It is common ground that the basic principle justifying legal professional privilege arises from the public interest requiring full and frank exchange of confidence between solicitor and client to enable the latter to receive necessary legal advice. Originally it related only to communications where legal proceedings were in being or in contemplation. This was the rationale which distinguished the solicitor and client relationship from that between any other professional man and his client. There is no doubt that legal professional privilege now extends beyond legal advice in regard to litigation. But how far?

Although originally confined to advice regarding litigation, the privilege was extended to non-litigious business. Nevertheless, despite that extension, the purpose and scope of the privilege is still to enable legal advice to be sought and given in confidence. In my judgment, therefore, the test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.

What documents, then, are disclosable on this test? The answer is provided by cases such as Smith-Bird v. Blower [1939] 2 All E.R. 406 and Conlon v. Conlons Ltd. [1952] 2 All E.R. 462. In the former case the client's letter to his solicitor informed him of a fait accompli, namely, that he had agreed to sell the property to the plaintiff's agent. As Mervyn Davies J. said in the Getty case [1985] Q.B. 956, 964: "Smith-Bird v. Blower... is a case simply of a letter written by a client to his solicitor being regarded as unprivileged in that the letter was not written for the purpose of obtaining legal advice."
Likewise in Conlon v. Conlons Ltd. [1952] 2 All E.R. 462, privilege was held not to extend to a communication from a client to his solicitor authorising him to offer terms of settlement. Morris L.J. said, at p. 466:

"It is, I think, plain that, if there are professional communications between a solicitor and his client of a confidential character for the purpose of getting legal advice, then, in general, there is privilege and protection. But that is not the case here. The interrogatories are directed to the three letters, and the plaintiff is invited to look at the three letters. When those letters are examined a fair and reasonable reading of them is: "My client authorises me to say to you that he will accept such and such an amount in settlement." That being so, an inquiry whether the plaintiff did or did not authorise his solicitor to write those letters is not an inquiry as to communications passing between the plaintiff and his solicitor confidentially. There is no suggestion in this case of asking for the disclosure of anything that the solicitors may have said to the plaintiff in regard to his claim generally or by way of giving advice as to the prospects of the action. The inquiry that is raised is whether the plaintiff did or did not authorise his solicitor to write certain letters which state that the plaintiff will accept a certain sum."

A hypothetical instance put in argument by Mr. Burton would be a case in which a client going on extended holiday instructed his solicitor to collect rents from his tenants. If an issue subsequently arose as to whether the landlord had waived any right to forfeiture, the communication of those instructions to his solicitor would be disclosable and admissible because there would be no question of their being related to the obtaining of legal advice.

It follows from this analysis that those dicta in the decided cases which appear to extend privilege without limit to all solicitor and client communication upon matters within the ordinary business of a solicitor and referable to that relationship are too wide. It may be that the broad terms used in the earlier cases reflect the restricted range of solicitors’ activities at the time. Their role then would have been confined for the most part to that of lawyer and would not have extended to business adviser or man of affairs. To speak therefore of matters "within the ordinary business of a solicitor" would in practice usually have meant the giving of advice and assistance of a specifically legal nature. But the range of assistance given by solicitors to their clients and of activities carried out on their behalf has greatly broadened in recent times and is still developing. Hence the need to re-examine the scope of legal professional privilege and keep it within justifiable bounds.

[...]

Referring Principles:

XII.6 - Attorney-client privilege