Status: ! Mixed or Mildly Negative Judicial Treatment

Mohamed Al Fayed, John MacNamara, Mark Griffiths, Paul Handley-Greaves, Colin Dalman, John Allen v The Commissioner of Police of the Metropolis, Niall Mulvihill, Jeffrey Edward Rees, James Reeve, Richard Reynolds

Case No: A2/2002/0758

Court of Appeal (Civil Division)

29 May 2002

Neutral Citation Number: [2002] EWCA Civ 780

2002 WL 820095

Before: Lord Phillips Master of the Rolls , Lord Justice Robert Walker and Lord Justice Clarke

Wednesday 29th May, 2002

On Appeal from the Queen's Bench Division

The Hon Mr Justice Curtis

Representation

Michael Briggs QC , Philip Marshall and Ingrid Newman (instructed by Lewis Silkin) for the Claimants/Appellants.

Duncan MacLeod and Perrin Gibbons (instructed by DS Hamilton , Directorate of Legal Services at New Scotland Yard) for the First, Second, Fourth, Fifth and Sixth Defendants/Respondents.

Simon Freeland QC (instructed by Rowe Cohen for the Third Defendant/Respondent.

JUDGMENT

Lord Justice Clarke:

Introduction

1. This is an appeal from an order made by Curtis J on 26 March 2002 in which he ordered the appellants to return two written opinions of Mr Orlando Pownall of counsel, dated 26 May 1998 and 5 July 1998 respectively, to the respondents. We shall call them “the Pownall opinions”. They had been made available to the appellants by the solicitor for the respondents (other than the third respondent) when they gave inspection of documents in this action on 24 October 2001. It is common ground, on the one hand, that the Pownall opinions were included in the documents to be inspected by mistake and, on the other hand, that the appellants' solicitors, Lewis Silkin, were not aware of any mistake until counsel so stated on 17 January 2002.

2. The respondents applied for an order that the Pownall opinions be returned to them and that the appellants be restrained from making any use of them or their contents for the purposes of the trial. The judge granted those applications and the appellants now appeal from his order. They do so pursuant to permission granted by Dyson LJ. The judge held that it would have been obvious to a reasonable solicitor in the position of Lewis Silkin that the Pownall opinions had been made available to them by mistake or, put another way, that a reasonable solicitor in their position would have

appreciated that the respondents' solicitor had made an obvious mistake in sending them copies of the opinions.

Background

3. On various dates in March 1998 Mr Al Fayed and the other appellants were arrested on suspicion of theft or criminal damage in connection with the alleged theft of and damage to the contents of a safe deposit box which Mr 'Tiny' Rowland kept at Harrods. The arrests were attended by a certain amount of publicity. The investigations of the allegations were conducted by the Organised Crime Group ("OCG") of the Metropolitan Police of which the second, third, fourth and fifth respondents were members. The third respondent carried out the investigation and his actions were overseen by the second respondent, who was his superior.

4. The appellants were released and in due course the OCG investigation was brought to an end in about July 1998 without any charge having been brought against any of them. The appellants' case is that the arrests were wrongful and that the respondents are liable for false imprisonment. The appellants' case is in outline as follows. First, the arrests were made for improper motives, including a desire either to avoid criticism by Mr Rowland of their investigation of his complaint or to assist him in his civil claims, rather than because of a real suspicion of criminal conduct. Secondly, there were no reasonable grounds to suspect any of the appellants of theft or criminal damage. Thirdly, in any event the arrests constituted the unreasonable exercise of the police discretion whether or not to arrest, both because of the full co-operation in the police investigation then being offered by the appellants and because of the absence of any reasonable prospect that criminal proceedings could be mounted against them.

5. The respondents' case is that the appellants were lawfully arrested with reasonable cause. Both parties have given detailed particulars of their respective cases. This appeal is concerned with only one aspect of the facts. The respondents rely upon advice given by Mr Pownall. On 25 February 1998 the police sought Mr Pownall's advice in his capacity as Senior Treasury Counsel. He advised in conference on that date and subsequently in writing on 3 March 1998. The police case in this regard is pleaded in paragraph 23(a) of the re-amended defence as follows:

> "… he advised that he considered the proposed arrests and interviews at a police station to be appropriate. It is further admitted and averred that Senior Treasury Counsel after having been made aware of the evidence against the Claimants and the case developments, including representations made on behalf of the Claimants by Mr Burton [who was their solicitor], advised that he could not foresee any justifiable criticism of the proposed arrests. It is admitted that Senior Treasury Counsel stressed that ultimately the decision to arrest was a police decision. It is averred that Senior Treasury Counsel had previously advised on 17 th November 1997 that the available evidence disclosed a prima facie case of theft."

6. That opinion has been described in argument as "the arrest opinion" in contrast to the Pownall opinions dated 26 May and 5 July 1998 respectively, which played a part in the police decision not to charge the appellants.

The Issue

7. The arrest opinion was obtained in response to instructions given to Mr Pownall by the police, whereas the Pownall opinions were obtained in response to instructions given by the CPS. The CPS subsequently made copies of them available to the police in the circumstances set out below. It was copies of those copies which were sent to the appellants' solicitors as part of the process of inspection of documents under CPR Part 31 .

8. It is common ground that while in the possession of the police they were the subject of legal professional privilege ("LPP"). The police say that they were also the subject of class public interest immunity ("PII"). The appellants say that when they were physically provided to their solicitors the police were no longer entitled to assert either LPP or PII in respect of them. The police say that they were made available to the appellants by mistake and that that fact would have been obvious to a

reasonable solicitor in the position of the appellants' solicitors, Lewis Silkin. The judge accepted that submission. The appellants say that he was wrong to do so.

