

RETURN – self-assessment –notice of intention to inquire into return – taxpayer practising as a solicitor – notice requiring taxpayer to produce clients' ledger and clients' cash book and certain documents to support the entries in both – whether reasonably required – whether taxpayer's duty of confidentiality overrides obligation to produce – whether documents covered by legal professional privilege – whether disclosure would contravene Article 8 of the ECHR – whether disclosure would infringe the Data Protection Act 1998 - appeal dismissed – Taxes Management Act 1970 s 19A(2)

THE SPECIAL COMMISSIONERS

GEORGE HENRY GUYER Appellant

- and -

DAVID WALTON

(H M INSPECTOR OF TAXES) Respondent

SPECIAL COMMISSIONER : DR A N BRICE

Chairman's name: use right arrow to move to starting point after this box

Sitting in London on 21 February 2001

There was no appearance by or on behalf of the Appellant

Ingrid Simler of Counsel, instructed by the Solicitor of Inland Revenue, for the Respondent

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DECISION

The appeal

1. Mr George Henry Guyer (the Appellant) appeals against a Notice under section 19A of the Taxes Management Act 1970 (the 1970 Act). The Notice was dated 23 December 1999 and related to the Appellant's return for the year of assessment 1996-97. It required the production of the Appellant's clients' ledger, his clients' cash book, and any copy invoices, receipts, bank statements, cheque stubs or building society passbooks supporting the entries in the clients' ledger and the clients' cash book.

2. The Appellant did not attend and was not represented at the hearing of the appeal. Regulation 16 of the Special Commissioners (Jurisdiction and Procedure) Regulations 1994 SI 1994 No.1811 provides:

"16(1) If a party fails to attend or to be represented at a hearing of which he has been duly notified, the Tribunal may-

(a) unless it is satisfied that there is good and sufficient reason for such absence, hear and determine the proceedings in the absence of the party or his representative, or

(b) postpone or adjourn the hearing.

(2) Before deciding to hear and determine any proceedings in the absence of a party or his representative, the Tribunal shall consider any representations in writing or otherwise submitted by or on behalf of that party in response to the notice of hearing and shall give any party present at the hearing an opportunity to be heard in regard to those representations."

3. The Appellant wrote on 19 February 2001 in response to the notice of hearing. In that letter he indicated that he would not attend the hearing and made written representations. From these it became clear that the Appellant had seen the bundle of documents to be produced at the hearing and also a copy of the witness statement of the Respondent containing the evidence to be given at the hearing. Accordingly, under Regulation 16(1)(a) I decided to hear and determine the proceedings in the absence of the Appellant and to consider the representations in his letter of 19 February 2001 during the hearing of the appeal.

The legislation

4. Section 19A(1) of the 1970 Act provides that the section applies where an officer of the Board gives notice under section 9A(1) to the taxpayer of his intention to inquire into the return on the basis of which a taxpayer's self-assessment was made. It was not disputed that a notice under section 9A(1) had been given to the Appellant and that it had been given in time.

5. Subsections 19A (2) and (6) provide:

"(2) For the purpose of enquiring into the return the officer may at the same or any subsequent time by notice in writing require the taxpayer, within such time (which shall not be less than 30 days) as shall be specified in the notice

(a) to produce to the officer such documents as are in the taxpayer's possession or power and as the officer may reasonably require for the purpose of determining whether and, if so, the extent to which the return is incorrect or incomplete and

(b) to furnish the officer with such accounts or particulars as he may reasonably require for that purpose

(6) An appeal may be brought against any requirement imposed by a notice under subsection (2) above to produce any document or to furnish any accounts or particulars."

The issues

6. The Appellant argued that the requested documents were not reasonably required by the Respondent; that the duty of confidentiality which he owed to his clients prevented disclosure of the requested documents; and, alternatively, that the documents were the subject of legal professional privilege. He also relied upon the Human Rights Act 1998 and the Data Protection Act 1998. The Respondent disputed all these claims.

