R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax

[2001] EWCA Civ 329

COURT OF APPEAL, CIVIL DIVISION

SCHIEMANN, SEDLEY LJJ AND BLACKBURNE J

12, 13 FEBRUARY, 2 MARCH 2001

Judicial review – Information – Power to require information – Production of documents – Inspector applying to Special Commissioner ex parte for consent to issue notice to bank to produce documents relevant to bank's tax liability including documents subject to legal professional privilege – Bank requesting commissioner to hold inter partes hearing – Commissioner refusing – Commissioner consenting to issue of notice – Whether commissioner had jurisdiction to permit inter partes hearing – Whether notice requiring production of documents subject to legal professional privilege authorised by statute – Whether notice interfering with rights of privacy – Taxes Management Act 1970, s 20(1), (7) – Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 8.

MG, a merchant bank, devised and operated a tax-related scheme which it commended to clients as enabling them to secure extremely low-cost term funding through a tax arbitrage based on property. Under the scheme MG's client granted a long lease in a property that it already owned to MG who granted a sublease back. The client received the lump sum payment from MG for the lease as a capital receipt (usually to set off against capital losses). MG claimed the lump sum payment qualified for tax relief against its trading income. The inspector of taxes suspected that the transactions were not trading but capital transactions. In order to investigate a particular instance of the scheme further, the inspector served on MG a notice under s 20B(1) of the Taxes Management Act 1970 (the 1970 Act) which stated that if specified documents were not produced within a stated period, he would consider applying to a Special Commissioner under s 20(7) [a] of the 1970 Act for permission to issue a notice under s 20(1) of the 1970 Act. The documents specified included documents which MG considered were protected from disclosure by legal professional privilege. MG requested of the commissioner by letter the benefit of an inter partes hearing if and when the inspector applied for consent under s 20(7). The letter also summarised reasons why consent should not be given; these included that as the documents qualified for legal professional privilege a s 20(1) notice could not require their disclosure. The commissioner concluded that MG had no right to attend the meeting at which the inspector sought consent and that he had no discretion to allow MG's attendance. On the inspector's application the commissioner consented to the issuing of the notice. MG applied for judicial review. The Divisional Court dismissed the application. MG appealed contending: (i) that s 20(1) did not authorise an inspector to issue a notice requiring disclosure of material subject to a legal professional privilege; and (ii) that the commissioner had a discretion to allow inter partes representations to be made.

Held – (1) The provisions of which s 20 was a part dealing with the production by taxpayers and others of documents that contained information relevant to either any tax liability or to the amount of any such liability constituted a detailed code regulating to whom, by whom and subject to what threshold requirements, both

[a] Section 20, so far as material, is set out at p 502 *d* to 503 *d*, post

procedural and substantive, such notices to produce documents could be given. Taken as a whole the provisions of the code carried the inescapable implication that the rule of legal professional privilege was excluded except where it was expressly preserved and that the provisions in the code which made express provisions for documents which did not need to be produced marked the limits of the available exceptions. The code embodied an investigatory power, of broad ambit, conferred by Parliament to counter abuses of the tax system as part of the core function of the Revenue to collect revenue. It could not therefore 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 was also in play. That lay within recognition by art 8(2)[b] of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 of the economic wellbeing of the country as a ground on which the right to respect for private life and correspondence might in a proper case be abrogated. In doing its best to make a coherent whole of what had been enacted the court was not neutral. It started from the principle of legality, which in the instant case meant the upholding, unless Parliament had clearly said otherwise, of legal professional privilege. But that proviso brought the court back to the compellingly clear implication of the structure and wording of that segment of the Act examined. Since it was Parliament's manifest intent that legal privilege should in general yield to the statutory disclosure regime, the principle of legality required the court to give effect to it.

(2) A right to be heard was axiomatically worth little without some knowledge of the case that had to be met. Either therefore, the inspector's hand had in some measure to be shown or the taxpayer had to be content to make submissions in the dark. The former was destructive of the whole purpose of the procedure; the latter would create a sustained pressure for disclosure. The purpose of Parliament was in lieu of any inter partes procedure to install the commissioner as monitor of the exercise of the Revenue's intrusive powers and to require an inspector to put everything known to him, favourable and unfavourable, before the commissioner when seeking his consent. Therefore the possibility of an oral hearing was excluded by the nature of the process in question.

Accordingly, MG's appeal would be dismissed.

Notes

For the power to call for documents and information from a taxpayer, see Simon's Direct Tax Service A3.151.

For the right to respect for private and family life, home and correspondence guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 8, see 8(2) Halsbury's Laws (4th edn reissue) para 149. Article 8 of the convention now has effect under the Human Rights Act 1998 and is contained in Part I of Sch 1 to the Human Rights Act 1998.

For the Taxes Management Act 1970, s 20(1), (7), see Simon's Direct Tax Service, Part G2.

For the Human Rights Act 1998, Sch 1, Part I, see ibid, Part H1.

Cases referred to in judgment

B (a minor) v DPP [2000] 2 WLR 452, [2000] 1 All ER 833, HL.

[b] Article 8, so far as material, 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 ... the economic well-being of the country ...'

Board of Education v Rice [1911] AC 179, HL.
Fetherstonaugh v IRC [1984] STC 261; sub nom *Finch v IRC* [1985] Ch 1, CA.
Foxley v United Kingdom (2000) 8 BHRC 571, ECt HR.
Georgiou and anor (t/a Marios Chippery) v United Kingdom [2001] STC 80, ECt HR.
Leech v Deputy Governor of Parkhurst Prison [1988] AC 533, [1988] 1 All ER 485, HL.
Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997, [1968] 1 All ER 694, HL.
Parry-Jones v Law Society [1969] 1 Ch 1, [1968] 1 All ER 177, CA.
R v Derby Magistrates' Court, ex p B [1996] AC 487, [1995] 4 All ER 526, HL.
R v IRC, ex p T C Coombs & Co [1991] STC 97, [1991] 2 AC 283, [1991] 3 All ER 623, 64 TC 124, HL.
R v IRC, ex p Taylor (No 2) [1990] STC 379, [1990] 2 All ER 409, 62 TC 578, CA.
R v Secretary of State for the Home Dept, ex p Simms [2000] AC 115, [1999] 3 All ER 400, HL.
Walker (Inspector of Taxes) v Centaur Clothes Group Ltd [2000] STC 324, [2000] 1 WLR 799, [2000] 2 All ER 589, HL.

