVC/Opportunity Equity Partners L.P. et al.* [2001] C.I.L.R. 444 a decision of my brother Sanderson ("the TIW case"). In TIW the plaintiff sought injunctions preventing the defendants from making use of documents stolen from one of the plaintiff's (Demarco's) computer. These included e-mails to Demarco's lawyers. The plaintiff sought injunctions restraining the defendants from making use of these documents in litigation between them. In his judgment Mr. Justice Sanderson focussed primarily on one of the stolen documents which was a letter agreement made between the plaintiff TIW and the plaintiff Demarco. I believe that this was because of the way the case was argued before him. This was not a letter from Demarco to his lawyer and it was not covered by legal advice privilege.

In holding that the letter agreement was relevant for the purposes of other litigation between the parties Sanderson J. relied on *Webster* v. *James Chapman & Co.* and concluded that the headnote as stated in [1989] 3 All E.R. 939 was an accurate summary of the law. The judgments of the court of Appeal in *Derby & Co.* v. *Weldon* and *Pizzey* v. *Ford* were not cited to him. Relying as he did on *Webster*, Sanderson J. expressed the opinion that even if the letter agreement was privileged he would exercise his discretion to refuse the injunction against its use as a result of

"balancing". However, Sanderson J. did enjoin the defendants from "receiving, reviewing, examining or making use of any confidential documents that were or might have been taken from the plaintiffs or the plaintiff's companies without first obtaining the leave of the court. That would, of course, have included the e-mails from Demarco to his lawyers. Consequently, the court in TIW did not override legal advice privilege and had it purported to do so the decision would have been overtaken by the court of Appeal's disapproval of the *Webster* case.

In *Al Fayed et al.* v. *Commissioner of Police et al.* [2002] E.W.C.A. Civ. 780 the claimant sued the defendants for damages for unlawful arrest and imprisonment. The solicitor for some of the defendants made available to the plaintiffs copies of two opinions they had received from counsel concerning (it seems) the propriety of the arrest. It was common ground, that until disclosed, these opinions were subject to legal advice privilege. The copies of the opinions were made available for inspection by the plaintiffs pursuant to the *Rules of Practice*. The defendants argued that the disclosure of the opinions was a mistake and a mistake that would have been obvious to a reasonable solicitor. Mr. Justice Curtis accepted that proposition and granted an injunction. The court of Appeal held:

> "(1) a solicitor has ostensible authority to waive legal advice privilege on behalf of his client,
>
> (2) if, as in the *Al Fayed* case privileged documents are produced for inspection by the other side on discovery, it will usually be too late to claim the privilege, and
>
> (3) nevertheless the court has a discretion to grant an injunction."[19]

[19] In this case, the injunction sought was refused.

The court of Appeal indicated that it had seen the opinions in questions and that they appeared to be relevant to the issues to be tried and that the plaintiff's solicitor had reasonably concluded that the disclosure of the opinions had been intentional and not a mistake and consequently no injunction should have been granted. *Derby Magistrates'* was not cited nor discussed.

I note that in these cases it is made clear that the court has power to intervene by way of an injunction even after disclosure of a privileged document. However, where the court concludes that the privilege has been waived (implied not expressly) an injunction will not be granted. These decisions do not, it seems to me, stand for the proposition that mere disclosure amounts to a waiver or the loss of the privilege, although in *Derby & Co.* v. *Weldon*, Dillon L.J. spoke of "restoring" the privilege, Nourse L.J. in *Goddard* said that the injunction was granted "in aid of the privilege".

