

## NEWS

### A Privilege, not a Right – Court of Appeal refuses to extend Privilege to Accountants & non-lawyers

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**Michael Axe reports on the Implications of the Court of Appeal's decision that confidential communications between clients and their accountants are not protected from disclosure by Legal Professional Privilege.**

Legal Profession Privilege (LPP) is a form of confidentiality covering communications between clients and their lawyers, which provides clients with an absolute right to refuse to disclose such communications in legal proceedings. LPP can arise where the communications relate specifically to pending or contemplated litigation (Litigation Privilege), or more generally where the communications relate to the seeking or giving of legal advice (Legal Advice Privilege). However, Legal Advice Privilege has historically only applied to legal advice provided by lawyers, and not to legal advice provided by any other parties.

#### The Prudential Case

In November 2007, Prudential was served with statutory notices by HM Revenue & Customs (HMRC) requiring it to disclose the legal advice it had received from its accountants in relation to its tax liabilities. Prudential argued that its accountants' legal advice was covered by LPP, primarily on the basis that it was the *nature* of the legal advice that is relevant to the application of LPP, not the *status* of the person giving the advice.

The implications of Prudential's application to the Court of Appeal were sufficiently far reaching that the Institute of Chartered Accountants of England and Wales, the Law Society and the Bar Council were all allowed to make submissions to the Court of Appeal.

#### The Need for Certainty

In October 2010 the Court of Appeal rejected Prudential's application and confirmed that LPP only applied to qualified lawyers (subject to some statutory exceptions; see below) and did not apply to legal advice provided by accountants or other non-lawyers.

One of the key factors behind the Court of Appeal's decision was the fact that LPP is an "absolute rule", meaning that the Courts have no real discretion in relation to its application. Because of its absolute nature, the Court of Appeal believed that LPP needed to be "*clear and certain in its application*" (which it was in the context of legal advice provided by qualified lawyers).

However, the Court of Appeal said that if LPP was extended to cover legal advice provided by accountants and other professionals, then "*the scope of the rule would be lamentably uncertain*" due to the lack of clarity in relation to, for example, which types of "accountants" and which areas of law it should apply to. The Court of Appeal did not consider that such a degree of uncertainty should be introduced to an absolute rule such as LPP.

#### Parliament's Role

Prudential referred to the fact that there were certain (limited) statutory exceptions to the normal LPP rules, which allowed LPP to be claimed by certain non-lawyers (such as patent agents) in specific circumstances. However, this point did not assist Prudential's application, as the Court of Appeal considered that this merely highlighted that only Parliament had the power to introduce new legislation to extend the scope of LPP.

The Court of Appeal noted that the question of whether Parliament should extend LPP to include accountants had been raised on a number of occasions, and considered that "*Parliament's failure to change the law in this respect is not an accident*".

#### The Risks of Instructing Non-Lawyers

Following hot on the heels of the European Court of Justice's decision that LPP does not apply to advice provided by in-house lawyers in relation to competition law matters (see our earlier article [No legal privilege for in-house lawyers in competition law matters](#)), this case further highlights the dangers of seeking legal advice from non-lawyers.

Following the Court of Appeal's decision in the Prudential case, any party that obtains legal advice on its tax liabilities from an accountant rather than a lawyer will have significantly less protection from disclosure should its

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tax status ever be called into question. This could be of particular concern to companies that implement a "tax minimisation" scheme based on advice from accountants (or other tax consultants), as the companies might be forced to disclose their "confidential" communications with their advisors regarding the scheme if HMRC later decides to commence tax evasion proceedings against them. This is, of course, despite the fact that if exactly the same advice had been given by a lawyer, LPP would apply.

This threat of disclosure may ultimately lead to more tax advice being sought from lawyers rather than accountants. Perhaps more worryingly, some parties may seek advice from accountants without disclosing all relevant details (for fear that the details might ultimately become discloseable), meaning that any advice provided by the accountants will not be based on the complete picture of all relevant facts.

#### Litigation Privilege

The Court of Appeal's decision in the Prudential case was, however, only concerned with the "Legal Advice Privilege" form of LPP, not the "Litigation Privilege" form of LPP which can apply to confidential communications relating to the giving/receiving of advice or the gathering evidence in relation to litigation.

"Litigation Privilege" will normally cover communications passing between the client and its lawyer, or between the lawyer or client and a third party (such as accountants or other professional advisors), provided of course that the communications relate to existing, pending or reasonably contemplated litigation.

However, the Court of Appeal has previously confirmed (for example, in the 2004 case of *USA v Philip Morris Inc & Others*) that neither "a distinct possibility that sooner or later someone might make a claim" nor "a general apprehension of future litigation" would be sufficient to qualify as existing, pending or reasonably contemplated litigation. Instead "litigation must have been reasonably in prospect" at the relevant time (although this did not mean that "there must have been a greater than 50% chance of litigation").

This means that it is very unlikely that "Litigation Privilege" would apply to confidential communications passing between the client and its accountant (or other non-lawyer advisors) in relation to issues such as its tax liabilities, until such time as litigation becomes reasonably likely (which will no doubt be some time after the initial advice is provided). It therefore remains the case that if the confidentiality of the initial advice is to be protected by "Legal Advice Privilege", such advice must be provided by a qualified lawyer.

For further information on this or any other issue on Privilege, please contact [Michael Axe](#) by emailing [Michael](#) or by calling him on 08450 990045, or speak to your usual contact in the [Commercial Disputes Team](#).

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