Cases referred to in skeleton arguments

Baker v Campbell (1983) 153 CLR 52, Aust HC.
Campbell v United Kingdom (1984) 7 EHRR 165, ECt HR.
Campbell v United Kingdom (1992) 15 EHRR 137, ECt HR.
Comr of Inland Revenue v West-Walker [1954] NZLR 191, CA NZ.
Crowley v Murphy (1981) 34 ALR 496, Fed Ct Aust.
General Mediterranean Holdings SA v Patel [2000] 1 WLR 272,[1999] 3 All ER 673.
Grazebrook (M and W) Ltd v Wallens [1973] ICR 256, [1973] 2 All ER 868, NIRC.
Invercargill City Council v Hamlin [1996] AC 624, [1996] 1 All ER 756, PC.
Kirkness (Inspector of Taxes) v John Hudson & Co Ltd [1955] AC 696, [1955] 2 All ER 345, 36 TC 28, HL.
L, Re [1997] AC 16, [1996] 2 All ER 78, HL.
Marleasing SA v La Comercial Internacional de Alimentacion SA (Case C-106/89) [1990] ECR 4135, ECJ.
Melluish (Inspector of Taxes) v BMI (No 3) Ltd [1995] STC 964, [1996] AC 454, [1995] 4 All ER 453, 68 TC 1, HL.
NAP Holdings UK Ltd v Whittles (Inspector of Taxes) [1994] STC 979, 67 TC 166, HL.
Niemietz v Germany (1993) 16 EHRR 97, ECt HR.
O'Reilly v Comr of State Bank of Victoria (1983) 153 CLR 1, Aust HC.
Ormond Investment Co Ltd v Betts (Inspector of Taxes) [1928] AC 143, 13 TC 400, HL.
Pepper (Inspector of Taxes) v Hart [1992] STC 898, [1993] AC 593, [1993] 1 All ER 42, 65 TC 421, HL.
Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA [1992] BCLC 583.
R v Doubtfire (19 December 2000, unreported), CA.
R v DPP, ex p Kebilene [2000] 2 AC 326,[1999] 4 All ER 801, HL.
R v Gaming Board for Great Britain, ex p Benaim [1970] 2 QB 417, [1970] 2 All ER 528, CA.
R v IRC, ex p Banque Internationale à Luxembourg SA [2000] STC 708.
R v IRC, ex p Lorimer [2000] STC 751.
R v Khan [1997] AC 558, [1996] 3 All ER 289, HL.
R v O'Kane and Clarke, ex p Northern Bank Ltd [1996] STC 1249, 69 TC 187.
R v Secretary of State for Trade and Industry, ex p Lonrho plc [1989] 1 WLR 525, [1989] 2 All ER 609, HL.
R v Special Comr of Income Tax, ex p IRC [2000] STC 537.
Silver v United Kingdom (1983) 5 EHRR 347, ECt HR.

Sweet v Parsley [1970] AC 132,[1969] 1 All ER 347, HL.
Westcott (Inspector of Taxes) v Woolcombers Ltd [1986] STC 182; *affd* [1987] STC 600, 60 TC 575, CA.

Appeal

Morgan Grenfell & Co Ltd (MG) appealed against the dismissal by the Divisional Court (Buxton LJ and Penry-Davey J) ([2000] STC 965) of its application for judicial review of the decision of a Special Commissioner to give consent under s 20(7) of the Taxes Management Act 1970 (the 1970 Act) to the giving of a notice to MG under s 20(1) of the 1970 Act requiring the delivery of documents, which included material subject to legal professional privilege, for the purposes of the Revenue's inquiry into MG's tax liability.

Michael Beloff QC and *Giles Goodfellow* (instructed by Slaughter & May) for MG.
Timothy Brennan and *Ingrid Simler* (instructed by the Solicitor of Inland Revenue) for the Crown.

Cur adv vult

2 March. The following judgment of the court was delivered.

BLACKBURNE J (delivering the judgment of the court at the invitation of Schiemann LJ).

Introduction

[1] This is an appeal against the dismissal by the Divisional Court (Buxton LJ and Penry-Davey J) (see [2000] STC 965) of an application by Morgan Grenfell & Co Ltd (MG), the well-known merchant bank, for judicial review of: (i) a Special Commissioner's decision to give consent under s 20(7) of the Taxes Management Act 1970 (the 1970 Act) to the giving of a notice to MG under s 20(1) of the 1970 Act; (ii) the notice itself, which is dated 28 September 1999, requiring MG to deliver documents and notes of meetings with advisers relating to a property transaction between MG and the Tesco Group entered into in February 1995; and (iii) a written decision of the commissioner dated 16 April 1999 (the preliminary decision) ruling (a) that he had no jurisdiction or discretion to allow MG to participate in an inter partes hearing of an application for consent to the issue of the s 20(1) notice, and (b) that, as a matter of necessary inference, the provisions of s 20 of the 1970 Act override the taxpayer's ordinary right to legal professional privilege.

[2] In issue before the Divisional Court were four questions which the court formulated in the following terms (see [2000] STC 965 at 969, para 8):

> 'I. Does s 20(1) of the 1970 Act authorise an inspector to issue a notice requiring disclosure by a taxpayer of material subject to legal professional privilege?
>
> II. Does a commissioner hearing an application by an inspector under s 20(7) of the 1970 Act have jurisdiction to permit the intended recipient of the inspector's notice to attend the hearing and make representations?
>
> III. In the present case, could the inspector have held the reasonable opinion that the material subject to legal professional privilege contained or might contain information relevant to MG's tax liability, as s 20(1) of the 1970 Act requires?
>
> IV. To the extent that it is a separate issue from III, did the commissioner err in law in consenting to the issue of the notice in relation to the material subject to legal professional privilege?'

[3] The court concluded: (i) that s 20(1) of the 1970 Act authorised an inspector to issue a notice requiring disclosure by a taxpayer of material subject to legal professional privilege; (ii) that MG had no right to require an oral hearing and more generally, that the commissioner had no jurisdiction to afford the intended recipient of the notice an inter partes hearing in respect of an application for consent under s 20(7); (iii) that, on the basis of the disclosed information, the commissioner could have held the reasonable opinion that the material subject to legal professional privilege contained or might contain information relevant to MG's tax liability; and (iv) that, to the extent that it was a separate issue, the commissioner had not erred in law in consenting to the issue of the notice. The application was therefore dismissed.