9. Before considering the facts it is convenient to summarise the relevant legal principles.

The Legal Principles

10. The relevant principles were not in dispute before the judge. Nor were they in dispute before us, at any rate so far as LPP is concerned. Such differences as there were between the parties were essentially differences of emphasis.

11. Disclosure of documents is now governed by CPR Part 31 . By rule 31.2 a party discloses a document by stating that the document exists or has existed. By rule 31.3 a party to whom a document has been disclosed has a right to inspect the document except in certain circumstances, which by rule 31.3(1)(b) include the case where the party disclosing the document has a right or duty to withhold inspection of it. Such a right may exist on a number of grounds including LPP and PII. However, in both those cases a party may choose not to rely upon LPP or claim PII.

12. Rule 31.19 provides machinery for the resolution of disputes as to whether a party has a right or duty to withhold inspection. By rule 31.19(3) a person who wishes to claim that he has such a right or duty must state in writing both that he has such a right or duty and the grounds upon which he relies. By rule 31.19(4) that statement must be made in the list in which the document is disclosed or, if there is no list, to the person wishing to inspect the document. By rule 31.19(5) a party may apply to the court to decide whether a claim made under paragraph (3) should be upheld.

13. The relevant question in this appeal is in what circumstances a party who has inspected copy documents which were subject to LPP or PII, but which have been voluntarily, but mistakenly, sent to him for inspection must return them or may be restrained from using them in the litigation in which they were disclosed. There have been a number of cases in which this problem has arisen in comparatively recent times, including several before the advent of the CPR and at least one since the CPR came into force. They have all considered the circumstances in which an injunction might be granted to order the return of the documents or to restrain their use.

14. Rule 31.20 provides:

> “Where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the permission of the court.”

So far as we are aware, until now no-one has suggested that different principles apply to the operation of that rule from those applicable to the question what, if any, injunction should be granted.

15. We were referred to a number of cases including *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership [1987] 1 WLR 1027* , *Derby & Co Ltd v Weldon (No 8) [1991] 1 WLR 73* , *Pizzey v Ford Motor Co, The Times 8 March 1993* and *International Business Machines Corporation v Phoenix International(Computers) Ltd [1995] 1 All ER 413* under the RSC and *Breeze v John Stacey and Sons Ltd, unreported, 21 June 1999* under the CPR. All the cases were concerned with LPP and not PII.

16. In our judgment the following principles can be derived from those cases:

> i) A party giving inspection of documents must decide before doing so what privileged documents he wishes to allow the other party to see and what he does not.
>
> ii) Although the privilege is that of the client and not the solicitor, a party clothes his solicitor with ostensible authority (if not implied or express authority) to waive privilege in respect of relevant documents.
>
> iii) A solicitor considering documents made available by the other party to litigation owes no duty of care to that party and is in general entitled to assume that any privilege which might

otherwise have been claimed for such documents has been waived.

iv) In these circumstances, where a party has given inspection of documents, including privileged documents which he has allowed the other party to inspect by mistake, it will in general be too late for him to claim privilege in order to attempt to correct the mistake by obtaining injunctive relief.

v) However, the court has jurisdiction to intervene to prevent the use of documents made available for inspection by mistake where justice requires, as for example in the case of inspection procured by fraud.

vi) In the absence of fraud, all will depend upon the circumstances, but the court may grant an injunction if the documents have been made available for inspection as a result of an obvious mistake.

vii) A mistake is likely to be held to be obvious and an injunction granted where the documents are received by a solicitor and:

a) the solicitor appreciates that a mistake has been made before making some use of the documents; or

b) it would be obvious to a reasonable solicitor in his position that a mistake has been made;

and, in either case, there are no other circumstances which would make it unjust or inequitable to grant relief.

viii) Where a solicitor gives detailed consideration to the question whether the documents have been made available for inspection by mistake and honestly concludes that they have not, that fact will be a relevant (and in many cases an important) pointer to the conclusion that it would not be obvious to the reasonable solicitor that a mistake had been made, but is not conclusive; the decision remains a matter for the court.

ix) In both the cases identified in vii) a) and b) above there are many circumstances in which it may nevertheless be held to be inequitable or unjust to grant relief, but all will depend upon the particular circumstances.

x) Since the court is exercising an equitable jurisdiction, there are no rigid rules.

17. Those principles seem to us also to apply to cases where the documents were not initially the subject of LPP privilege but in respect of which the disclosing party was entitled to claim PII. Once it is accepted that the party concerned is not bound to refuse to permit inspection of a relevant document we can see no reason why (in the absence of particular circumstances in a particular case) different principles should apply to the two situations.

18. Finally, it seems to us that the same approach should be adopted to the exercise of the discretion conferred on the court by rule 31.20 of the CPR. Whether the question is whether to grant an injunction or to make an order under that rule, the court should do what is just and equitable in all the circumstances of the case.

19. The differences of emphasis between the parties to which we referred above amounted to this. Mr Briggs QC submitted that an injunction should only be granted where it would be unconscionable to permit the party who has received the document to retain or use it.

20. He initially submitted that it would only be unconscionable to permit the recipient to retain or use the document if he either knew that the document had been provided by mistake or deliberately turned a blind eye to whether a mistake had been made or not. In short he submitted that the test should be subjective and not objective. On that approach no injunction would be granted merely on the basis that the recipient ought to have appreciated that an obvious mistake had been made.