7. Thus the issues for determination in the appeal were:

(1) whether the requested documents were reasonably required for the purpose of determining whether the Appellant's return for 1996-97 was incorrect or incomplete;

(2) whether the Appellant's duty of confidentiality to his clients prevented the disclosure of the requested documents;

(3) whether the requested documents were covered by legal professional privilege;

(4) whether disclosure of the requested documents would contravene Article 8 of the Convention in Schedule 1 of the Human Rights Act 1998; and

(5) whether disclosure of the requested documents would infringe the Data Protection Act 1998.

The evidence

8. A statement of agreed facts was produced. Oral evidence was given by the Respondent on his own behalf. A bundle of documents was produced by the Respondent which also contained the documents referred to by the Appellant in his written representations of 19 February 2001.

The facts

9. From the evidence before me I find the following facts.

10. The Appellant is a solicitor who practises on his own account. Most of the professional work undertaken by the Appellant is conveyancing. On 4 December 1997 the Appellant submitted his self-assessment return for the year ending on 5 April 1997. This was reviewed and an enquiry opened by the Respondent. The Respondent informed the Appellant, under section 9A of the 1970 Act, that he intended to make some inquiries into the return and asked for some information which was provided by the Appellant. The information then provided by the Appellant included copy invoices, expenses invoices, an office cash book, pass books for three building society accounts used for office account (National Provincial Building Society (National Provincial), Abbey National Building Society (Abbey National) and Marsden Building Society (Marsden)), and passbooks for four building society accounts used for clients' account (National Provincial, Abbey National, Bradford & Bingley Building Society (Bradford & Bingley) and Marsden).

11. The Respondent examined this information which indicated that frequently the amounts included in the office cash book were greater than the amounts shown on the invoices. There was no evidence in the documents provided of the

reason for the additional payments. Also, the office cash book showed that disbursements had been made for which no supporting documentation was provided. Two of many examples which illustrated the difficulties were put in evidence by the Respondent.

12. In the first example a fee note was issued to client A on 25 October 1996 for acting in connection with a mortgage of £96,000.00. The amount of the professional fees shown on the fee note was £150.00. There was an entry in the office cash book on 29 October 1996 showing that £830.75 had been received from client A. This represented payment by client A for the fees and also the repayment of a short term loan of £680.75 made by the Appellant to client A on 25 October 1996 and also recorded in the office cash book. In fact, the remittance received from client A amounted to £877.75 which was £47.00 more than the amount shown in the office cash book. On 29 October 1996 that amount was placed in the Marsden office account. On the same day, namely 29 October 1996, the sum of £47 was transferred from the Marsden office account to the Marsden client account and there were no further entries to explain what happened to that money. Also, the amount of the mortgage advance which was received was £95,843.60 and this was placed in the Bradford & Bingley client account. There was no explanation for the difference between this amount and the amount of the advance of £96,000.00 as shown on the invoice. The Respondent formed the view that, as the destination of the £47.00, and the difference between the amount of the mortgage and the amount actually received, both concerned clients' money they would both be recorded in a clients' cash book and clients' ledger which would provide the information he required to reconcile the various entries.

13. In the second example a fee note was issued to client B on 13 May 1996 for acting in connection with the purchase of a property for £20,000.00 and a mortgage. The amount of the professional fees shown on the fee note was £300.00. On 17 May 1996 the office cash book recorded the receipt of the sum of £1,300.00 from client B being £1,000.00 for repayment of a loan and £300.00 for fees. Although the office cash book recorded the date of the grant of the loan to client B as 14 May 1996 there was also an earlier transaction on 8 March 1996 of £1,000.00, the receipt of which was recorded in the National Provincial client account. On the same day a receipt and withdrawal of the sum of £1,000 was recorded in the National Provincial office account. There were no explanations for these transactions. The actual remittance of £1,300.00 recorded in the office cash book on 17 May 1996 was not paid in to any of the office building society accounts. However, the National Provincial office account did record the deposit of £2,000.00 on 17 May 1996 and on the same day there was a transfer of £700.00 to the Abbey National client account. The £700.00 was not explained in the documents provided. Also, on 11 May 1996 the National Provincial office account recorded the receipt of £17,000.00 which was transferred to the Abbey National client account the same day. Withdrawals were made from the Abbey National client account of £18,000.00 on 14 May 1996 and of £40.00 and £657.00 on 17 May 1996. There were no explanations for these withdrawals. The Respondent formed the view that he was unable to follow the flow of monies on the information he had. As all the discrepancies concerned clients' monies the Respondent formed the view that the clients' cash book and clients' ledger were needed to follow the transactions.