[4] MG's appeal, which is brought with the Divisional Court's permission, raises the following issues: (i) does s 20(1) of the 1970 Act authorise an inspector to issue a notice requiring disclosure by a taxpayer of material subject to legal professional privilege (the substantive issue); and (ii) does the commissioner have a discretion to allow the taxpayer to make oral representations to him, inter partes, as to why consent should not be given to the giving of a notice under s 20(1) of the 1970 Act (the procedural issue)?

[5] The background to the proceedings, so far as it is necessary to set it out, is a tax-related scheme whereby, in essence, MG's client (in these proceedings it is a member of the Tesco Group), grants a long leasehold interest in property which it already owns to MG in return for a lump sum. MG then subleases the property back to the client in return for a periodic rent. The lump sum payment made by MG is claimed by it to qualify for tax relief against its trading income while the capital receipt by the client (in this case Tesco) will not be taxed as giving rise to any capital gain because of the availability of some form of relief such as a capital loss. The scheme is advertised by MG as enabling participants 'to secure extremely low cost funding through a tax arbitrage based on property' and is marketed as 'STELA' (an acronym for Sale With Tax Enhanced Leasing Arbitrage).

[6] As the Divisional Court pointed out (see [2000] STC 965 at 968, para 4) MG have emphasised that they have throughout been open with the inspector of taxes: there is no suggestion here of tax evasion and, as MG contended, no question of tax avoidance either. Nevertheless, the inspector suspected (as he continues to do) that, on a true understanding of the matter, it might well emerge that the transactions, involving (as here) the purchase of supermarkets, are not trading transactions, but capital transactions, and should be treated as such for tax purposes. We were told by Mr Brennan, for the Crown, that the Revenue is aware of 16 such schemes involving payments made of £259m with tax at stake of £77m. It was with a view to investigating these matters further that—in regard to the particular transaction undertaken with Tesco in February 1995—the Revenue had recourse to its statutory powers of investigation under the 1970 Act.

[7] To this end, in November 1998, the inspector served on MG a so-called 'precursor notice' under s 20B(1) that, if the documents specified on an attached schedule were not produced within a stated period, he would consider applying to a Special Commissioner for permission to issue a s 20(1) notice. Among the items specified on the schedule were documents which MG contends are protected from disclosure by legal professional privilege.

[8] MG responded by requesting of the presiding Special Commissioner that they be granted the benefit of an inter partes hearing if and when the Revenue should apply for consent under s 20(7) to the issue of a s 20(1) notice. The letter requesting such a hearing also set out a summary of their reasons why consent should not be given among which was that, as the documents qualified for legal professional privilege, a s 20(1) notice could not require their disclosure.

[9] In the preliminary decision, given on 16 April 1999, the Special Commissioner, His Honour Stephen Oliver QC, concluded (so far as material):

(i) that MG—as the intended recipient of an intended s 20(1) notice—had no right to attend the meeting at which the inspector seeks the commissioner's consent under s 20(7) and he had no discretion to admit them; (ii) that arguments based on the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (the convention) (the Human Rights Act 1998 not then being in force) did not alter this conclusion; and (iii) that a taxpayer's ordinary right of legal professional privilege does not entitle him to refuse to comply with a s 20(1) notice.

[10] At an ex parte hearing on 28 September 1999 and notwithstanding further written representations by MG's legal advisers, the commissioner gave his consent to the issue of a s 20(1) notice. On the same day the notice was issued to MG. These proceedings followed shortly thereafter.

The 1970 Act

[11] Before coming to the two issues which arise on this appeal, it is necessary to set out the material provisions of the 1970 Act. We do so in their form as they existed in 1999. They were subsequently amended by the Finance Act 2000, effective from 28 July 2000, but in respects which do not affect the outcome of this appeal.

> **'20 Power to call for documents of taxpayer and others**
>
> (1) Subject to this section, an inspector may by notice in writing require a person—
>
> > (a) to deliver to him such documents as are in the person's possession or power and as (in the inspector's reasonable opinion) contain, or may contain, information relevant to—
> >
> > > (i) any tax liability to which the person is or may be subject, or
> > > (ii) the amount of any such liability, or
> >
> > (b) to furnish to him such particulars as the inspector may reasonably require as being relevant to, or to the amount of, any such liability.
>
> (2) Subject to this section, the Board may by notice in writing require a person—
>
> > (a) to deliver to a named officer of the Board such documents as are in the person's possession or power and as (in the Board's reasonable opinion) contain, or may contain, information relevant to—
> >
> > > (i) any tax liability to which the person is or may be subject, or
> > > (ii) the amount of any such liability, or
> >
> > (b) to furnish to a named officer of the Board such particulars as the Board may reasonably require as being relevant to, or to the amount of, any such liability.
>
> (3) Subject to this section, an inspector may, for the purpose of enquiring into the tax liability of any person ("the taxpayer"), by notice in writing require any other person to deliver to the inspector or, if the person to whom the notice is given so elects, to make available for inspection by a named officer of the Board, such documents as are in his possession or power and as (in the inspector's reasonable opinion) contain, or may contain, information relevant to any tax liability to which the taxpayer is or may be, or may have been, subject, or to the amount of any such liability; and the persons who may be required to deliver or make available a document under this subsection include the Director of Savings ...

(7) Notices under subsection (1) or (3) above are not to be given by an inspector unless he is authorised by the Board for its purposes; and—

(a) a notice is not to be given by him except with the consent of a General or Special Commissioner; and
(b) the Commissioner is to give his consent only on being satisfied that in all the circumstances the inspector is justified in proceeding under this section ...

(8A) If, on an application made by an inspector and authorised by order of the Board, a Special Commissioner gives his consent, the inspector may give such a notice as is mentioned in subsection (3) above but without naming the taxpayer to whom the notice relates; but such a consent shall not be given unless the Special Commissioner is satisfied—

(a) that the notice relates to a taxpayer whose identity is not known to the inspector or to a class of taxpayers whose individual identities are not so known;
(b) that there are reasonable grounds for believing that the taxpayer or any of the class of taxpayers to whom the notice relates may have failed or may fail to comply with any provision of the Taxes Acts;
(c) that any such failure is likely to have led or to lead to serious prejudice to the proper assessment or collection of tax; and
(d) that the information which is likely to be contained in the documents to which the notice relates is not readily available from another source ...