21. There would in our view be much to be said for such an approach because, if the test is unconscionability, there is considerable force in the proposition that objective fault should not be sufficient to justify the grant of an injunction. However, Mr Briggs recognised that such an approach would not be consistent with the decisions of this court in *Pizzey v Ford Motor Co* and *Breeze v John Stacey and Sons Ltd* . In these circumstances he submitted that an injunction should be granted only where it should have been perfectly obvious to the recipient that a mistake had been made.

22. Mr Macleod, on the other hand, submitted that an injunction should be granted where the mistake should be obvious to a reasonable solicitor. He recognised that the test could not be less strict than that because of the decision in *Breeze* , but he submitted that it should be no more strict. He stressed the importance which the courts have attached to LPP. If he had had available the speeches in the *House of Lords in R v Special Commissioner ex p Morgan Grenfell & Co Ltd [2002] UKHL 21* , which he did not because they were not delivered until 16 May (which was two days after the hearing of this appeal) he would no doubt have relied upon the statement in paragraph 7 of the speech of Lord Hoffmann that “LPP is a fundamental human right long established in the common law”. Mr Macleod thus emphasised the importance of a party's right to rely upon LPP, which he submitted should not be readily lost by mistake. He stressed the observation of Slade LJ in the *Guinness Peat* case at p 1046 that

> “the law should not encourage parties to litigation or their solicitors to take advantage of obvious mistakes made in the course of the process of discovery.”

23. As we see it, it was to balance considerations of that kind that the courts have developed the principles which we have summarised above. We do not think that it would be appropriate to add Mr Briggs' gloss by adding ‘perfectly’ to obvious. The first case in which the principle in paragraph 16 vii) b) above is to be found was *Pizzey v Ford Motor Co* , where Mann LJ (with whom the other members of the court agreed) said this, as quoted by Aldous J in the *IBM* case at p 422:

> “Cases of mistake are stringently confined to those which are obvious, that is to say those which are evident. This excites the question: evident to whom? The answer must be, to the recipient of the discovery. If the mistake was evident to that person then the exception applies, but what of a case where it is not evident but would have been evident to a reasonable person with the qualities of the recipient? In this context the law ought not to give an advantage to obtusity and if the recipient ought to have realised that a mistake was evident then the exception applies. … The critical question is thus whether a reasonable person with the qualities of Ms Kwong would have realised that Miss Mair made a mistake. The relevant quality of Ms Kwong is that she is a solicitor.”

It was made clear in the *Breeze* case that the test is one of obvious mistake and nothing less. Anything less would involve holding that the solicitor for the receiving party B owed a duty of care to the other party A, which he does not. On the other hand, to add ‘perfectly’ to obvious would be a step too far.

24. We should add that in the discussion so far we have not considered the case where B is a litigant in person and thus does not have a solicitor acting for him. In the *IBM* case Aldous J suggested (at p 423) that the test should be what would be obvious to the reasonable solicitor in order to ensure consistency between different types of case. That opinion was not, however, necessary for the decision and was not considered in *Breeze* . Moreover, it is not consistent with the passage from the judgment of Mann LJ in *Pizzey* quoted above. We are not persuaded that it is correct, although it is not necessary for us to determine the true position in order to decide this appeal because, as in *Pizzey* itself, the documents were received by a solicitor.

25. We would also add that, as is recognised in paragraph 16 ix) above, there may be many circumstances where it would not be just to grant an injunction on the facts of a particular case. One such case might be where B's solicitor sends the documents for consideration by B before

considering them himself and B learns a fact from the document which it would be unjust to prevent him from using in the litigation, even though it would have been apparent to B's solicitor that a mistake had been made. All depends upon the circumstances of the particular case.

26. We therefore turn to the circumstances of this case. Mr Macleod submitted that this case is similar to the *IBM* case on the facts. We will therefore return to the reasoning in that case after considering the facts of this case in some detail. We do so having in mind that the essential (although not the only) question for decision is whether a reasonable solicitor in the position of Lewis Silkin would have appreciated, when receiving the Pownall opinions on inspection of documents in the action, that they were provided as a result of an obvious mistake on the part of the solicitor for the police.

The Facts

Before Commencement of Proceedings

27. The appellants (or some of them) complained to the Police Complaints Authority ("PCA") about the police investigation of the alleged theft of and criminal damage to the contents of Mr Rowland's safety deposit box at Harrods. The PCA investigation was carried out by the Chief Constable of Northamptonshire, Mr Fox. He collated and considered a mass of evidence and decided that the police had not properly conducted the investigation in that they failed to investigate the allegation that between about April 1997 and February 1998 sums totalling about £265,000 passed from Mr Rowland to Mr Loftus (or to his partner on his behalf). Mr Loftus was a disaffected former employee of Harrods who provided information which formed the basis of the allegations against the appellants.

28. In January 2001 the PCA wrote to Mr Burton of Burton Copeland, who were the solicitors acting for Mr Al Fayed at that time, informing him that part at least of his complaint was upheld. On 9 March 2001 Lewis Silkin wrote to the first respondent ("the Commissioner") setting out the nature of the appellants' case and asking him to disclose the report of Mr Fox and all documents which Mr Fox had considered in the course of his inquiry. Thereafter the correspondence was conducted on behalf of the police by Mr Falk, who is and was a barrister in the employ of the Metropolitan Police Directorate of Legal Services. On 2 April Mr Falk replied to the letter of 9 March saying that Mr Fox's report would not be disclosed on the ground that it was the subject of PII, but that the primary materials, including witness statements, interviews and the like would be disclosed. Lewis Silkin replied in turn on 6 April setting out the appellants' case in detail and enclosing a schedule of documents sought.

