

Privilege – Lawyers Only

The Supreme Court has given judgment in a long awaited case on whether or not legal advice given by accountants is privileged. The case is *R (on the application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents)* [2013] UKSC 1.

As well as the parties, the taxpayer and Her Majesty's Revenue and Customs, other interested parties intervened. The Interveners were The Law Society of England and Wales, The General Council of the Bar of England and Wales, The Institute of Chartered Accountants of England and Wales, AIPPI UK Group, and the Legal Services Board.

The issue which led to the appeal was whether Prudential had to comply with a notice served by the inspector of taxes to produce documents relating to a marketed tax avoidance scheme devised by PriceWaterhouseCoopers.

On receipt of the notices for production, Prudential disclosed many documents, but refused to disclose some documents on the grounds that they were covered by legal advice privilege.

Whilst there was no dispute that legal advice given to a client in such circumstances by a solicitor or barrister would be privileged, the issue before the Supreme Court was whether advice from accountants was also protected by privilege. As Lord Neuberger said,

“19. In summary terms, as is common ground on this appeal, LAP applies to all communications passing between a client and its lawyers, acting in their professional capacity, in connection with the provision of legal advice, i.e. advice which “relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law” – *Three Rivers (No 6)*, [2005] 1 AC 610, para 38, per Lord Scott.”

Lord Neuberger addressed the consequences of allowing the appeal.

“37. If we were to allow this appeal, we would therefore be extending LAP beyond what are currently, and have for a long time been understood to be, its limits. Indeed, we would be extending it considerably, as the issue cannot simply be treated as limited to the question whether tax advice given by expert accountants is covered by LAP. While that is the specific question between the parties, it is just a subset, no doubt an important subset, of a much larger set. To concentrate on tax advice given by accountants would be wrong, because it would ineluctably follow from our accepting Prudential's argument that legal advice given by some other professional people would also be covered.”

He went on to set out arguments for allowing the appeal, including referring to the very strong dissent of Lord Sumption, as follows,

“39. There is no doubt that the argument for allowing this appeal is a strong one, at least in terms of principle, as anyone reading Lord Sumption’s judgment can appreciate. LAP is based on the need to ensure that a person can seek and obtain legal advice with candour and full disclosure, secure in the knowledge that the communications involved can never be used against that person. And LAP is conferred for the benefit of the client, and may only be waived by the client; it does not serve to protect the legal profession. In light of this, it is hard to see why, as a matter of pure logic, that privilege should be restricted to communications with legal advisers who happen to be qualified lawyers, as opposed to communications with other professional people with a qualification or experience which enables them to give expert legal advice in a particular field.”

Lord Sumption commenced his dissenting judgment as follows,

“114. In my opinion the law is that legal professional privilege attaches to any communication between a client and his legal adviser which is made (i) for the purpose of enabling the adviser to give or the client to receive legal advice, (ii) in the course of a professional relationship, and (iii) in the exercise by the adviser of a profession which has as an ordinary part of its function the giving of skilled legal advice on the subject in question. The privilege is a substantive right of the client, whose availability depends on the character of the advice which he is seeking and the circumstances in which it is given. It does not depend on the adviser’s status, provided that the advice is given in a professional context. It follows, on the uncontested evidence before us, that advice on tax law from a chartered accountant will attract the privilege in circumstances where it would have done so had it been given by a barrister or a solicitor. They are performing the same function, to which the same legal incidents attach.” (my emphasis)

He was supported by Lord Clarke, who illustrated his point with an example,

“140. The striking feature of the judgments of Lord Neuberger and Lord Sumption, and indeed of Lord Hope, is to my mind that they agree what the common law is or should be if the issue is treated as one of principle. As I see it, that principle can readily be seen by taking a simple example. Suppose that two individuals, A and B, have the same problem, the solution to which depends upon an application of the legal principles of taxation law to the same, or substantially the same, facts. Suppose that A seeks advice from, say, Freshfields, and that B seeks advice from, say, PricewaterhouseCoopers. Each asks the same question and Page 47 gives an account of what are substantially the same facts to the person from whom the advice is sought. Each is receiving legal advice. The question for decision in this appeal is whether the information given and the advice received are privileged as legal advice. Are both A and B entitled to claim the privilege and refuse to disclose to HMRC the information and the advice?