20A Power to call for papers of tax accountant
(1) Where after the passing of the Finance Act 1976 a person—

(a) is convicted of an offence in relation to tax (whenever committed) by or before any court in the United Kingdom; or
(b) has a penalty imposed on him (whether before or after the passing of that Act) under section 99 of this Act,

and he has stood in relation to others as a tax accountant, an inspector authorised by the Board for the purpose of this section may by notice in writing require the person to deliver to him such documents as are in his possession or power and as (in the inspector's reasonable opinion) contain information relevant to any tax liability to which any client of his is or has been, or may be or have been, subject, or to the amount of any such liability ...

20B Restrictions on powers under ss 20 and 20A ...
(3) An inspector cannot under section 20(1) or (3) or under section 20A(1), give notice to a barrister, advocate or solicitor, but the notice must in any such case be given (if at all) by the Board; and accordingly in relation to a barrister, advocate or solicitor for references in section 20(3) and (4) and section 20A to the inspector there are substituted references to the Board ...
(8) A notice under section 20(3) or (8A) or section 20A(1) does not oblige a barrister, advocate or a solicitor to deliver or make available, without his client's consent, any document with respect to which a claim to professional privilege could be maintained.'

[12] Section 20, under which the notice given to MG was issued, is part of an elaborate series of provisions to be found in ss 20 to 20D of the 1970 Act dealing with the production by taxpayers and others of such documents as, in the reasonable opinion of the inspector or, in some cases, the Commissioners of Inland Revenue, contain information relevant either to any tax liability to which a person may be subject or to the amount of any such liability. The provisions, which have

been amended and added to from time to time (s 20 itself being a wholesale replacement by the Finance Act 1976 of the provisions originally contained in the 1970 Act), constitute a detailed code regulating to whom, by whom and subject to what threshold requirements, both procedural and substantive, such notices can be given. With the assistance of a most helpful schedule to his skeleton argument, Mr Brennan reviewed the scope of these provisions, ranging from what he described as the Revenue's most intrusive power, contained in s 20C, to enter and search specified premises, if necessary by force, where there is a reasonable ground to suspect serious fraud and that evidence of it is likely to be found at the premises, to the relatively less intrusive power, under s 20(1), to call on a taxpayer to deliver documents.

The substantive issue

[13] After reviewing various provisions of the code, the Divisional Court felt 'driven to conclude that the provisions of the 1970 Act taken as a whole do demonstrate a premise that the rule of legal professional privilege is excluded from them save when it is expressly incorporated' (see [2000] STC 965 at 974, para 27). It therefore concluded that, although s 20(1) was silent on the matter, it was a necessary implication from that premise that arguments based on legal professional privilege could not be used to resist an application for disclosure under s 20(1).

[14] Mr Beloff QC, for MG, attacked that conclusion on two bases: (i) the Divisional Court's approach to statutory construction which, in certain respects he submitted, was inappropriate; and (ii) its analysis of the 1970 Act which, he submitted, was flawed.

[15] With the exception of two particular matters, to which we come later, the general approach to the question of construction (as distinct from the application of that approach to the 1970 Act) advanced before the Divisional Court and again before us was not a matter of controversy. It involved the following elements: (i) legal professional privilege, including legal advice privilege, is a fundamental right; (ii) because of the principle of legality, legal professional privilege cannot be overridden by general or ambiguous words but only by express language or necessary implication; (iii) because no language in the 1970 Act expressly overrides legal professional privilege, to succeed, the Revenue must establish that, by necessary implication, legal professional privilege was excluded from s 20 (including s 20(1)) except where expressly preserved; and (iv) the concept of necessary implication connotes an implication which is compellingly clear.

[16] Relevant to (i)—the fundamental nature of the rule of legal professional privilege—is the statement of Lord Taylor of Gosforth CJ in *R v Derby Magistrates' Court, ex p B* [1996] AC 487 at 507 that:

> 'Legal professional privilege is ... 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.'

Relevant to (ii)—the significance of the principle of legality—is Lord Hoffmann's statement in *R v Secretary of State for the Home Dept, ex p Simms* [2000] AC 115 at 131 that—

> '... the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.'

Relevant to (iv)—what must be shown to give rise to a necessary implication that a fundamental right such as legal professional privilege is intended to be overridden—is the observation of Lord Nicholls of Birkenhead in *B (a minor) v DPP* [2000] 2 WLR 452 at 458 (a case concerned with whether there was a need for a mental element in a particular sexual offence) that:

> '"Necessary implication" connotes an implication which is compellingly clear. Such an implication may be found in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament when creating the offence.'

Also relevant was Lord Steyn's search for what he described ([2000] 2 WLR 452 at 466) as a 'consistency of theme' in the statutory provisions there under examination such as to justify overriding the presumption that general words in a statute are not intended to abrogate fundamental rights.

[17] We consider, in agreement with the Divisional Court, that, taken as a whole, the provisions of the code do carry the inescapable implication that the rule of legal professional privilege is excluded except where it is expressly preserved and that the provisions in the code which make express provision for documents which need not be produced mark the limits of the available exceptions. We reach that conclusion for the following reasons.

[18] The code embodies an investigatory power, of broad ambit, conferred by Parliament to counter abuses of the tax system as part of the core function of the Commissioners of Inland Revenue (under s 13(1) of the Inland Revenue Regulation Act 1890) 'to collect and cause to be collected every part of inland revenue'. It cannot therefore be assumed that there is only one fundamental right at stake, namely a person's right to keep from disclosure documents which are subject to legal professional privilege. The public interest in the prompt, fair and complete collection of the public revenue, as laid down by Parliament, is also in play. It lies within recognition by art 8(2) of the convention of the economic well-being of the country as a ground on which the right to respect for private life and correspondence may in a proper case be abrogated.