29. The partner of Lewis Silkin who had (and has) the conduct of the claim on behalf of the appellants is Mr Thomas Coates. He has 20 years' experience of commercial litigation. On 8 April Mr Falk told him on the telephone that he was considering disclosing the legal advice which had been given to the police but that he was awaiting instructions. On 11 May Mr Falk wrote to Lewis Silkin reiterating that Mr Fox's report, but not its accompanying documentation, was subject to PII on a class basis and would not be disclosed. He also relied upon Mr Pownall's arrest opinion.

30. The letter included significant passages in both those respects. As to the Pownall arrest opinion Mr Falk said this:

> "So far as the discretion to make an arrest (where reasonable grounds for suspicion exist) is concerned it is clear from the judgment of the House of Lords in Mohammed-Holgate v Duke [1984] AC 437 that the discretion cannot be questioned except on *Wednesbury* grounds. In the present case DCS Rees sought legal advice from this Department as to the legality of an arrest of Mr Al-Fayed. This Department instructed Mr Orlando Pownall, Treasury Counsel at the Old Bailey, to advise which he duly did on 25 February 1998. The advice was put into writing on 3 March 1998 and concluded "Although I am reluctant to advise senior police officers on the conduct of their investigations I can foresee no justifiable criticism of their decision to arrest and interview Mr Al-Fayed." [Mr Falk's emphasis] The decision and timing of arrest in any criminal investigation will always involve an exercise of judgment, sometimes a difficult one, but it seems hard to assert (particularly in view of Treasury Counsel's opinion above) that the decisions to arrest were decisions that no reasonable investigating officer could have taken."

31. Under the heading of disclosure Mr Falk wrote:

> “We now make voluntary, pre-action, disclosure of relevant primary materials in the enclosed index. The Note attached to the index explains why certain specified documents have been crossed out and are <u>not</u> disclosed.
>
> The Commissioner has waived legal professional privilege in respect of legal advice provided to DCS Rees by Mr Pownall in relation to the arrest of Mr Al-Fayed.”

32. The “enclosed index” set out a considerable number of documents by reference in each case to a page number or numbers. Some of the documents were crossed out in the index. The Pownall opinions were in that category. The following entry was struck through with a line: “Advice x 2 from Mr POWNALL (260598 & 0500798)” against page numbers “875–894”. The “Note” attached to the index stated that “the following documents, referred to by page numbers, are not disclosed for the following reasons”. Except for one category of documents, which were not disclosed at the request of Mr Rees and which were disclosed subsequently, the reason given in each case was that the documents were not relevant. Thus the reason given for not disclosing the Pownall opinions was that they were not relevant.

33. That letter is important because it emphasised the distinctions which the police drew at that time between various classes of document. They refused to disclose Mr Fox's report on the ground of PII. On the other hand they waived LPP (and presumably any PII) in respect of the inquiry documents which they regarded as relevant and they declined to disclose the Pownall opinions and other documents on the ground that they were not relevant. There was no suggestion in the letter that if, contrary to their view, the opinions were relevant they would wish to claim LPP or to assert PII. The letter is also important because it expressly relied upon Mr Pownall's arrest opinion in support of the defendants' case that the claimants could not show that the decision to arrest them was *Wednesbury* unreasonable.

34. We should perhaps note in passing that both the letter and the index proceeded on the basis that the police were not ‘disclosing’ documents which they acknowledged to exist but which they were refusing to allow the respondents to see. They were thus using ‘disclose’ in a different sense from that used in CPR rule 31.2 . We shall return to this point below.

35. Lewis Silkin replied to Mr Falk's letter on 14 May. They reserved the appellants' position as to the Fox report, stating that, if PII attached to it, it would be a matter for the trial judge whether or not to order disclosure. As to relevance, they asked the police to describe the various documents in more detail and to explain why they were not relevant. As to the Pownall opinions, they said (among other things) under the heading waiver of LPP:

> “As you have clearly stated that you are waiving the privilege [in the arrest opinion], and in any event since you have relied in an open letter on the advice given by Mr Pownall, it follows that the Commissioner has waived legal professional privilege in respect of all instructions and advices (whether formally in writing or given orally and subsequently reduced into writing) to or from Mr Pownall in relation to these matters.”

They added a request for a number of particular classes of document in connection with advice sought from Mr Pownall including “any further instructions to or advices from Mr Pownall in relation to the issue of the arrest and possible charge of any of our clients in 1998”. In reply on 16 May Mr Falk enclosed some further documents, including instructions to counsel dated 25 February 1998 and a note of the conference on that day, but otherwise simply said that prosecuting counsel's advices on charges given <u>after</u> the dates of the arrests related to the issue of charging and the prospects of conviction.

36. Lewis Silkin wrote again on 18 May asking for the documents which the police said were irrelevant. They also asked them whether the index specified all the documents accompanying the Fox report and asserted that they were entitled to see instructions to, communications with and advice from counsel with regard to the decision whether or not to charge the appellant. They said this:

> “The decision to arrest cannot be looked at in isolation; the possibility of a charge and the initiation of a prosecution must also be considered. Material considered in the

> context of a decision not to charge and the initiation of a prosecution must also be considered. Material considered in the context of a decision not to charge is undoubtedly relevant in considering whether the arrests were made bona fide on the basis of genuine belief, reasonable grounds and the proper exercise of discretion. For example, if there was advice that there was no material following the arrests which justified a charge being made, we would wish to consider that advice in determining whether the arrests themselves were justifiable".