14. Accordingly, on 30 April 1999 the Respondent asked to see the clients' cash book detailing all the transactions recorded in the building society pass books used for clients' money and a clients' ledger if these were maintained by the Appellant. The Appellant replied on 18 May to say that he did maintain a clients'

cash book and a clients' ledger but that he was under a duty of confidentiality not to disclose them. Further correspondence followed and on 9 September 1999 the Appellant wrote to say that the information in the clients' cash book and the clients' ledger was not relevant in determining his liability to tax and he repeated his arguments about confidentiality.

15. Notices under section 19A were issued on 8 October 1999 and 17 November 1999 and subsequently withdrawn. A third notice was issued on 23 December 1999 and required the production of:

"1. Clients ledger covering the period from 1 January 1995 to 31 December 1996.

2. Clients cash book covering the period from 1 January 1995 to 31 December 1996.

3. Any copy invoices, receipts, bank statements, cheque stubs or building society pass books supporting the entries on either of the 2 records at 1 or 2 above."

16. On 20 January 2000 the Appellant appealed against the notice of 23 December 1999.

Reasons for decision

Issue (1) – reasonably required

17. The first issue is whether the requested documents were reasonably required for the purpose of determining whether the Appellant's return for 1996/97 was incorrect or incomplete.

18. The Appellant's arguments, as set out in his notice of appeal of 20 January 2000, are:

"Records of money and the financial affairs of clients (i.e. other persons) are not relevant and therefore not reasonably required for the purpose of determining the correctness of my tax return."

19. In his letter of 19 February 2001 the Appellant stated:

"The office cash book shows all fees and commissions received as per invoices. It also shows moneys paid out (e.g. disbursements, loans, business expenses etc.) and the reimbursement of such moneys."

20. The Appellant's letter of 19 February 2001 then referred to the two examples given by the Respondent in evidence as follows:

"Example 1

The office cash book shows a loan to [client A] of £680.75p. It also shows repayment of the loan of £680.75p and payment of my fee of £150. These entries complete the transactions as far as the office money is concerned.

A cheque was received from [client A] totalling £877.75p and paid to office account. The extra £47 was client money and transferred as cleared funds to client account. If the £47 had been paid directly to client account it would have

taken 10 working days (i.e. a fortnight) before the money could have been withdrawn as cleared funds. The £47 was later paid out of client account. £40 was paid to the Land Registry for a registration fee and £7 was paid to the Land Registry for search fees.

A cheque for the net mortgage advance of £95,843.60 was received from Bradford & Bingley Building Society, the Society having deducted a mortgage guarantee charge of £156.40p.

The extra £47 and the mortgage advance of £95,843.60 are client moneys belonging to [client A] and not to me. Records of their money and financial affairs are not relevant and therefore not reasonably required to determine the correctness of my tax return.

Example 2

The office cash book shows a loan to [client B] of £1,000 on 14 May 1996. It also shows repayment of the loan of £1,000 and payment of my fee of £300 on 17 May 1996. These entries complete the transactions as far as the office money is concerned.

On 8 March 1996 a cheque was received from [client B] for £1,000 and paid into office account. The whole amount was client money and transferred as cleared funds to client account so that it could be drawn upon immediately, The £1,000 was paid out on 9 April 1996 to the seller's solicitors as a deposit on [client B's] purchase of a property.

On 11 May 1996 a cheque was received from Bradford & Bingley Building Society for £17,000 (£2,000 having been retained), paid into office account and, being client money, was transferred as cleared funds to client account. On 14 May 1996 the balance purchase price of £18,000 was paid out of client account to the same seller's solicitors.

On 17 May 1996 a cheque for the release of the retention of £2,000 was received from Bradford & Bingley Building Society for [client B] and paid into office account. £1,300 was retained for repayment of the loan of £1,000 and payment of my fees of £300. The extra £700 was client money and transferred as cleared funds to client account with National & Provincial Building Society ... The £700 was later paid out of client account. £40 was paid to HM Land Registry for the registration fee, £3 was paid to the Land Registry for search fees and the balance of £657 was paid to [client B].