[19] The code is detailed in its provisions. The operation of s 20(1) well illustrates the point. The notice is to be given by an inspector of taxes, but only if he is authorised by the Board (ie the Commissioners of Inland Revenue) for its purposes (see s 20(7)). Even then, the inspector has no authority to give notice under s 20(1) to a barrister, solicitor or advocate. Only the Board can do this (see s 20B(3)). Before service of a s 20(1) notice, the taxpayer to be served must first be given a precursor notice under s 20B(1), ie he must first have been given a reasonable opportunity to deliver the documents in question. The inspector must hold the reasonable opinion that the documents he requires contain or may contain information relevant to the recipient's liability or the amount of that liability (see s 20(1)). Under s 20(7)(a) the notice is not to be given except with the consent of a General or Special Commissioner. The commissioner has been described as 'the monitor of the decision' of the inspector to serve the notice (see Lord Lowry in *R v IRC, ex p T C Coombs & Co* [1991] STC 97 at 110, [1991] 2 AC 283 at 302). Under s 20(7)(b) the commissioner must be satisfied that, in all the circumstances, the inspector is justified in proceeding. In addition to the service of the s 20(1) notice, s 20(8E) requires the inspector to give the recipient a written summary of his reasons for applying for consent by the commissioner to the giving of the notice.

[20] Against that background it is, to say the least, surprising that, if Parliament had intended that the inspector should have no power to require the delivery of documents covered by legal professional privilege, it has failed to spell this out. Can the same be said (as Mr Beloff says it) of the converse?

[21] Lawyers, ie barristers, advocates and solicitors, are dealt with separately by the code. A notice under s 20(1) or under s 20(3) (which relates to notices given to third persons, other than the taxpayer in question) or under s 20A(1) (which provides for the service of a notice on a person who has acted for others as a tax accountant and who has been convicted of a tax offence or has had a penalty imposed on him under s 99 of the 1970 Act) cannot be given to a lawyer except by the Board. The separate treatment of lawyers applies as much where it is their own tax liability that is involved (as would be the case where the notice is given under s 20(1)) as where the tax liability of clients is at stake (as will be the case where the notice is given under s 20(3)).

[22] With lawyers identified as a separate class of recipient of notices, s 20B(8) provides that:

> 'A notice under section 20(3) or (8A) or section 20A(1) does not oblige a barrister, advocate or a solicitor to deliver or make available, without his client's consent, any document with respect to which a claim to professional privilege could be maintained.'

This provision, it is to be noted, applies only where the lawyer, served with a notice, is acting for a client. It does not apply to a lawyer served as a taxpayer. This is so even if the documents which the lawyer is required to deliver include documents relating to advice given to a client with respect to which a claim to legal professional privilege by the client could be maintained. What can be the purpose of highlighting the preservation of legal professional privilege when notices are served under those sections but not, as in the example just mentioned, where the lawyer is served as the taxpayer if there is an underlying assumption that documents covered by legal professional privilege are in any event protected from disclosure?

[23] Mr Beloff's suggested answer to this was to refer to the uncertain scope in English law of the protection given to legal professional privilege in respect of material held by solicitors outside judicial or quasi-judicial proceedings at the time the code, in its substituted form, was introduced into the 1970 Act in 1976. In *Parry-Jones v Law Society* [1969] 1 Ch 1, the Court of Appeal held that the Law Society was entitled under s 29 of the Solicitors Act 1957 to make rules enabling it to inspect a solicitor's books and supporting documents in order to see that the Solicitors' Accounts and Trust Accounts Rules were being complied with, even if it meant disclosing the client's affairs, thereby overriding any privilege or confidence which might otherwise subsist between solicitor and client. Lord Denning MR made reference, as a category separate from the privilege relating to legal proceedings, to the privilege which 'arises out of the confidence subsisting between solicitor and client similar to the confidence which applies between doctor and patient, banker and customer, accountant and client, and the like' (see [1969] 1 Ch 1 at 7). He said that '[t]he law implies a term into the contract whereby a professional man is to keep his client's affairs secret and not to disclose them to anyone without just cause'. In the same case Diplock LJ said ([1969] 1 Ch 1 at 9) that—

> '... privilege, of course, is irrelevant when one is not concerned with judicial or quasi-judicial proceedings because, strictly speaking, privilege refers to a right to withhold from a court, or a tribunal exercising judicial functions, material which would otherwise be admissible in evidence. What we are concerned with here is the contractual duty of confidence, generally implied though sometimes expressed, between a solicitor and client.'

The court held that, in the circumstances of that case, the contractual duty of confidence was overridden.

[24] It was only later, said Mr Beloff, that this further category of protection—now commonly referred to as legal advice privilege—was recognised to

be as much a part of legal professional privilege as was so-called litigation privilege. He suggested that it was because, in 1976, it might well have been perceived that there was a risk that the lawyer's duty of confidence would yield to the general words of s 20(3), that s 20B(8) was inserted. Its function, he submitted, may therefore be seen as making clear that legal professional privilege was not limited to quasi-judicial proceedings, that the decision to disclose privileged material held by the solicitor was the client's decision and not the solicitor's and that, accordingly, the solicitor had to observe his duty of confidence.

[25] The difficulty about this submission is that, if Parliament's purpose was to avoid any risk that the duty of confidence would yield to the general words of s 20(3) (or the other provisions mentioned in s 20B(8)), it did so in a singularly inappropriate way. Rather than state that the duty to disclose does not extend to communications between a professional legal adviser and his client (or any person representing his client) made in connection with the giving of legal advice to the client, it limits it to notices under s 20(3) (or under ss 20(8A) and 20A(1)) and then only when served on the taxpayer's professional legal adviser.

[26] The Divisional Court ([2000] STC 956 at 973, para 21) was of the opinion that the repetition in s 20B(8) of the rule as to legal advice privilege was otiose unless the scheme of the 1970 Act was to exclude the legal professional privilege rule unless expressly otherwise stated. We agree.

[27] The Divisional Court referred also to s 20C(4). That provision has since been amended by the Finance Act 2000 so that, since 28 July 2000, it provides simply that 'nothing in subsection (3) above authorises the seizure and removal of items subject to legal privilege'. After drawing attention to the provision as it existed and as amended by the Finance Act 2000, the Divisional Court said this ([2000] STC 965 at 973, para 24)—

> '... it is very difficult to rationalise the successive versions of s 20C(4) ... if, as MG contended, references in the code to legal professional privilege are merely confirmatory of a general rule to which the code is necessarily subject. It is a necessary element in that argument that the exclusion of material subject to legal professional privilege in the hands of legal advisers was merely a specifically stated instance of a general, though unexpressed, protection of legal professional privilege. But, if that were so, and the terms of the statute were originally thought sufficient to address every incidence of legal professional privilege, why was it changed to make specific reference to legal professional privilege as a whole?'