37. On 29 May Mr Falk replied saying that the index specified all the documents accompanying the Fox report. He added:

> "One reason for adopting this procedure was an attempt to re-assure your clients that no "primary materials" were being unjustifiably withheld."

Under the heading waiver of LPP he further added:

> "With respect, we disagree with your argument that you are entitled to see advice from Counsel given after arrest. The criteria justifying an arrest and justifying a charge are, of course, fundamentally different. Even if there were no further material advancing a prosecution following an arrest, that would have no bearing on whether the arrest was, or was not, lawful. You will see that the disclosure made does retain material relating to advice from the CPS before arrest. We are not in a position to make any disclosure on behalf of the CPS."

38. It is we think clear from that letter that the police were maintaining their stance that the Pownall opinions were not relevant. Although they do refer to the position of the CPS, we do not read the letter as claiming LPP or PII in respect of the Pownall opinions if, contrary to the respondents' case, they were relevant. Lewis Silkin replied on 1 June restating their position with regard to the Pownall opinions. Thereafter neither side changed its position before proceedings were commenced.

39. In summary the position as at that time was that Lewis Silkin were seeking disclosure and inspection of the Pownall opinions on the ground that they were relevant and that, having disclosed and relied upon the arrest opinion, the police had no alternative but to disclose them. For their part, the police were refusing to disclose them on the ground that they were not relevant because considerations relevant to whether they had grounds for arresting the appellants were different from those which were relevant later to whether they should be charged.

After Commencement of Proceedings

40. Proceedings were commenced on 14 June 2001. The defence of all the appellants except Mr Rees was served on 31 August and Mr Rees' defence was served on 6 September adopting the defence of the others. Paragraph 23(a), relying upon the Pownall arrest advice, was in the same form as quoted above.

41. On 24 October Mr Falk wrote to Lewis Silkin enclosing a copy of the first and second appellants' list of documents, which comprised standard disclosure under rule 31.6. The list was divided into three sections A, B and C. Section A consisted of the Operation Jagan documents, section B was entitled "Complaints Investigation" documents and section C contained "Other Documents". Section A contained volumes 1 to 14, section B contained volume 15 and section C contained volume 16. The list also included an express statement that the responsible officer did not object to the appellants inspecting them or to producing copies. It was moreover plain from the terms in which LPP was claimed that no claim for privilege was made in respect of any of the documents in those sections. It was also plain from those terms that privilege was only claimed for counsel's advice and the like "which came into existence after these proceedings were contemplated or commenced for the purpose of substantiating the Defence to the claims". The Pownall opinions did not fall into that category.

42. Section B was described as follows:

“SECTION B — Complaints Investigation Documents Volume 15

15.1 Index to Complaints Investigation documents attached to the report of Chief Constable Fox of Northamptonshire Police dated 23.06.00

15.2 All documents listed in 15.1 above (as already disclosed to the Claimants' solicitors and listed in the schedule attached to the letter from MPS Legal Services Directorate to the Claimants' solicitors dated 11.05.01).”

43. By letter dated 25 October (the day after receiving the list) Lewis Silkin asked the police to provide copies of all the items listed. Mr Coates says that before making that request he did not review the list in other than a very cursory way on the basis that it is his usual practice to ask the other side for copies of everything listed. We consider that that is a very understandable approach.

44. Mr Coates' assistant Ms Sally Johnson, who is a solicitor with 10 years' experience of commercial litigation, played a significant role with regard to the list of documents. Although she did not immediately conduct a detailed review of it, it was apparent to her from the list that more documents were being disclosed than had been disclosed before the proceedings were commenced. On 25 October she spoke to Mr Andrew Fairbrother, who was assisting Mr Falk and is a solicitor of over four years standing, and asked him how long it would take to copy the documents. He said that it would take some time. On 31 October he told her that it might be possible for copying to be finished the next day.

45. On 1 November Ms Johnson spoke again to Mr Fairbrother. She says that he said that copying was nearly finished but that he and Mr Falk would need to check it before the documents were released. Mr Fairbrother does not specifically recall saying that he or Mr Falk would “check” the documents before they went out. He says that if he did use the word “check” it would have been in the terms that Mr Falk or he would check with the clerks to see that all the documents had been copied, were ready for collection and that all appeared to be ready before Lewis Silkin came to collect them.

46. Whatever precisely was said, later that day Mr Fairbrother told Ms Johnson that the documents were ready. As a result they were collected and brought to Lewis Silkin's offices where they were seen by Ms Johnson. There were 16 volumes, which she arranged to be put into 11 lever arch files. Most of the volumes had yellow ‘post-it’ stickers at the beginning on which there was either a handwritten note saying “checked” or a tick. Ms Johnson assumed that they had been used by Mr Fairbrother or Mr Falk to identify the volumes checked by them. She removed them and threw them away. It seems to us that, whatever the exact words used by Mr Fairbrother, it was reasonable for Ms Johnson to infer from what was said, together with the stickers, that the documents had been checked by a responsible person to ensure that the correct documents were disclosed. Standard disclosure is an important aspect of any action. It is an important part of the duty of any solicitor to put in place a system which ensures that it is carried out properly and with care. It was reasonable to suppose that the police had such a system.