In *Istil Group Inc. et al.* v. *Zahoor et al.* [2003] E.W.H.C. 165 (Ch.) is a judgment of Mr. Justice Lawrence Collins. The claimant sought to restrain the use by the defendants of e-mail correspondence which they had obtained from a source unknown to either party. It was alleged that one e-mail (intended for Mr. Axelrod) was covered by legal advice privilege and the others were subject to litigation privilege. Lawrence Collins J. discussed both heads of legal professional privilege and the rationale for each. With regard to legal advice privilege he referred to *Derby Magistrates'* and quoted Lord Taylor's statement that legal advice privilege was "more than an ordinary rule of evidence...it is a fundamental condition on which the administration of justice rests." With respect to litigation privilege Lawrence Collins J. said the following at page 8:

"Although there are obvious cases of overlap, a distinction is normally drawn between legal advice privilege (sometimes called simply legal professional privilege) and litigation privilege. The former extends to all communications between the client and the client's legal adviser for the purpose of obtaining or giving legal advice. The privilege exists whether litigation is anticipated or not. Litigation privilege attaches to communications which come into existence with the dominant purpose of being used in aid of pending or contemplated litigation. See *Buttes Gas & Oil Co.* v. *Hammer (No. 3)* [1981] Q.B. 223, 243, per Lord Denning M.R.

The policy reason behind the first category of privilege, legal advice privilege, is that it is "necessary, to use a vulgar phrase, that [the client] 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 substantiality of his defence against the claim of others": *Anderson* v. *Bank of British Columbia* (1876) 2 Ch. D 644, 649, per Sir George Jessel M.R.

In *Ventouris* v. *Mountain* [1991] 1 W.L.R. 607, 611 Bingham .J. referred to the public interest in clients being "free to unburden themselves without reserve to their legal advisers" and their legal advisers being "free to give honest and candid advice on a sound factual basis, without fear that these communications may be relied on by an opposing party if the dispute comes before the court for decision." He went on: "It is the protection of confidential communications between client and legal adviser which lies at the heart of legal professional privilege, as is clear form the classical exposition of the law of Sir George Jessel M.R. in *Anderson* v. *Bank of British Columbia*." In *R.* v. *Derby Magistrates' court, ex parte B* [1996] A.C. 487, 507 Lord Taylor of Gosforth C.J. said that legal professional privilege is "much more than an ordinary rule of evidence.... It is a fundamental condition on which the administration of justice as a whole rests."

The second category, litigation privilege, was classically described as documents which come into existence for obtaining evidence to be used in litigation, or for obtaining information which might lead to the obtaining of evidence: see *Wheeler* v. *LeMarchant* (1881) 17 Ch. D. 675, 684-5, per Cotton L.J.) or "...as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as materials for the brief" (*Anderson* v. *Bank of British Columbia* (1876) 2 Ch.D. 644 at 656, per James L.J. cited with approval by Lord Simon of Glaisdale in *Waugh* v. *British Railways Board* [1980] A.C. 521, 537),

That rationale is not very attractive and is perhaps ripe for reconsideration in the light of reforms which are designed to make litigation more open and less like a game of poker. More attractive as a rationale is the consideration that preparation of a case is inextricably linked with the advice to the client on whether to fight or to settle, and if so, on what terms. As Sir Richard Scott V-C said in *Re Barings plc* [1988] 1 All E.R. 673, 681:

> "...documents brought into being by solicitors for the purposes of litigation were afforded privilege because of the light they might cast on the client's instructions to the solicitor or the solicitor's advice to the client regarding the conduct of the case or on the client's prospects. There was no general privilege that attached to documents brought into existence for the purposes of litigation independent of the need to keep inviolate communications between client and legal adviser. If documents for which privilege was sought did not relate in some fashion to communications between client and legal adviser, there was no element of public interest that could override the ordinary rights of discovery and no privilege. So, for example, an unsolicited communication from a third party, a potential witness, about the facts of the case would not, on this view, have been privileged. And why should it be? What public interest is served by according privilege to such a communication?"[20]

He then referred to *Calcraft* (noting that it had been much criticized in the academic literature) and to *Lord Ashburton's* case, and at page 20:

> "In the context of an application for an order for disclosure of privileged documents, the House of Lords in *R.* v. *Derby Magistrates' court, ex parte B* [1996] A.C. 487 rejected the use of a balancing exercise between the public interest in securing the availability of all relevant evidence and the public interest in upholding legal professional privilege.
>
> What, then, is the extent of the discretion in the exercise of the *Lord Ashburton* v. *Pape* line of authorities to restrain breach of confidence in relation to documents which have already been disclosed, but which would otherwise be privileged? In particular, can the court conduct a balancing exercise and if so, on the basis of what factors? In the light of the apparent difference of view between Nourse L.J. in *Goddard* and Scott J. in *Webster*, and the subsequent decisions in *Derby* v. *Weldon (No. 8)* and *Pizzey* v. *Ford Motor Co. Ltd.*, in my judgment the position is as follows:
>
> First, the starting point is that the essence of legal professional privilege is that it entitles the client to refuse to