The £1,000, £17,000 and £700 are client moneys belonging to [client B] and not to me. Records of his money and financial affairs are not relevant and therefore not reasonably required to determine the correctness of my tax return."

21. For the Respondent Ms Simler argued that the information in the Respondent's possession had unexplained gaps. Although the Appellant's letter of 19 February 2001 had filled the gaps in respect of the two given examples that demonstrated that the documents already supplied were incomplete and required to be supplemented by further information. Also, there was no evidence to substantiate the explanations given by the Appellant. The two examples were only illustrations of a wide problem which arose from a lack of consistency between the amounts shown on the invoices and the amounts entered into the office cash book and from the failure to enter into the office cash book all the transactions in the building society office accounts. Both the firm's profits and

interest on all the building society accounts were relevant in determining whether the Appellant's returns were incorrect or incomplete. Also relevant was the amount of commission received by the Appellant for arranging mortgages. Money paid as disbursements would not be the Appellant's income but the Respondent had to be in a position to establish that such money was in fact paid as disbursements.

22. In considering the arguments of the parties I remind myself that section 19A only applies to documents which are reasonably required for the purpose of determining whether and, if so, the extent to which the Appellant's return is incorrect or incomplete. The return no doubt includes a statement of the firm's profits, including matters such as commissions received from persons other than clients, and interest on both office and undesignated client accounts. The Respondent is entitled to satisfy himself that all entries relating to the business are reconciled and that all relevant income has been returned and to seek explanations for unexplained payments into and out of the business. The method of accounting adopted by the Appellant means that there are numerous entries in the office accounts which are not reconciled. The information already supplied to the Respondent is not sufficient to enable him to reconcile these entries and to satisfy himself that all relevant income has been returned. The clients' ledger and clients' cash book, with the supporting documents requested, will enable the various accounts to be reconciled.

23. I conclude that the information requested is reasonably required for the purpose of determining whether the Appellant's return is incorrect or incomplete.

Issue (2) - confidentiality

24. The second issue is whether the Appellant's duty of confidentiality to his clients prevents the disclosure of the requested documents.

25. The arguments of the Appellant were set out in his notice of appeal dated 20 January 2000 as follows:

"Disclosure by a solicitor of information relating to clients breaches the solicitor's duty of confidentiality which is an obligation in law as well as a matter of professional conduct. Disclosure of such information renders the solicitor liable to disciplinary proceedings by the Solicitors Disciplinary Tribunal and liable also to a civil action by a client."

26. For the Respondent Ms Simler accepted that a solicitor owed a duty of confidentiality to his clients and was under an obligation not to disclose his clients' affairs to anyone save in exceptional circumstances. However, she argued that a statutory provision could override the duty of confidentiality and she cited *Parry-Jones v The Law Society* [1969] 1 Ch 1. She argued that the Appellant had already disclosed many documents which identified clients by name and gave details of their transactions. These included the copy invoices, which named the clients and gave details of the professional work done; copies of the office cash book which was annotated to show the names of clients; and the four building society client accounts, some of which had been annotated to show the names of clients. The clients' ledger and clients' cash book would not contain more information about the clients but it would enable the Respondent to complete his enquiries into the Appellant's tax return.

27. In *Parry-Jones The Law Society*, in the exercise of powers in rules made under the Solicitors Act 1957, required a solicitor to produce certain documents.

The solicitor argued that the information concerning clients was confidential. The Court of Appeal held that the contractual duty of confidence was overridden by the duty to obey the general law; that under the Solicitors Act The Law Society could make rules empowering it to inspect documents; and that the rules overrode any privilege or confidence which might otherwise subsist between solicitor and client.

28. In the light of that authority I hold that the provisions of section 19A of the 1970 Act override the contractual duty of confidence owed by a solicitor to his clients

Issue (3) - legal professional privilege

29. The third issue is whether the requested documents were covered by legal professional privilege.

30. The Appellant's arguments were set out in his notice of appeal of 20 January 2000 in the following way:

"Information compiled from communications between a client and solicitor are protected from disclosure by legal professional privilege."