47. On Friday 2 November Ms Johnson supervised the pagination of the documents. As she did so, she made spot checks of the documents to ensure that they broadly corresponded to the index. She did not see the Pownall opinions until the next week, when she was referred to them by Mr Coates. Her primary concern on 2 November was to provide the appellants personally with paginated copies of the documents which had been disclosed, in accordance with Mr Coates' instructions. They had indicated a desire to see them as soon as possible.

48. In the case of most of the volumes of documents the indexes had been placed at the beginning. This was not, however, the case in respect of volume 15, although volume 15 was divided into sections with a list at the beginning of each. The part in which the Pownall opinions appeared was headed “Other Relevant Documentation”. It was in the same form as it had been when it had been sent as an index with the letter of 11 May with one crucial difference. As explained in paragraph 32 above, when sent with the letter of 11 May it had some documents crossed out because, as stated in the note attached to the index, they were not relevant. In the form in which it was received by Lewis Silkin on inspection of documents, none of the documents was crossed out.

49. Mr Coates did not start reading the documents until late on Monday 5 November, by which time some of the appellants themselves had read into the documents in preparation for a meeting which had been scheduled for 6 November. Mr Coates came across the Pownall opinions on either 5 or 6

November when skimming through the documents in the bundles, not by reference to the index. He formed the view that they were relevant and that the police solicitor must have decided to disclose them in discharge of the obligations of any solicitor under the CPR. He discussed them with one of the appellants, Mr Macnamara, on the telephone.

50. Although Mr Coates formed the view that the police must have intended to disclose the opinions, he had sufficient reservations to speak to Ms Johnson. She told him about her conversation with Mr Fairbrother and about the 'post-it' stickers and said that she had no reason to believe that they had been disclosed other than intentionally. However, since he was due to see the appellants later in the day, he asked her to conduct a review of the position.

51. Ms Johnson checked the documents and found that the Pownall opinions were not loose, as they might have been if they had been included in the documents copied by mistake. They were in their correct position as indicated in the relevant part of the volume 15 index described above. She reviewed the claim for privilege in the list and found no reference to them. There was nothing which suggested to her that they had been disclosed or made available for inspection by mistake. She was aware that the police had previously asserted that they were not relevant but formed the view that the police had decided to disclose them after all on the basis that, contrary to their previous assertion, the opinions were in fact relevant. Her experience was that it was quite common for parties to disclose more documents once proceedings had begun. She therefore advised Mr Coates that in her opinion they had been disclosed deliberately.

52. Mr Coates himself reviewed the volume 15 index and reached the same conclusion. He says that he does not recall applying his mind to the form of the list quoted above. Mr Macleod submitted that, if he had done so, he would have appreciated that a mistake had been made because paragraph 15.2 describes the documents as "all documents listed in 15.1 above (as already disclosed … and listed in the schedule attached to the latter … dated 11.05.01). He pointed to the fact that in the note attached to the index the documents which the police were objecting to being made available on the ground that they were not relevant were described as documents which "are not disclosed". Thus he submitted that paragraph 15.2 made it clear that the police intended to disclose and make available for inspection the documents which had not been crossed out in the index attached to the 11 May letter.

53. That submission undoubtedly has some logical force, although Mr Coates says that he would have read paragraph 15.1 as intending to disclose and make available all the documents in the index. We will return to this below, but it is not relevant to the actual state of mind of Mr Coates, which is that he thought that the Pownall opinions had been disclosed on purpose and not by mistake. In short he thought that the police had accepted his view that they were relevant and disclosed them. As a result he openly relied upon them subsequently.

54. Before inspection took place the appellants had launched an application relating to the pleadings which was to be determined at a CMC. On 19 December Mr Coates made a witness statement in which he expressly relied upon the Pownall opinions and to which he exhibited copies. In a letter also dated 19 December Lewis Silkin again expressly relied upon the opinions, asserting that it appeared to have been accepted that LPP had been waived in all communications between the solicitor's department and the police. Mr Falk replied on 2 January 2002 without making any suggestion that the Pownall opinions had been supplied in error.

55. The CMC referred to above was listed before Wright J on 17 January. The witness statement of Mr Coates dated 19th December 2001 prepared for that hearing expressly referred to the Pownall opinions. Moreover the third respondent's skeleton argument asked the judge to read it as part of the pre-reading which he was invited to carry out. It was only on the morning of the hearing on 17 January that counsel for the first and second respondents made the assertion for the first time that the opinions had been supplied by mistake. By that time the judge had already read them.

Obvious Mistake?

56. It is not suggested that the evidence of Mr Coates and Ms Johnson that they did not appreciate that a mistake had been made is not true. Thus two experienced solicitors genuinely thought that the Pownall opinions were made available to the appellants on purpose. In our view, on the facts of this case, as is often likely to be the case, that is a significant factor in support of the conclusion that it was not obvious to a solicitor in the position of a partner of Lewis Silkin that the police had made the

Pownall opinions available by mistake.