[20] In *Barings* Scott V.C. vigorously attacked the judgment of the Court of Appeal in *Guinness Peat* (see *Phipson* §20-29).

produce documents which are covered by the privilege, or to answer questions about privileged matters. But it has been said that once a privileged document is disclosed, the privilege itself is lost: see *Guinness Peat Properties Ltd.* v. *Fitzroy Robinson Partnership* [1987] 1 W.L.R. 1027, 1044, per Slade L.J. accepting argument to this effect. In *Black & Decker* v. *Flynn Ltd.* [1991] 1 W.L.R. 753 Hoffmann J. said that once a privileged document was disclosed the question was one of admissibility, and not privilege.

Second, since the decisions from *Lord Ashburton* v. *Pape* to the modern decisions involve the equitable jurisdiction to grant injunctions to protect breach of confidence, it follows that the normal rules relating to the grant of equitable remedies apply. In *Goddard* Nourse L.J. expressly mentioned (at 685) delay as a factor (and this was repeated by Slade L.J. in *Guinness Peat,* at 1046). It must also follow that other equitable principles on the grant of injunctions apply, such as consideration of the conduct of the party seeking the injunction, including the clean hands principle.

Third, in such cases the court should "ordinarily" intervene: *Guinness Peat* at 1046.

Fourth, Nourse L.J. was not saying in *Goddard* that the court should never apply the general principles relating to confidential information. What he was saying was that in this context (protection of privileged documents under the *Lord Ashburton* v. *Pape* principle) the court was not concerned with weighing the materiality of the document and the justice of admitting it. That was also the view of Vinelott, J. and Dillon L.J. in *Derby* v. *Weldon (No. 8)* and of Mann L.J. in *Pizzey* v. *Ford Motor Co. Ltd.*

Fifth, there is nothing in the authorities, which would prevent the application of the rule that confidentiality is subject to the public interest. In this context, the emergence of the truth is not of itself a sufficient public interest. The reason why the balancing exercise is not appropriate is because the balance between privilege and truth has already been struck in favour of the former by the establishment of the rules concerning legal professional privilege: see *The Aegis Blaze* [1986] 1 Lloyd's Rep. 203,

> 211; *R.* v. *Derby Magistrates' court, ex parte N* [1996] A.C. 487, 508.
>
> Sixth, other public interest factors may still apply. So there is no reason in principle why the court should not apply the rule that the court will not restrain publication of material in relation to misconduct of such a nature that it ought in the public interest to be disclosed to others: *Initial Services Ltd.* v. *Putterill* [1968] 1 Q.B. 396, 405 per Lord Denning M.R., who quoted Wood V.C. in *Garlside* v. *Outram* (1856) 26 L.J. Ch. 113, 114: "There is no confidence as to the disclosure of iniquity". But the defence of public interest is not limited to "iniquity"; *Lion Laboratories Ltd.* v. *Evans* [1985] 1 Q.B. 526, applying *Fraser* v. *Evans* [1969] 1 Q.B. 349, 362, where Lord Denning M.R. said that iniquity is merely an instance of just cause or excuse for breaking confidence. See also *Attorney General* v. *Guardian Newspapers (No. 2)* [1990] 1 A.C. 109, at 268-269, per Lord Griffiths; and *Ashdown* v. *Telegraph Group Ltd.* [2002] Ch. 149, approving *Hyde Park Residence Ltd.* v. *Yelland* [2001] Ch. 143, 172 *per* Mance L.J.

