

Insight: Litigation

January 2013

Supreme Court confirms that legal advice privilege does not apply to communications with non-lawyers

The Supreme Court this week handed down judgment in the case of *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax and another*,¹ confirming that legal advice privilege does not extend to legal advice given by non-lawyers, such as accountants.

The decision confirms the current understanding of the scope of legal advice privilege. Despite extensive submissions from the Bar Council and the Law Society, which both intervened in the proceedings, the Supreme Court concluded that there was no good reason in principle to distinguish between legal advice received from lawyers and non-lawyers in a world where, for example, advice on tax law is widely sought from accountants rather than lawyers. Nevertheless, the majority concluded that the need for certainty of the application of legal advice privilege, in particular, precluded them from extending the remit of legal advice privilege to communications with non-lawyers. Rather, it is for Parliament to determine whether, and to what extent, the privilege should be extended.

Summary

This insight:

- Explains in brief the basis for litigation and legal advice privilege and contrasts the two;
- Sets out the relevant background to the Supreme Court's decision;
- Provides a brief analysis of the decision itself; and
- Considers its implications.

Legal Professional Privilege

Legal professional privilege ("LPP") consists of two sub-categories of privilege: legal advice privilege ("LAP") and litigation privilege. LPP operates as a limited exception to the general rule that all relevant material is disclosable during litigation proceedings or regulatory investigations (absent direct statutory provision to the contrary). The courts have considered LPP integral to the administration of justice and the rule of law, as it allows a person to confide fully in his or her legal advisor for the purposes of obtaining legal advice without fear that such communications would be used against him in legal proceedings.

Legal Advice and Litigation Privilege compared

LAP applies to confidential communications, written or oral, between lawyer and client, for the purpose of giving or obtaining legal advice (regardless of whether litigation is contemplated). In contrast, litigation privilege will apply to confidential communications where the communications exist for the dominant purpose of being used in actual, pending or contemplated litigation. Unlike LAP, litigation privilege may apply to communications with non-lawyers, but it was not relevant in the present case.



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¹ [2013] UKSC 1

Key Issue

The relevant issue was whether LAP should extend to communications with non-lawyer accountants providing expert advice on tax law. The Court necessarily addressed the issue on a wider, principled basis by considering whether the principle of LAP should be framed to include legal advice from non-lawyers more generally, with accountants being a prime example.

Factual Background

The facts of the case relate to a marketed tax avoidance scheme devised by PricewaterhouseCoopers (“**PwC**”) that was disclosed to HMRC in accordance with Part 7 of the Finance Act 2004. This scheme was adapted by PwC for the Prudential group through a series of transactions in order to achieve a reduction in the Prudential group’s corporation tax liability in the United Kingdom.

On reviewing the relevant transactions, HMRC requested Prudential disclose certain classes of documents. While Prudential did disclose many of the requested documents, it withheld certain documents on the grounds that they were subject to LAP. Pursuant to section 20 of the Taxes Management Act 1970 (now replaced by Schedule 36 of the Finance Act 2008), HMRC served notices on Prudential requiring disclosure of the disputed documents. Prudential issued an application for judicial review challenging the validity of the notices on various grounds, including that certain of the documents requested were subject to LAP and not disclosable.

The High Court and the Court of Appeal rejected Prudential’s application. Both held that, although the disputed documents would have attracted LAP if the advice had been provided by a member of the legal profession, they were bound by previous authority² that LAP does not extend to advice provided by a professional person who is not a qualified lawyer. The Court of

Appeal went further and held that, even if it had not been bound by previous authority, it would still have dismissed the appeal as any extension of the scope of LAP was a matter for Parliament, not the courts.

The Supreme Court’s Decision

The Supreme Court (by a majority of 5 to 2) confirmed that the scope of LAP does not extend to communications pertaining to legal advice given by non-lawyers and declined to extend its scope to include such communications. In doing so, it confirmed the decisions reached by the High Court and the Court of Appeal in the case, as well as the currently accepted understanding of the scope of LAP generally, which was described as universal. Consequently, the decision confirms that no communication between a non-lawyer and his or her client can benefit from LAP, regardless of its subject matter.