57. The reasons which led them to that conclusion are correctly summarised in Mr Briggs' skeleton argument substantially as follows:

> i) Previous objection to disclosure of the Pownall opinions was based on an assertion of irrelevance not LPP, still less PII.
>
> ii) When they read them the Pownall opinions appeared to them to be plainly relevant. They therefore thought that those advising the police on disclosure had recognised that their earlier stance on relevance could not be persisted in.
>
> iii) The list claimed privilege only for post-litigation materials.
>
> iv) They had been told that that the documents had been checked, which was confirmed by the ‘post-it’ stickers.
>
> v) The index to volume 15 indicated that the Pownall opinions were intended to be disclosed because they were specifically listed and were not now crossed out as they had been previously.
>
> vi) There were no signs of error in the preparation of the list, the index or the documents. For example the Pownall opinions were not supplied loose but in their correct place in the documentation in accordance with the index.
>
> vii) As is not uncommon, a considerable number of further documents were disclosed in the list by comparison with the number of documents disclosed before proceedings were commenced.

58. Mr Macleod submitted that this case is similar to the *IBM* case in which no less than four solicitors had formed the view that certain documents had not been disclosed by mistake, yet it was held that it would have been obvious to a reasonable solicitor that a mistake had been made. Aldous J correctly directed himself there (as the judge did here) that in making its decision the court should have regard to the extent of the claimed privilege in the documents, the nature of the disclosed documents, the complexity of the discovery, the way in which discovery was made and the surrounding circumstances. In short the court must have regard to all the circumstances of the case.

59. Each case is of course different and we have considerable doubt whether it is appropriate to compare decisions reached in different cases on different facts. However, we have considered the conclusions reached on the facts in the *IBM* case because of the reliance placed upon them by Mr Macleod and indeed by the judge. In that case Aldous J specifically considered two classes of documents which had been disclosed by mistake, namely legal bills, which included counsel's fee notes and a road map.

60. As to the legal bills, he expressed his conclusions as follows at p 426g:

> “As I have said, I cannot think of any good reason why the reasonable solicitor should conclude that Phoenix decided to waive privilege in the legal bills. They are clearly privileged; they seem to be irrelevant to proceedings in this country; they fall within the category of documents for which privilege is claimed; the method of giving discovery was not meticulously carried out; the amount of discovery was very substantial and it was done in a hurry. From that and the absence of any reasonable reason why Phoenix should waive privilege, I conclude that the reasonable solicitor would believe that the legal bills had been disclosed by mistake and would be evident to him.”

61. Aldous J reached much the same conclusion with regard to the road map, which he held a reasonable solicitor would have appreciated contained advice given by lawyers. He held that the reasonable solicitor would have concluded that the document was an incriminating document and added at p 430 e to h:

> “If so, why should Phoenix decide to waive privilege? I cannot think of any answer which would be acceptable to the reasonable solicitor. The suggestion that Phoenix decided to disclose the road map because one more incriminating document would make no difference is unacceptable to me and I believe would be unacceptable to the reasonable solicitor. He would believe that it was a document which would normally be privileged and therefore would not normally be disclosed.
>
> He could not be certain that it was privileged as it was not signed, but the idea that a legal analysis suggesting strategy would be disclosed in circumstances where IBM would believe that it contained incriminating material, for any reason other than mistake is hard to understand.
>
> The reasonable solicitor would also realise that the number of documents disclosed was substantial and that discovery had been carried out within a tight time schedule. From that, he would realise that mistakes could occur and were more likely to occur than in a case where discovery was slight. He would also realise that the road map fell within the class of documents for which privilege had been claimed and be surprised that a document containing legal advice had been disclosed.”

62. Mr Macleod submitted and the judge held that this case is factually similar to the *Guinness* and *IBM* cases. We do not agree. In the *Guinness* case this court upheld the grant of an injunction where the solicitors were, as Slade LJ put it at p 1045D,

> “seeking to take advantage of what they must have known was an obvious error on the part of FRP's solicitors in permitting them on two occasions to inspect this letter and in including it in Part 1 of Schedule 1 of the supplemental list”.

It was thus held that the solicitors knew that an obvious mistake had been made, whereas here it is accepted that Lewis Silkin had no such knowledge.

63. In our judgment *IBM* was also a very different case from this. Here there had been what appeared to be a careful approach to disclosure. This was not a case, like *IBM* , where the method of giving discovery was not meticulously carried out or where it was done in a hurry. Moreover, this was not in our judgment a case in which there was no sensible reason why the police should not disclose the Pownall opinions.

64. The judge held that the hypothetical solicitor would have appreciated that the opinions were legally privileged and subject to PII. The appellants correctly accept that the opinions were indeed originally privileged. Although they say that it was by no means clear to a reasonable solicitor that the opinions would have been the subject of PII, it is not necessary for us to decide whether that is so or not because the question is whether it would have been obvious to the reasonable solicitor that the police could not have decided to waive LPP or not to claim PII in respect of the documents.

65. As explained above, the issue in the correspondence had been whether the opinions were relevant. Unlike in the *IBM* case, it was by no means obvious that, if the police solicitor decided that the opinions were, after all, relevant, as Lewis Silkin had been asserting in correspondence, either they or the CPS would wish to claim LPP or assert PII. They might well wish to put the whole picture before the court so that everything was out in the open.

66. In this regard it is relevant to observe that in part 7.3 of volume 7 in section A, which contains correspondence between the police and the CPS, there is correspondence in June 1998 which was disclosed in the list but not in the pre-action disclosure and which would no doubt originally have been subject to LPP and PII in the same way as the Pownall opinions. There were thus other documents which the police had decided to disclose. We do not think that in these circumstances it can fairly be held that it should have been obvious to Lewis Silkin that the Pownall opinions were disclosed by mistake.