Lawrence Collins J. then found that the Affidavit evidence put forward before him by the claimants was incomplete, misleading and dishonest. As well it included a document which the claimants knew had been forged. He said that the timing of the production of this bogus document "would suggest that it was produced to create a case against Mr. Zahoor and to deceive the court." He concluded his judgment as follows (page 17-18):

> "In my judgment this is a case which, in the exercise of the *Lord Ashburton* v. *Pape* jurisdiction the court is entitled to balance the public interest in supporting legal professional privilege on the one hand, and the public interest in the proper administration of justice on the other hand. This is a cause where there has on any view been forgery, and where there was a deliberate decision not to adduce evidence in a context which made the evidence which was put forward misleading. Although the decision not to refer to the bogus Appendix 1 was deliberate, I make no finding that there was a deliberate attempt to mislead the court. I have already stated my conclusion that on the material before me it is likely that the forgery was produced for the purpose of this litigation. In my judgment the combination of forgery

> and misleading evidence make this a case where the equitable jurisdiction to restrain breach of confidence gives way to the public interest in the proper administration of justice.
>
> The claimants, having disclosed the bogus Appendix 1, have to accept that the case would go forward on a wholly false basis if the fact that they were in possession of it before Mr. Masood swore his third affidavit and exhibited Masood Appendix 1 were suppressed.

He therefore rejected the application for an injunction except for the e-mail to Axelrod.

It seems to me firstly that the facts in *Istil* cannot be regarded as similar to the facts in the Application before me. Secondly, it seems that based on the *Istil* facts, Lawrence Collins J. was entitled if not obliged to refuse the injunction on general principles. That is to say the grant of equitable relief is subject to the court's discretion and may be refused on the basis of the clean hands doctrine (see 16 Hals. 4th ed. paragraph 751). Thirdly, Lawrence Collins J. seems to have upheld the claimant's right to the return of the one document subject to legal advice privilege even after taking into account the fraud exception to the privilege. I would respectfully disagree with Lawrence Collins J's assertion that it is necessary to invoke the general law relating to breach of confidence in these cases. The court should act in aid of the privilege. The *Istil* case did not involve legal advice privilege except for the Axelrod e-mail.

CONCLUSIONS

Balancing

In my opinion, the "balancing" which *Derby Magistrates'* shows has been resolved in favour of legal advice privilege cannot be revisited by the court as a purported exercise of the discretion to grant or withhold equitable relief.

Ms. Proudman urged me to assume that the fax contains an unequivocal admission that the side letter was executed by IIU. She said that this assumption should be made because of Mr. Jones' refusal to disclose the fax even to the court. I cannot make that assumption.

In *Wentworth* v. *Lloyd* [1864] 11 E.R. 1154 Lord Chemsford said that:

> "The law has so great a regard to the preservation of the secrecy of this relation (the relationship between solicitor and client) that even the party himself cannot be compelled to disclose his own statements made to his solicitor with reference to professional business".
>
> "The exclusion of such evidence is for the general interest of the community and therefore to say that when a party refuses to permit professional confidence to be broken everything must be taken most strongly against him, what is it but to deny him the protection which for public purposes the law affords him and utterly to take away a privilege which can thus only be asserted to his prejudice."

The Editors of *Phipson* (paragraph 20-03) cite this case for the proposition that:

> "No adverse inference can be drawn from the fact that a party has made a claim for privilege over a document".

Consequently, Ms. Proudman's assertion that this case will proceed on a wholly false basis unless the plaintiffs are at liberty to make use of the fax is a matter for speculation and as such the question cannot be resolved by an assumption which *Wentworth* v. *Lloyd* shows should not be made. In addition, there can be no doubt that the House of Lords was well aware when deciding *Derby Magistrates'* that the prosecution of the stepfather for murder might well proceed on a wholly false basis, yet the rules of legal advice privilege were held to be paramount.

That leaves for consideration whether or not the privilege in the fax has been lost simply because the plaintiffs now have a copy of it and whether apart from "balancing" there is any particular

reason why the court's discretion to grant or withhold an equitable remedy ought to be exercised in favour of the plaintiffs or the defendants.

Has Privilege Been Lost?