[28] Mr Beloff submitted that s 20C(4) was not redundant and that its purpose was to clarify that a warrant under s 20C cannot authorise the seizure of material covered by legal professional privilege in the hands of a lawyer and that, accordingly, the lawyer's duty of confidentiality remains absolute. He also pointed out that, as the section is a power to seize (and not require disclosure of) documents covered by the warrant so that the consent of the holder of the documents or of any other person is irrelevant, the legislation distinguishes between ss 20B(8) and 20C(4). That may be so but what the argument fails to address is why Parliament has chosen to highlight this particular aspect of legal professional privilege. As the Divisional Court aptly observed ([2000] STC 956 at 973, para 25):

> 'If it were thought necessary to give a special reminder of the importance of legal professional privilege in some particular case or cases, that might be thought more appropriate in a case such as the present, arising under s 20(1) of the 1970 Act, where no fraud is alleged or suspected.'

[29] Over and above the express preservation of legal professional privilege in s 20B(8) and s 20C(4) there was a further provision to which we were referred. By s 20B(2):

> 'A notice under section 20(1) does not oblige a person to deliver documents or furnish particulars relating to the conduct of any pending appeal by him; a notice under section 20(3) or (8A) does not oblige a person to deliver or make available documents relating to the conduct of a pending appeal by the taxpayer; and a notice under section 20A does not oblige a person to deliver documents relating to the conduct of a pending appeal by the client. "Appeal" means appeal relating to tax.'

[30] The Divisional Court considered ([2000] STC 965 at 972, para 18) that this provision did not carry the matter further since appeals might be conducted by persons other than lawyers, and the documents in question might therefore go beyond those subject to legal professional privilege. It was suggested that the section was introduced in view of the uncertain position—as regards matters of privilege—where a taxpayer conducts his appeal in person or acts with the assistance of a person other than a qualified lawyer. Be that as it may, it is to be noted that the privilege identified by s 20B(2) is confined to 'pending' appeals. MG's approach to the code assumes, however, that the privilege continues indefinitely. (In *R v Derby Magistrates' Court, ex p B* [1996] AC 487 at 507 Lord Taylor emphasised that '[t]he client must be sure that what he tells his lawyer in confidence will *never* be revealed without his consent [emphasis added]'.) Why then should Parliament express privilege in this provision in terms merely of pending appeals if, in truth, the privilege is to continue after the appeal has been disposed of? The documents to which the privilege attaches could well be material notwithstanding disposal of the particular appeal.

[31] Thus far, we have considered the code without regard to decided authority. In *R v IRC, ex p Taylor (No 2)* [1990] STC 379, a notice under s 20(2) had been served on a solicitor as taxpayer. Among other challenges advanced by him to the notice, the solicitor objected that some of the documents covered by the notice might contain information protected by his clients' legal professional privilege. In the course of his judgment dismissing the solicitor's appeal on this and other points, Bingham LJ (with whom Lord Donaldson of Lymington MR and Nourse LJ agreed) said ([1990] STC 379 at 384):

> 'Counsel for the applicant ... drew attention to the language of s 20B(2) and, in particular, the language "conduct of a pending appeal" and referred to the preservation of legal professional privilege which is made in s 20B(8). He argued that Parliament could not have intended to override the client's ordinary right to legal professional privilege in respect of documents in the hands of a legal adviser. I am, for my part, and with all respect to that argument, unpersuaded by it. It is quite plain that Parliament had the position of professional legal advisers very much in mind. So much is plain from s 20B(3) and s 20B(8). Parliament has expressly preserved the client's legal professional privilege where disclosure is sought from a lawyer or tax accountant in his capacity as professional adviser and not taxpayer. That is the position covered by s 20B(8). Parliament has, moreover, provided a measure of protection where the notice is given under s 20(1) or s 20(3) concerning documents relating to the conduct of a pending appeal by the client. But there is no preservation of legal professional privilege and no limited protection where the notice relates to a lawyer in his capacity as taxpayer who is served with a notice under s 20(2). The clear inference is, in my judgment, that a client's ordinary right to legal professional privilege, binding in the 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 (see *Parry-Jones v Law Society* [1969] 1 Ch 1). 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.'

[32] Mr Beloff submitted to us, as he had to the Divisional Court, that that decision was not binding on us as it concerned a notice under s 20(2) served on a solicitor as a taxpayer who was concerned to urge his clients' legal professional privilege as a reason for not disclosing various documents. He also submitted that, in any event, Bingham LJ did not approach the issue of construction from the premise of the principle of legality.

[33] The Divisional Court accepted Mr Beloff's first point and, although seeing force in the second, considered that the Court of Appeal could not have been ignorant of the significance of legal professional privilege, in its full sense, which by 1989 (when *Ex p Taylor (No 2)* was decided) was already well-established. The court went on to say, first, that, although *R v Derby Magistrates' Court, ex p B* [1996] AC 487 was decided some years after, in its statement of the importance of the principle of legal professional privilege, the House of Lords made, and purported to make, no new law and, second, that it was not possible to reconcile the outcome of *Ex p Taylor (No 2)* with the position contended for by MG in the present case.

[34] Mr Brennan submitted that the Court of Appeal in *Ex p Taylor (No 2)* decided the legal professional privilege point in favour of the Revenue and, that, since the relevant provision in that case, s 20(2) is not, for this purpose, relevantly different from s 20(1), the ratio in that case is decisive of the issue in the present case and binding on this court. Alternatively, he submitted, the Divisional Court was correct to hold that it is impossible to reconcile the outcome of *Ex p Taylor (No 2)* with Mr Beloff's submissions in the present case.

[35] We consider, like the Divisional Court, that the Court of Appeal in *Ex p Taylor (No 2)* could not have been unaware of the fundamental importance of legal professional privilege. The fact that it may not have approached the issue of construction in the full light of the principle of legality as it has now come to be formulated does not, in our view, detract from this fact. We also agree with the Divisional Court that it is impossible to reconcile the outcome of *Ex p Taylor (No 2)* with the submissions of MG in the present case. Since we have reached the same view on the issue of legal professional privilege as the Court of Appeal did in *Ex p Taylor (No 2)*, it is idle to consider whether, in any event, we are bound by the ratio in that case.

