

Briefing Note

No legal professional privilege exists in legal advice provided by non-lawyers



R (on the application of Prudential PLC) v Special Commissioner of Income Tax

The Court of Appeal has given judgment in *R (on the application of Prudential PLC and another) v Special Commissioner of Income Tax and another* [2010] EWCA Civ 1094 as to whether legal professional privilege extends to legal advice provided by non-lawyers.

Legal Professional Privilege

The principles of legal professional privilege (LPP) were first established in the sixteenth century. Subject to very limited exceptions, LPP is an absolute rule which establishes a client's right to privacy in respect of their communications with their lawyer for the purpose of obtaining legal advice in relation to their legal rights and obligations.

The facts

In the present case, Prudential sought to argue that it was entitled to assert LPP in relation to advice on tax law received from well-known accountants, PricewaterhouseCoopers, in order to limit the scope of notices served on Prudential in November 2007 by HM Inspector of Taxes under section 20 of the Taxes Management Act 1970 (TMA) requiring the production of documents. Section 20 of the TMA gave power to require the production of documents both of the taxpayer and of any other person. An exception to the requirement to disclose documents applied to items subject to legal professional privilege, which by definition in the TMA applied only to communications between a professional legal adviser and his client or client representative.

Prudential sought to establish that the principle of LPP extends further than has previously been recognised; in particular, to legal advice sought from and given by an accountant in relation to fiscal liabilities.

In its Judgment, the Court of Appeal cantered through 200 years of authorities on LPP, acknowledging en route the policy underlying LPP:

*"...the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the client's) affairs, should be secure against the possibility of scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else... is an idea to which I subscribe."*¹ Lord Scott of Foscote.

¹ *Three Rivers District Council v Governor and Company of the Bank of England (No. 6)* [2004] UKHL 48

The decision

Ultimately, the Court of Appeal considered itself bound by the earlier Court of Appeal judgment in *Wilden Pump Engineering Co v Fusfeld* [1985] FSR 159, to the effect that, at common law, LPP only applies in relation to advice given by members of the legal profession: qualified solicitors and barristers and by extension foreign legal professionals. In *Wilden Pump*, the Court of Appeal refused to extend LPP to communications with patent agents. In *Prudential*, Lloyd LJ (who gave the leading and only judgment) considered this to be both in accordance with the law and necessary in a democratic society. To extend LPP, outside of statute, to the seeking and giving of legal advice from non-lawyers would result in the scope of the rule being lamentably uncertain. It is vital that the rule is clear and certain, both as to scope and function.

Lloyd LJ considered that any extension of LPP to other professions, must be a matter for Parliament.

Future extension of the scope of LPP beyond the legal profession

Parliament's current thinking on the possible extension of LPP beyond members of the legal profession can be seen in the provisions of the Legal Services Act 2007 (LSA). The LSA, which allows for alternative business structures to be introduced, will, when fully in force, allow non-lawyers to have professional, management or ownerships roles in legal organisations, which will themselves be required to be licensed. Under s.190 of the LSA, LPP will be extended beyond qualified solicitors and barristers to persons providing advocacy, litigation, conveyancing and probate services, in relation to the exercise of prescribed services and activities, provided they are persons authorised by listed approved regulators.

Notwithstanding that multi-disciplinary partnerships (MDP's) are likely to become increasingly common as a result of the LSA, and those MDP's are likely to have accountants in professional, management or ownerships roles within them, the LSA specifically does not extend LPP to such other professionals. Rather, the LSA provides that material will be privileged if provided to a client by a licensed MDP through a lawyer or someone acting at the direction and under the supervision of a lawyer. It remains to be seen how the courts will interpret "at the direction and under the supervision of a lawyer" and the extent to which a lawyer need be involved in the provision of the advice.

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This note does not constitute legal advice but is intended as general guidance only. It is based on the law in force on 13 October 2010.

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