The question as to whether a solicitor has ostensible authority to waive legal advice privilege does not arise on the facts of this case. It was held by Hoffman J. (as he then was) in *Black & Decker* v. *Flymo Ltd.* [1991] 1 W.L.R. 753 that once a document (in that case, a document subject to litigation privilege) had been disclosed in a witness statement provided to the opposite party pursuant to the *Rules of Practice*, privilege in that document was lost.

Hoffman J. said at page 755:

> "It seems to me that once the statement has been disclosed pursuant to the rule, there can no longer be any question of privilege. It is not possible to assert a right to refuse to disclose in respect of a document which has already been disclosed. Once the document has passed into the hands of the other party the question is no longer one of privilege but of admissibility. So, for example, Ord. 38, r. 2A(4) deals with the admissibility at the trial of a statement from a witness who has not been called.
>
> Is there any reason why such a document should not be admissible on an application like this? In my judgment its exclusion would be contrary to the policy of which Ord. 38, r. 2A is one manifestation. The general policy which Ord. 38, r. 2A embodies is that the parties should so far as possible come to trial fully prepared with all the relevant documents and with information about what the other side's case is going to be, so that no one will be taken by surprise and no adjournments of the trial will be necessary in order to enable a party to gather information which could have been obtained before. If the witness statement has to be treated as inadmissible for the purposes of a discovery application it only means that the discovery application will be postponed till the evidence in the witness statement is

> given as evidence at the trial. As a result there may have to be an adjournment of the trial until that discovery has been given and considered by the party who seeks it. This would be a waste of time and costs. In my judgment therefore witness statements once disclosed are admissible for the purposes of applications for specific discovery. I need not say anything about whether there might be other kinds of applications in which they would not be so admissible."

There is no reference in the report to any of the cases I have mentioned. The inclusion of privileged information in a witness statement should certainly be capable of amounting to a waiver. The proposition that mere disclosure removes legal advice privilege even though there has been no waiver express or implied seems to me to be inconsistent with the cases I have reviewed in this judgment. It is also inconsistent with the judgment of the court of Appeal in *Guinness Peat* v. *Fitzroy Robinson* [1987] 1 W.L.R. 1027. That was a case involving a privileged document which had been disclosed on discovery. After referring to another judgment of Mr. Justice Hoffman in re: *Briamore Manufacturing Ltd.* [1986] 1 W.L.R. 1429 to the same effect as his judgment in *Flymo* Slade L.J. said on behalf of the court of Appeal at page 1043-1044 as follows:

> "The judge, in granting the injunctions sought in the present case, followed, or purported to follow, the *Goddard* and *Herbert Smith* decisions, briefly expressing himself as satisfied that "the errors in this case can be corrected."
>
> The evidence shows clearly that there was never any intention on the part of the F.R.P.'s solicitors to abandon the privilege which they regarded as attaching to the McLeish letter. As the judge found, the disclosure was due to inadvertence on the part of the F.R.P.'s solicitors. As soon as the error occurred, they applied for delivery up of the letter.
>
> Nevertheless, a mere plea of inadvertence does not by itself necessarily enable a party to litigation to avoid a loss of privilege. Privilege may be lost by inadvertence. This is well illustrated by the decision of this court in *Great*

Atlantic Insurance Co. v. *Home Insurance Co.* [1981] 1 W.L.R. 529. In that case, the plaintiffs' counsel at the trial read to the judge two paragraphs of a copy of a memorandum, being unaware that the memorandum contained other paragraphs in respect of which privilege could have been claimed and without any intention of waiving privilege. Templeman L.J., which whom Dunn L.J. agreed, held that privilege had been thereby waived in respect of the whole memorandum, saying, at p. 540:

> "when counsel in the course of a trial introduces into the record a document or part of a document he thereby effectively waives any privilege attaching to that document which could otherwise be asserted by his client."

Templeman L.J. was not persuaded that any discretion existed which would enable the court to restore and enable the plaintiffs to assert privilege in respect of the whole of the memorandum or in respect of that part of it which had not been introduced in evidence so far. He was referred to *Lord Ashburton* v. *Pape* [1913] 2 Ch. 469, but considered that it had no relevance, saying, at p. 541:

> "The court has no jurisdiction to relieve the plaintiffs from the consequences of their own mistakes particularly as those consequences cannot be wholly eradicated; part of the memorandum has in fact been read to the trial judge."