31. For the Respondent Ms Simler argued first that the documents requested were not covered by legal professional privilege as they did not consist of legal advice nor were they brought into existence in relation to litigation. However, even if the documents were covered by legal professional privilege they were not protected from disclosure and she cited *R v Inland Revenue Commissioners, ex parte Taylor (No 2)* [1990] STC 379; *R v Inland Revenue Commissioners, ex parte Lorimer* [2000] STC 751; and *R (on the application of Morgan Grenfell & Co. Ltd) v Special Commissioner of Income Tax* [2000] STC 965 (DC).

32. I have considerable doubt as to whether a clients' cash book, a clients' ledger and the supporting documents requested in the notice are covered by legal professional privilege. However, I do not have to decide that point as, even if they were, the authorities indicate that legal professional privilege can be excluded by express statutory provision.

33. Taylor concerned the provisions of section 20(2) of the 1970 Act rather than section 19A but the principles it established are of general application. The appeal concerned a notice given to a solicitor requiring him to produce all documents in his possession or power relating to the solicitor's business and private accounts, agreements, contracts and correspondence. The solicitor argued that some of the documents might contain information which was protected by his duty of confidentiality to his clients. Bingham LJ (at 384) referred to the other provisions of section 20 which preserved legal professional privilege and continued:

"But there is no preservation of legal professional privilege and no limited protection where the notice relates to the lawyer in his capacity as taxpayer who is served with a notice under section 20(2). The clear inference is, in my judgment, that a client's ordinary right to legal professional privilege, binding in an ordinary way on a legal adviser, does not entitle such legal adviser as a taxpayer to refuse disclosure. That is not, to my mind, a surprising intention to attribute to Parliament. In different circumstances the Court of Appeal has held that the Law Society is entitled to override a client's right to legal professional privilege when investigating a solicitor's accounts. It is, as I think, altogether appropriate that the revenue, being charged with the duty of collecting the public revenue, should enjoy a similar power."

34. The same principles were applied in *Lorimer*, where the taxpayer was also a solicitor and also in *Morgan Grenfell* (since upheld by the Court of Appeal – see [2001] STI 281). There the Court of Appeal said that the provisions of the 1970 Act, taken as a whole, carried the inescapable implication that the rule of legal professional privilege was excluded except where it was expressly preserved and the provisions in the Act which made express provision for documents which need not be produced marked the limits of the available exceptions.

35. In this appeal the Appellant is being required to produce documents in his capacity as taxpayer. The rule of legal professional privilege is excluded because it is not expressly preserved by section 19A. It therefore follows that, if the requested documents were covered by legal professional privilege, they would still have to be disclosed by the Appellant.

Issue (4) - The Human Rights Act

36. The fourth issue is whether disclosure of the requested documents would contravene Article 8 of the Convention in Schedule 1 of the Human Rights Act 1998.

37. Article 8 provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

38. The Appellant's arguments were set out in his notice of appeal dated 20 January 2000 in the following way:

"Disclosure of client information infringes the client's right to privacy and contravenes the European Convention on Human Rights which is due to be incorporated into UK law by the Human Rights Act 1998."

39. For the Respondent Ms Simler argued that Article 8 expressly envisaged that interference with the right to respect for privacy might be necessary in a democratic society in the interest of the economic well-being of the country, or for the protection of the rights and freedoms of others. To the extent that a section 19A notice did interfere with rights of privacy such interference was justified as the notice was issued according to law, in pursuit of a legitimate aim, and was necessary in a democratic society for protecting the taxation system and revenue. She cited *Chappell v United Kingdom* (1989) 12 EHHR; *Funke v France* (1993) 16 EHRR 297; and *R v IRC, ex parte Banque Internationale a Luxembourg* [2000] STC 708 at 723 c-e.

40. In *Chappell* (1989) the High Court made a search and seize order against the applicant for breach of copyright; the order required the applicant to permit the plaintiffs to search his business premises (which were also his home) for, and remove, specified films and documents. The European Court of Human Rights held that there had been no breach of Article 8. Although there had been an

interference with the exercise of the applicant's right to respect for his private life and his home, the order had the legitimate aim of protecting the rights of others. Also, there had been sufficient legal basis for the interference since the word "law" in Article 8(2) included the common law.

