Extracts from the written Opinion of Mr Timothy Dutton QC over which the Board had at first claimed legal professional privilege but was then required to forego that privilege by I—S— who was at that time defending himself against a charge of unacceptable professional conduct.[1]

I—S—, 24 November 2010; end-note added 25 November 2010

I—S— had submitted:

"If there is an objection on the grounds of legal professional privilege, it has been waived by 1) the consideration of the advice by the Investigations Committee, and 2) the disclosure of the advice in these proceedings by the Board. The rule is: '... 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', *Al Fayed & Ors v Commissioner of Police of the Metropolis & Ors* [2002]EWCA Civ 780 (29th May, 2002). See also *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529 at 538G (partial disclosure must lead to disclosure of the whole document), and *Three Rivers District Council v Bank of England* [2004] EWCA Civ 218 at para 22 where *Great Atlantic* was cited and not controverted."

Included in the Opinion that was subsequently disclosed were the following extracts:

> "*Even if there were a sustainable argument that*[,] *for a statutory body to impose a rule upon its members that they must insure in a particular way, did require a rule or regulation which expressly authorized such a requirement, one has to bear in mind that the Board does not operate under the Code arrangement in the same way as other professions (such as solicitors and barristers) do with their PII requirements. There are the following distinctions...*
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> *"The Code does not have the same status as delegated legislation. It is a 'Code' and does not contain a set of 'Regulations' which define law. It is a document containing principles, some duties, and it sets broad standards. Whilst the Code is obviously important as a standard-setting document for the profession, and must be taken into account by the Professional Conduct Committee when hearing a complaint, a breach of the Code does not automatically mean that an architect is acting unlawfully, nor does it mean that he will automatically be found for one of the two forms of statutory wrong which the Professional Conduct Committee may find established under section 14(3). The Act expressly states that a breach of the Code by itself does not mean that either of the statutory offences is established."*

This advice, which had been given to the Board on 2 July 2003 more or less expressed in these two paragraphs the entire defence of I—S—. It is only therefore surprising that the Board persisted with its charge until it was bridled by the High Court.

Endnote, 25 November 2010. A reader of these extracts has brought the author's attention to the

1 The charge was eventually dropped after judicial review.

"summary" of Mr Dutton's advice that was published on the Board's website[2]. It will be seen from a careful reading of that summary that it makes no mention of those parts of the opinion that are extracted above. Mr Dutton had advised the Board to the effect that it could include in the Code all that it was claiming[3], but as seen above his clear advice was also that it would be futile to do that when the provisions were unenforceable. This raises the same issues as are contained in the lead article *Has ARB's practice of discrimination against UK qualifications ever been fair or lawful or justifiable*, namely whether the Board habitually acts as if it were more concerned to follow what it considers is reasonable rather than to allow the authorising statute to be the enabling point of reference for its activities. After expressing concerns about the concepts of possible *mala fides* and even *fundamental mendacity*, in a cautious aside our reader observes:

> *The reputation of barristers generally is constantly at risk whenever any of them lets instructing solicitors implicate them in their more questionable business.*

It is the editors' view that the part of the summary where Mr Dutton is reported as having replied with "an unqualified 'yes'" is, at the very least, misleading, and that this colours the entire summary in a way that Mr Dutton (who later became chairman of the Bar Council) would most likely not have approved. They also note that the summary on the Arb website persists in asserting legal professional privilege where this has been conceded (by disclosure at a PCC hearing on 27 March 2007) as being lost.

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2 It may be found **here**.

3 *Quoting:* "In particular the Board decided that it had the power: to include Standard 8 in the Code of Conduct; to issue guidelines as to what might be considered adequate professional indemnity insurance under Standard 8; to require an architect to confirm that he or she has professional indemnity insurance meeting the guidelines; to include Standard 10.1 of the Code of Conduct; to prescribe qualifications under Section 4(1)(a) of the Architects Act 1997 ('the Act') in accordance with the Board's General Rules and the Procedures for Validation 2000; to set conditions relating to the prescription of a qualification and to admit a candidate to the Register provided that in the opinion of a panel of assessors that candidate meets the Board's criteria."