[36] We come now to Mr Beloff's particular criticisms of the Divisional Court's approach to statutory construction. The first concerns the use of subsequent legislation to construe an earlier provision. He submitted that, in construing the ambit of s 20(1), it was not open to the Divisional Court to have regard to amendments to the code introduced subsequent to 1976 when s 20(1) was first enacted in what for all practical purposes is its current form. Subsequent legislation, he submitted, can only be referred to if the original is ambiguous i e if there are two or more equally tenable constructions and no other indications in the Act in question favouring one construction rather than the other or others (see *Fetherstonaugh v IRC* [1984] STC 261 at 272, sub nom *Finch v IRC* [1985] Ch 1 at 15). All the more was it not open to the Divisional Court to have regard to subsequent legislation, he submitted, where, as here, the court was considering whether there was a necessary implication that Parliament intended by s 20(1) to override a fundamental right. The justification for holding that a fundamental right has been overridden is that Parliament, by passing the relevant provision, must have

squarely faced up to the consequences of what it was doing and faced the political consequences (see the passage from Lord Hoffmann's speech in *R v Secretary of State for the Home Dept, ex p Simms* [2000] AC 115 at 131). The focus, he submitted, must therefore be on the material before Parliament at the time it enacted the particular provision (here s 20(1)). This necessarily could not include subsequent amendments or new provisions.

[37] The short answer to this submission is that the conclusion on the question of construction is unaffected by any legislation passed subsequent to 1976. The amendment to s 20C(4) introduced initially by the Finance Act 1989 and later replaced by the provision set out in para 27 above was itself almost word for word the same as the corresponding provision to be found in a proviso to s 20C(3) as it was enacted in 1976. That proviso stated—

> '... but this [i e the seizure and removal of items in execution of a warrant] does not authorise the seizure and removal of documents in the possession of a barrister, advocate or solicitor, with respect to which a claim for professional privilege could be maintained.'

[38] It is true that, in para 23 of its decision, the Divisional Court referred to s 20BA and para 5 of Sch 1AA to the 1970 Act which were introduced by the Finance Act 2000. Section 20BA enables orders to be made by 'the appropriate judicial authority' for the delivery of documents in cases where there is reasonable ground for suspecting that an offence involving serious tax fraud has been or is about to be committed and that documents which may be required as evidence for the purpose of proceedings in respect of the offence are or may be in the possession any person. Paragraph 5 of Sch 1AA provides that the section does not apply 'to items subject to legal privilege'. The reference to those provisions was not critical to the Divisional Court's decision but, even if it was, reference to them is not necessary to the conclusion which the Divisional Court reached and with which we agree that, except where otherwise expressly preserved, the rule of legal professional privilege cannot be maintained.

[39] But, in any event, we question why, in a code such as this which Parliament has from time to time amended, it should be impermissible when determining what, at the date that the s 20(1) notice was issued, the true scope was of that provision, to consider what Parliament's intention was by reference to other provisions of the code. We see no reason why, in a case such as this, the court's gaze must be confined to legislation as it existed at some much earlier date. Each amendment accrues to a text conveying an evolving, but at each stage ascertainable, intent.

[40] Mr Beloff's other criticism of the Divisional Court's approach to statutory construction concerned its failure, as he submitted, to pay proper regard to the view expressed by Lord Hoffmann in *Walker (Inspector of Taxes) v Centaur Clothes Group Ltd* [2000] STC 324 at 331, [2000] 1 WLR 799 at 805 that—

> '... an argument from redundancy [seldom] carries great weight, even in a Finance Act. It is not unusual for Parliament to say expressly what the courts would have inferred anyway.'

The importance of that approach, Mr Beloff submitted, is all the more to be respected where, as here, what is in issue is the overriding of a fundamental right. That is especially so, he said, given that there are no provisions of the 1970 Act which could not operate consistently with the general survival of legal professional privilege.

[41] We consider that Mr Beloff has placed heavier reliance on Lord Hoffmann's dictum than it was designed to bear. The strength or weakness of an argument from redundancy must depend on the particular text. The question here is whether Parliament's explicit protection of certain classes of privileged documents would be

redundant if its intention were that all such documents should be protected. In other words, as the Divisional Court observed ([2000] STC 965 at 974, para 26), the inquiry is into whether there can fairly be deduced from the terms of the code taken as a whole a consistency of theme that requires, within that code, specific provision to be made for the recognition of legal professional privilege. The absence of any good reason why, in a detailed code of closely related provisions, Parliament has chosen to mention particular cases where legal professional privilege is to be preserved, confirms our view that they are intended to be exceptions to an underlying rule that legal professional privilege is not to entitle a person served with a notice to refuse disclosure. The inspector's argument from redundancy is therefore one which, in the circumstances of this case, has some force.

[42] There is, however, another argument from redundancy. We have mentioned it at the end of para 20 above; but consistency has, we suspect, caused Mr Beloff to spell it out as a rhetorical question rather than in terms which, when they are used by the Revenue, he attacks. It can nevertheless legitimately be asked, as a riposte to the previous paragraph of this judgment, whether Parliament's explicit exposure to production of certain classes of otherwise privileged document would be redundant if its intention were that all such documents should be exigible by the Revenue. The answer, in our view, lies in what follows.

The principle of legality and the Human Rights Act 1998

[43] Mr Beloff made the powerful submission that a general abrogation of legal professional privilege, save where otherwise specified, in the face of the Revenue's powers of search and seizure is not only as difficult to imply as it would have been easy to express: it is all but blocked in the 1970 Act by the constitutional principle that unequivocal legislative provision is necessary in order to override fundamental rights. Here, he argues, the fundamentality of legal professional privilege as a domestic legal right of the individual has now been reinforced by the constraints placed by art 8 of the convention on the construction of legislation and on the acts of public authorities by ss 3 and 6 of the Human Rights Act 1998 (the 1998 Act). The decision of the European Court of Human Rights in *Foxley v United Kingdom* (2000) 8 BHRC 571 confirms that legal professional privilege is protected by art 8. Mr Beloff submits, and we accept, that the 1998 Act requires us to revisit the reasoning in *Ex p Taylor (No 2)* [1990] STC 379 in the light of the convention and its jurisprudence.

[44] Mr Beloff's initial recourse, however, is to *R v Derby Magistrates' Court, ex p B* [1996] AC 487 and to the protection afforded to it by s 11 of the 1998 Act:

> 'A person's reliance on a Convention right does not restrict—(a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom ...'

This is because art 8 affords a right to respect for private life and correspondence which can be qualified in a proper case, as we have said, by the interests of the economic wellbeing of the country. But legal professional privilege, as described in *R v Derby Magistrates' Court, ex p B*, is unqualified by any considerations of public or private welfare. We accept this as the starting point for considering the meaning of the 1970 Act.