In spite of its conclusion, the Court was unable to base its decision on any principled, rational reason that there should be a distinction between lawyers and non-lawyers in relation to privilege where both are engaged in providing legal advice. While the Respondents argued that the rule could be justified by the connection between lawyers and the courts, by the duties that lawyers owe to the courts and by the supposedly higher standards that lawyers are held to by the courts, this did not convince the Supreme Court. In particular, Lord Neuberger, giving the leading judgment, noted that the established extension of LAP to foreign lawyers by the courts could not be explained by any special relationship between foreign lawyers and the English courts.

Rather, the Court’s decision was based on the uncertainty that any extension of LAP would create.

The majority also noted that Parliament had legislated for extensions to LAP in the past, including limited extensions in relation to patent attorneys, registered trade mark agents and licensed conveyancers.

Moreover, several significant official reports had considered the scope of LAP and proceeded on the basis that LAP is restricted to legal advice given by lawyers. Indeed, the Government had expressly rejected an Office of Fair Trading proposal in 2003 that legal advice given by accountants should be subject to the same privilege conferred upon advice given by professional lawyers.

Therefore, the majority concluded that it was for Parliament to determine any extension of the scope of LAP and to set out its limits.

Lord Sumption (dissenting) concluded that the principle of LAP properly extends to legal advice provided by professionals whose profession ordinarily includes the giving of legal advice. It would be wrong to leave “*fundamental rights*” at common law such as privilege “*to depend on capricious distinctions unrelated to the legal policy which makes them fundamental*”. Further, Lord Sumption reasoned, there was no need to defer to Parliament’s assumption as to what the common law was if Parliament’s assumption was incorrect.

However, the decision of the majority (and particularly Lord Neuberger) was informed by the difficulties that they concluded would result from seeking to apply LAP to legal advice from any person “*whose profession ordinarily includes the giving of legal advice*”. In particular, Lord Neuberger concluded that this would “*carry with it an unacceptable risk of uncertainty and loss of clarity in a sensitive area of law*”. It would be difficult for a court to determine whether a particular profession (such as investment banking or chartered surveying) was one that ordinarily included the giving of legal advice. Lord Neuberger also noted the potential difficulty of ascertaining what in non-lawyers’ communications does and does not constitute legal advice, and of the difficulty in dealing with such communications which include both legal and non-legal advice. The Court contrasted communications with lawyers, and stated that there was an

² *Wilden Pump Engineering Co v Fustfeld* [1985] FSR 159

assumption that communications with lawyers would concern legal advice and be privileged, providing a greater degree of clarity.

Lord Neuberger concluded that, simply because an aspect of a common law rule had become outmoded in the modern world, it did not necessarily follow that it was right for the courts to amend that aspect of it. LAP is a “well-understood” rule, and the Court was reluctant to risk amending it.

Implications

Although the Supreme Court’s decision is not surprising, it provides a useful reminder of the scope of LAP and a warning, if one was needed, that communications with non-lawyers will be disclosable, even if they relate to the provision of legal advice.

It is also unsurprising, although helpful, that the Supreme Court has confirmed the availability of LAP to in-house and foreign lawyers in English proceedings.³

As the Court noted, there is no obvious basis as a matter of principle for any distinction between communications with lawyers as opposed to professionals who are not lawyers but provide legal advice. Nevertheless, the decision does avoid introducing a potentially significant additional burden on parties to legal and regulatory proceedings in ascertaining whether and to what extent privilege may pertain to any communication with any professional adviser. It also avoids the risk of costly satellite litigation that may arise from disputes over whether the extended privilege does or does not apply in any given case.

The Court’s confirmation that there is a presumption that communications with lawyers will be privileged is helpful (and there is nothing in the judgment to suggest that this presumption will not apply as much to communications with in-house lawyers as with independent lawyers). This will be of comfort to parties who are uncertain as to whether or not particular

communications with their lawyers will be privileged. However, it is important to remember that, in spite of the presumption, only communications for the purposes of seeking or giving legal advice are covered.

In light of its discomfort with the lack of any principled basis for its decision, the Court implicitly (and, in the case of Lord Clarke, explicitly) invited Parliament to intervene. The accountancy profession will doubtless be keen to use this invitation by the Supreme Court to push the Government for legislation to extend the remit of LAP. It remains to be seen whether the Government will rush to accept that invitation, especially given the current hostile political climate towards tax avoidance generally.

³ Although the decision will not affect the validity of the European Court of Justice’s 2009 ruling in the *Akzo Nobel* case, in which it held that LPP did not extend to communications with in-house lawyers, in the limited context of a competition investigation by the European Commission.