Mr. Burnton, in the present case, did not seek to suggest that F.R.P. had waived or otherwise lost their privilege simply by including the McLeish letter in Part 1 of Schedule 1 to the first supplementary list of documents. He accepted that they would have been entitled to serve an amended list claiming privilege for it at any time before inspection took place. However, in his submission, privilege is essentially privilege from compulsory disclosure. By analogy with the *Great Atlantic Insurance Co.* case, he submitted, once a privileged document has not only been disclosed but also inspected in the course of discovery, it is too late to put the clock back; the privilege is lost. The essential distinction between the present case and the *Goddard* and *Herbert Smith* cases, Mr. Burnton contended, is that neither of the two cases dealt with a loss

of privilege occurring as a result of a step taken in the litigation by the party entitled to the privilege. In all cases where inspection has been given in the course of discovery, he submitted, the court should follow the *Briamore* decision [1986] 1 W.L.R. 1429. This provides a simple practical rule. It places the onus on the party giving discovery, who should ensure that only documents in respect of which no claim of privilege is made should be disclosed. It avoids the practical problems involved in attempting to restore the previous *status quo* by prohibiting a party and his experts from using information obtained in the normal course of discovery.

With one important reservation, I would entirely accept the submissions summarised in the immediately preceding paragraph. Care must be taken by parties to litigation in the preparation of their lists of documents and no less great care must be taken in offering inspection of the documents disclosed. Ordinarily, in my judgment, a party to litigation who sees a particular document referred to in the other side's lists, without privilege being claimed, and is subsequently permitted inspection of that document, is fully entitled to assume that any privilege which might otherwise have been claimed for it has been waived. Let there be no doubt about that.

My one reservation is this. I do not think that after inspection has taken place in the course of discovery, the court is inevitably and invariably powerless to intervene by way of injunction in exercise of the equitable jurisdiction exemplified by the *Ashburton*, *Goddard* and *Herbert Smith* cases if the particular circumstances warrant such intervention on equitable grounds. I do not doubt, for example, that the court would be prepared so to intervene where one party to litigation had obtained inspection of a privileged document by fraud, albeit in what purported to be the normal course of discovery."

And at page 1045:

"In my judgment, the relevant principles may be stated broadly as follows:

(1) Where solicitors for one party to litigation have, on discovery, mistakenly included a document for

> which they could properly have claimed privilege in Part 1 of Schedule 1 of a list of documents without claiming privilege, the court will ordinarily permit them to amend the list under R.S.C., Ord. 20, r. 8, at any time before inspection of the document has taken place.
>
> (2) However, once in such circumstances the other party has inspected the document in pursuance of the rights conferred on him by R.S.C., Ord. 24, r. 9 the general rule is that it is too late for the party who seeks to claim privilege to attempt to correct the mistake by applying for injunctive relief. Subject to what is said in (3) below, the *Briamore* decision [1986] 1 W.L.R. 1429 is good law.
>
> (3) If, however, in such a last mentioned case the other party or his solicitor either (a) has procured inspection of the relevant document by fraud, or (b) on inspection, realises that he has been permitted to see the document only by reason of an obvious mistake, the court has the power to intervene for the protection of the mistaken party by the grant of a discretionary remedy, for example, on the ground of inordinate delay: see *Goddard's* case [1986] 3 W.L.R. 734, 745 e-f *per Nourse L. J.*

It seems to me that if the court will intervene for the protection of the mistaken party, it can only be intervening to protect the privilege. The discovery cases reinforce my view that legal professional privilege cannot be lost through theft or fraud.