67. We have ourselves seen the Pownall opinions and have formed the view that it cannot fairly be held that it was unreasonable for Lewis Silkin to conclude that they were relevant. The police rely upon Mr Pownall's arrest advice in support of their case that they had reasonable grounds for arresting the appellants. It seems to us to be at least arguable that there is material in the later Pownall opinions which may throw light upon the extent to which Mr Pownall was informed of the facts known to the police at the time he gave the arrest advice. We do not think that we should say more than that because the use, if any, which can or should be made of the Pownall opinions is a matter for the trial judge which it would be wrong for us to prejudge in any way.

68. For present purposes it is sufficient for us to express our conclusion that it would not have been obvious from the contents of the Pownall opinions that they were not relevant. We do not think that on a fair reading of the judgment, the judge held that it would. As we read the judgment, the judge concluded that it was obvious that the documents were subject to LPP and PII and that that the police had not waived their right to rely upon LPP or to assert PII. However, in our judgment, it was by no means obvious that, if the police solicitor had formed the view that the opinions were relevant, either the police or indeed the CPS would have wished to claim privilege or assert PII in respect of them. As we stated earlier, they might well have thought that it was better tactics for everything to be in the open, whether the trial was to be by jury or by judge alone.

69. Mr Macleod further submitted and the judge accepted that a careful inspection of the list would have made it clear to a reasonable solicitor that it was not intended to disclose the Pownall opinions. Volume 10 in section A is entitled “Counsel's Advices & Instructions to Counsel”. It includes Mr Pownall's advice of 17 November 1997 and 3 March 1998, together with instructions dated 25 February and an undated note of the conference with counsel. It was submitted that volume 10 contained the full extent of the waiver of privilege which was intended. However, while that may be so it is not obviously so. Volume 10 is part of section A which relates to the Jagan Operation. It is not part of section B, which contains the complaints investigation documents. There is, in our judgment, force in Mr Briggs' submission that one would not expect to see the Pownall opinions in section A at all, but in section B where they are in fact to be found.

70. We have set out in paragraph 52 above Mr Macleod's submission that Mr Coates should have considered volume 15 in the light of the previous correspondence, and in particular the index attached to the letter of 11 May, and that, if he had, he would have appreciated from the express terms of paragraph 15.2 that it was not intended to disclose any more documents than those not crossed out in the index attached to the 11 May latter. As stated above, there is undoubtedly logical force in that submission, but it is not in our judgment sufficient to lead to the conclusion that when Lewis Silkin received the documents from the police it should have been obvious to them that the police did not intend to make the Pownall opinions available.

71. We accept Mr Briggs' submission that the terms of paragraphs 15.1 and 15.2 are at best ambiguous. Mr Coates says that he would have read paragraph 15.1 as intending to disclose and make available all the documents referred to in the index of the documents attached to Mr Fox's report. On inspection, paragraph 15.1 was revealed to be a copy of the Fox report index with no crossings out and when the documents themselves were inspected they revealed that all the documents were being made available and not merely those not previously crossed out. It seems to us to be a reasonable conclusion from paragraph 15.1 and 15.2 read together and the subsequent provision of all the documents in the index that the police in fact intended to do what they did, namely to provide all the Fox report documents to the appellants.

72. Finally we should refer to a number of other points relied upon by Mr Macleod and accepted by the judge. It was suggested that a large number of documents were copied in a hurry and that the Pownall opinions came out of the blue and unannounced. It is not in our view a reasonable inference from those facts that a mistake might have been made. There was no reason for Lewis Silkin not to think that the police solicitor had a proper system of checking the documentation. There was no need for any announcement. On any view the list contained documents not previously disclosed. Lewis Silkin could reasonably suppose that all proper care had been taken on the other side.

73. In so far as it was suggested that Lewis Silkin should have appreciated that the police would have had no authority from the CPS to waive LPP or not to assert PII, we are unable to accept that submission. It is plain that there was close co-operation between the police and the CPS throughout the investigation. It was reasonable for Lewis Silkin to infer that in disclosing and making available the Pownall opinions the police had obtained all relevant authority and consent from the CPS.

74. In all the circumstances, while a solicitor might have concluded that a mistake had been made, it was by no means obvious. We have reached the clear conclusion that a reasonable solicitor could properly have reached the conclusions which Mr Coates and Ms Johnson in fact reached for the reasons which we summarised in paragraph 57 above.

75. Further we would not hold that when they reviewed the position they should have carried out a detailed analysis of the list because they did not owe a duty to the respondents. In any event, for the reasons we have given, such a review would not have led the reasonable solicitor to conclude that the police had made an obvious mistake.

76. That conclusion makes it unnecessary to consider further the significance, if any, in this context of the fact that it was not until 17 January 2002 that Lewis Silkin were informed that a mistake had been made, by which time reliance had been placed on the Pownall opinions.

Conclusion

77. For these reasons we have reached the conclusion that the judge was wrong to grant the injunction which he did and to order the return of the Pownall opinions. It follows that the appeal must be allowed and the injunction and order discharged.

78. As we understand it, the judge also refused the appellants' application for permission to use the Pownall opinions under CPR 31.20. It follows from our judgment that that refusal should also be set aside. In our view the appellants should be permitted to make proper use of the documents on the basis that they are no longer the subject of LPP or PII, as between the parties to this action, but the court (and in particular the trial judge) retains all its other powers of case management including those relating to the use and deployment of documents and their contents.

Order: 1. Appeal allowed. 2. Respondent to pay appellant's costs to be subject to detailed assessment 3. Appellant to pay respondent's costs of today to be subject to detailed assessment if not agreed.