[45] Of Mr Beloff's argument that nothing would have been easier than to say in black and white what Mr Brennan has sought to spell out of the legislation, it would be unjustifiably cynical to say that it represents the triumph of hope over experience. What can more cogently be said is that not all legislators are ready to meet the 'political cost' which, as Lord Hoffmann said in *R v Secretary of State for the Home Dept, ex p Simms* [2000] AC 115, might have to be paid for legislation that invades fundamental rights. One reason why there are many examples of statutory

provisions which emerge only by implication is that some statutes are cast in broad and unspecific language: the 1998 Act is a good example, but ever since the Code Napoléon (and arguably for much longer) the advantages of legislating in brief and broad terms and leaving it to the courts to fill in the detail have been recognised. A related reason, however, and one which can make for complexity rather than simplicity, is that hinted at both by Lord Hoffmann (ante) and some years earlier by Lord Upjohn when in *Padfield v Minister of Agriculture* [1968] AC 997 at 1061, he spoke of the 'fear of parliamentary trouble' and the need for ministers on occasion 'to face the music in Parliament': it is sometimes simpler or safer to let the court as the interpreter of legislation, rather than ministers as its advocates, spell out its implications. There is nothing novel or necessarily sinister in this. Disraeli when moving the second Reform Bill of 1867, pressed as to whether women were meant to be included in the 'persons' who were being enfranchised, replied that this would be 'a matter for the gentlemen of the long robe'—as indeed it turned out to be; and as recently as 1997–98, Lord Irvine of Lairg LC and other ministers in moving the Human Rights Bill more than once made it clear that judicial exploration and development of simple and broad provisions was the way Parliament was being invited to go.

[46] The choice is, no doubt, a choice of risks; but if it is made in favour of exegesis by the court, the court must do its best to make a coherent whole of what has been enacted. Mr Beloff correctly submits that in doing this the court is not neutral. It starts from the principle of legality, which in this case means the upholding, unless Parliament has clearly said otherwise, of legal professional privilege. But the proviso brings us back to what, for reasons we have given, we consider to be the compellingly clear implication of the structure and wording of the segment of the Act which we have been examining. If, as we hold, it is Parliament's manifest intent that legal privilege should in general yield to the statutory disclosure regime, the principle of legality requires us to give effect to it.

A right to be heard?

[47] The submission that a taxpayer or adviser at risk of compulsory disclosure of confidential documents ought to have an opportunity of deflecting the application is at first sight attractive. To see why, one need go no further than Lord Loreburn LC's celebrated remark in *Board of Education v Rice* [1911] AC 179 at 182 that acting in good faith and listening fairly to both sides 'is a duty lying upon everyone who decides anything'. But in the same passage Lord Loreburn made clear, as other judges of high authority have done many times since, that how this is done is in principle a matter for each decision-maker: natural justice does not generally demand orality. And there is a further, small, group of cases, of which Mr Brennan submits this is one, in which the exigencies of the legislative scheme make an inter partes procedure impossible.

[48] What is said here by Mr Beloff is that although the disclosure procedure is in one sense a first step which in itself determines nobody's rights or liabilities, in another and more important sense it is conclusive of the Revenue's right to invade somebody's privacy and (given our conclusions so far) to disrupt a relationship of professional confidentiality. His position, he contends, is if anything stronger than that of the applicant in *Georgiou and anor (trading as Marios Chippery) v United Kingdom* [2001] STC 80, in whose favour the European Court of Human Rights accepted that fine lines should not be drawn, for art 6 purposes, between the civil and criminal aspects of an assessment to a tax penalty. Here, where it is respect for private life and correspondence under art 8 which in issue, the impugned decision constitutes a completed invasion of the convention right. If the court is to sanction it, as we have done, then Mr Beloff contends that it should only be by including at least a power (he no longer says a duty) in the commissioner to hear oral submissions if he thinks they may help him to reach a sound conclusion. In this

way the common law will be doing what it can and should to prevent procedural unfairness from being heaped on substantive injustice.

[49] It will be recalled that in the present case the commissioner accepted written submissions from the applicants without demur. But he held that he had no power whatever to entertain oral submissions. Mr Brennan has tenaciously, and in our ultimate view successfully, defended this entrenched and in many ways unpromising position against Mr Beloff's assault. His argument is that, both on principle and on authority, the self-evident risk of compromising the investigation shuts out any possibility of an oral procedure.

[50] It has to be remembered that a right to be heard is axiomatically worth little without knowledge of the case that has to be met. Either, therefore, the inspector's hand has in some measure to be shown, or the taxpayer must be content to make submissions in the dark. The former, it is plain, is destructive of the whole purpose of the procedure; the latter, while some taxpayers may consider it better than nothing, will create a sustained pressure for disclosure. There are only two logical outcomes if these two imperatives clash in a face-to-face hearing: one is that the taxpayer will duly learn nothing, in which case it is not easy to see what will have been achieved on his behalf that could not have been achieved in writing; the other is that the commissioner's opportunity (in Mr Beloff's happy phrase) to 'enjoy the benefit of advocacy' will lead to accidental disclosure by him or (more probably) the inspector of material to which Mr Beloff does not contend that the taxpayer is entitled and the disclosure of which at this stage will run counter to Parliament's purpose. That purpose, we apprehend, is in lieu of any inter partes procedure to install the General or Special Commissioner as monitor of the exercise of the Inland Revenue's intrusive powers and to require an inspector to put everything known to him, favourable and unfavourable, before the commissioner when seeking his consent (see *R v IRC, ex p T C Coombs & Co* [1991] STC 97 at 110, [1991] 2 AC 283 at 302). We accept Mr Brennan's contention, therefore, that the possibility of an oral hearing is excluded by the nature of the process in question. We do not accept his further ground that to establish a discretion to hold a hearing is to invite judicial review of every decision not to do so and of every failure to extract information from the inspector or to obtain reasons from the commissioner. It is not legitimate, as Lord Bridge of Harwich said in *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533 at 566, to draw jurisdictional lines on a purely defensive basis. If the power exists, the possibility of judicial review comes with it. But, for the reasons we have given, we are satisfied that the commissioner was right to conclude that he possessed no such power.

[51] The appeal will therefore be dismissed.

Appeal dismissed with costs. Permission to appeal to the House of Lords refused.

Karen Widdicombe Solicitor.