The loss of privilege through waiver is understandable even if it is an implied waiver and even if the circumstances from which the court concludes that implied waiver has occurred may seem somewhat harsh, as the result in *Pizzey* v. *Ford* might be described. In my judgment it is completely inconsistent with *Derby Magistrates'* to hold that privilege can be lost without fault of any kind on the part of the beneficiary of the privilege. Similarly, it would be inconsistent with *Derby Magistrates'* to hold that legal advice privilege can be lost in the absence of some

positive act on the part of the client or the client's attorney or counsel which the court can reasonably hold amounts to implied waiver. Accordingly, if counsel reads from a document in open court as he clearly has the authority to do, privilege must be taken to have been waived. If a privileged letter is stolen it would be entirely inconsistent with *Derby Magistrates'* to hold that privilege in that communication had been lost. I would agree with the following statement from *Auburn*: *Legal Professional Privilege Law and Theory* 2000 at page 211-212:

> "In determining how much disclosure is required before the privilege will be lost, some judges and writers have suggested applying the principles used in equitable breach of confidence. However it would be wrong to do this. Privilege and equitable confidentiality are based on fundamentally different concerns. The privilege is primarily concerned with behavioural consequences: the effect of lack of client trust in lawyer-client communications. Equitable confidentiality is not at all concerned with behavioural consequences. Rather, it is concerned with the interest a person has in keeping a matter private as against the rest of the world. Thus any disclosure to the world, however small and whoever to, affects in some small way the interest which equitable confidentiality seeks to protect.
>
> In comparison, the privilege is concerned only with disclosure to the court or other investigative body. Leaving aside conclusions to be drawn in chapter 12 below, this is the privilege's only area of operations. Thus if there is a disclosure to a group of people, the privilege may still be serving an important purpose by withholding this information form the court, as doing so will go some way to maintaining client confidence in the protection afforded to communications with lawyers, with all the importune behavioural consequences this brings. Thus the scope of waiver arising from selective disclosure should not be aligned with the equitable confidentiality doctrine.
>
> Confidentiality should be considered only as a factor at the time the legal communication is made. After that it should hardly ever be taken into account in determining whether communications should no longer be considered privileged. The only limits may be where disclosure has been made to

> an agent or representative of the opponent, and the practical workability of withholding from a court a communication the contents of which are widely known."

The author supports the above with the following footnote:

> "Even if the privileged communication is published to almost all the world, if the privilege can still be effectively maintained before a court or other investigative body, then there is little reason not to continue to bolster candid legal communications (*contra* C. Tapper, n. 91 above, 474 and C. Passmore, n. 58 above, 184; also see *Chandris Lines* v. *Wilson & Horton Ltd.* [1981] 2 NZLR 600 (H.C.), where this was actually the case). Withholding privileged communications from a court will have this effect, even if the information is known to the rest of the world. In fact the privilege may serve its purpose more effectively if more people are already aware of the contents of the communication. Refusing to admit into evidence publicly known communications highlights the strength of the rule, and hence may promote even more favourable behaviour as a result."

I therefore decline to hold that privilege in the fax, (or copies of it) has been lost.

The Exercise of Discretion

It is apparent that the question of "balancing" enters into the picture at two stages. Firstly, it has sometimes been undertaken to determine whether one principle of public policy overrides another. That is to say, whether there is the right to assert the claim to privilege at all. As a result of *Derby Magistrates'* the balance has tipped in favour of the defendants.

The "balancing" has also been viewed as part and parcel of the exercise of the court's discretion in granting or withholding an injunction. In the latter case, even if the applicant for the injunction has a right to the privilege, it is said that the remedy may be denied in the exercise of the court's discretion. If that is so the circumstances would have to be extraordinary. Whatever

the case, the "balancing" can only be undertaken once. Consequently, I cannot refuse the injunction on the basis of "balancing".

Ms. Proudman also submitted that the defendants have been guilty of laches and an injunction should be refused on that ground. I cannot accept that proposition either. The record does not disclose an inordinate delay but rather continuing attempts on behalf of the defendants to persuade the plaintiffs to explain how they obtained a copy of the fax and its return. In addition, it is impossible to argue on the facts here that the defendants have acquiesced in the plaintiffs possession of the fax or their intended use of it.

The Order

Consequently, an order will go for the relief requested in paragraph 2 of the Summons with costs to the defendant in the cause.

Dated: May 30, 2003

Released: , 2003

Justice Kellock