41. *Funke v France* (1993) also concerned a search and seize power exercised by the French customs authorities at the applicant's house. There the European Court of Human Rights held that the interferences were a violation of Article 8 because of the very wide powers of the customs authorities; the absence of any requirement of a judicial warrant; and the fact that the customs authorities had never lodged a complaint. The present appeal can be distinguished on its facts. Here, there is no question of the search of the Appellant's home; the powers of the Inland Revenue are carefully prescribed by statute; there is judicial supervision as there is a right of appeal against a section 19A notice; and the Appellant knows the reasons for the request.

42. *Banque Internationale* (2000) concerned notices issued under sections 20(3) and 20B(2) of the 1970 Act requesting access to the bank's complete files in respect of a number of transactions with specified clients. The bank argued, among other things, that the notices interfered with the right of the bank and of the clients to privacy as guaranteed by Article 8(2). Lightman J held that, so far as the service of the notices did interfere with rights protected by Article 8(1), there was ample justification as required by Article 8(2). The notices were issued according to law, in pursuit of a legitimate aim, and were necessary in a democratic society for protecting the taxation system and the revenue.

43. The relevance of Article 8 was also considered by the Divisional Court in *Morgan Grenfell*. At paragraph 33 of his judgment Buxton LJ said:

"33. Accordingly, while we accept that in principle interference by the state with material subject to legal professional privilege potentially engages Article 8, we see nothing either in authority or in principle to lead us to think that the convention jurisprudence would forbid that interference when it was exercised for the reasons and on the legal grounds that exist in the present case; in particular bearing in mind that the material is subject to such stringent protection in national law. We do not think that the convention jurisprudence even arguably provides in this case greater protection than is provided by domestic law."

44. The Court of Appeal upheld that decision and said that it could not be assumed that there was only one fundamental right at stake, namely a person's right to keep from disclosure documents which were subject to legal professional privilege. The public interest in the prompt, fair and complete collection of the public revenue, as laid down by Parliament, was also in play. Moreover, it lay within recognition by Article 8(2) of the economic well-being of the country as a ground on which the right to respect for family life and correspondence might in a proper case be abrogated.

45. In the light of all those authorities I conclude that, so far as the service of the notice in this appeal does interfere with rights protected by Article 8(1), there was ample justification as required by Article 8(2). The notices were issued according to law, in pursuit of a legitimate aim, and were necessary in a democratic society for protecting the taxation system and the revenue.

Issue (5) - The Data Protection Act

46. The fifth issue is whether disclosure of the requested documents would infringe the Data Protection Act 1998 (the 1998 Act).

47. The Appellants arguments on this issue were set out in his letter of 1 June 2000 when he stated that "disclosure would contravene the Data Protection Act 1998".

48. For the Respondent Ms Simler argued that the 1998 Act provided a number of exceptions enabling disclosure of data to be made. She referred to section 27(3) and (4), to paragraph 2 of Schedule 3, to section 29(3) and to section 35(1).

49. Section 35(1) provides that personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by order of the court. In this appeal the disclosure of the requested documents is required by and under section 19A of the 1970 Act.

50. I conclude that disclosure of the requested documents would not infringe the Data Protection Act 1998.

Decision

51. My decisions on the issues in the appeal are:

(1) that the requested documents are reasonably required for the purpose of determining whether the Appellant's return for 1996/97 was incorrect or incomplete;

(2) that the Appellant's duty of confidentiality to his clients does not prevent the disclosure of the requested documents;

(3) that, even if the requested documents were covered by legal professional privilege, that would not prevent their disclosure;

(4) that disclosure of the requested documents would not contravene Article 8 of the Convention in Schedule 1 of the Human Rights Act 1998; and

(5) that disclosure of the requested documents would not infringe the Data Protection Act 1998.

53. The appeal is, therefore, dismissed.

DR NUALA BRICE

SPECIAL COMMISSIONER 19 March 2001

SC 3017/2000