141. In my opinion, the only principled answer to that question is yes. It is accepted on all sides that the privilege is that of the client, that is A and B, and not that of either the solicitors or the accountants. It is also accepted that, as recently confirmed in *R*

(Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax [2002] UKHL 21, [2003] 1 AC 563, the privilege is a “fundamental human right long established in the common law”, which was “a necessary corollary of the right of any person to obtain skilled advice about the law”: per Lord Hoffmann, with whom the other members of the House of Lords agreed, at para 7. As Lord Sumption says at para 122, the privilege depends upon the public interest in promoting A and B’s access to legal advice on the basis of absolute confidence.

142. It seems to me to follow that, if the common law treats the information and advice as privileged in the case of A, principle requires that it must do the same in the case of B. The advice is the same legal advice in both cases and the expertise of the adviser in each case is broadly similar, if not the same. Indeed some accountants may be able to give more specialised legal advice than some solicitors. I agree with Lord Sumption, for the reasons he gives (at para 122), that the privilege is conferred in support of the client’s right to consult a skilled professional adviser and not in support of a right to consult the members of any particular professional body...”

However, Lord Neuberger, who was in a majority of five out of seven justices, concluded that the appeal should be dismissed,

“52. I reach this conclusion for three connected reasons, which together persuade me that what we are being asked to do by Prudential is a matter for Parliament rather than for the judiciary. First, the consequences of allowing Prudential’s appeal are hard to assess and would be likely to lead to what is currently a clear and well understood principle becoming an unclear principle, involving uncertainty. Secondly, the question whether LAP should be extended to cases where legal advice is given from professional people who are not qualified lawyers raises questions of policy which should be left to Parliament. Thirdly, Parliament has enacted legislation relating to LAP, which, at the very least, suggests that it would be inappropriate for the court to extend the law on LAP as proposed by Prudential.”

Accordingly, although the law on the ambit of privilege is not entirely clear in certain circumstances, this case makes it absolutely clear that, if there is legal advice privilege, it only arises in relation to communications between a client and its lawyers. Even though accountants give legal advice on tax matters (as do other professionals such as actuaries, auditors, architects and surveyors in different fields), communications with accountants are not covered by legal advice privilege.

Steven Loble
steven@loble.co.uk



STEVEN LOBLE

Consultant, Dispute Resolution and Commercial Litigation

Steven has been in practice as a solicitor in London for 28 years.

Chambers' Global Directory 2012 states: "Steven Loble offers a wide-ranging international dispute resolution practice. He speaks German, French and Italian, as well as *"offering extraordinary expertise in the intersection of US and UK law."* In addition, he is *"a hard-working and accessible individual, and as clients we are very happy with the results that he has achieved."*

Steven is described in the 2010 edition of **Legal 500** as *"extremely knowledgeable and efficient."*

He has acted in over 50 reported cases and has wide experience of international and commercial litigation. He has been involved in a number of the leading cases on enforcing foreign judgments, obtaining evidence for foreign proceedings, privilege, interest rate swaps, legal costs, and financial disputes. Many of Steven's clients are based outside the United Kingdom. With years of experience acting for foreign clients, he has substantial expertise in dealing with the issues which arise in cross-border litigation - choice of law, jurisdictional disputes, enforcement of judgments, obtaining evidence, dealing with questions of

foreign law and sovereign immunity. He frequently advises in relation to public and private international law and represents the government of a friendly foreign state in litigation in England on a regular basis. Steven has expertise in the use of the latest technology, to manage cases with large numbers of documents both efficiently and cost-effectively. Steven uses alternative dispute resolution where appropriate.

Recent work includes:

- advising Citigroup in obtaining vital evidence in England in connection with an \$8 billion claim against it by Guy Hands' Terra Firma private equity group arising out its purchase of EMI music
- a case which clarified the rules on Part 36 offers to settle;
- obtaining evidence in a number of cases brought against banks in the United States for facilitating terrorism by maintaining accounts for terrorist organisations
- advising a foreign regulator in relation to a case against an English company which is alleged to be in breach of the regulations of the foreign country
- acting for an investment bank in relation to the Lehman Brothers' bankruptcy
- other credit-crunch related litigation
- enforcing a judgment of a United States court for over \$100m.

steven@loble.co.uk

+44 (0)20 7478 9012