

UK Supreme Court Declines to Extend Legal Advice Privilege to Communications with Non-Lawyers

On January 23, 2013, the UK Supreme Court handed down its judgment in the *Prudential* case.¹ The case related to the ability of a client to claim legal advice privilege (**LAP**) over communications relating to tax advice provided by a firm of accountants. The Supreme Court held, by a majority decision, that LAP extends only to communications relating to legal advice which are made between professional lawyers and their clients.

Background

LAP is a principle of common law, rather than statute, that exists for the benefit of a client receiving legal services. It attaches to confidential communications between a client and its legal advisers, for the seeking and receiving of legal advice. It allows the client to prevent any third party, including a court or tribunal and the tax authorities, from seeing the relevant documents for any purpose, save where the client waives privilege, statute specifically overrides it, or certain other exceptions apply.

The facts of the case

HM Revenue & Customs issued information notices under the UK's tax rules, requiring Prudential to produce documents in connection with tax advice it had received from PricewaterhouseCoopers.

The taxpayer challenged the validity of the notices issued by HMRC, on the basis that the documents HMRC had requested were protected by LAP. The taxpayer argued that LAP should attach to communications passing between chartered accountants and their clients, which are made for the purpose of seeking expert tax advice, if LAP would attach to communications between a professional lawyer and the client in the same circumstances.

Although the facts of the case related to advice provided by a firm of accountants, the taxpayer's argument was essentially that the character and circumstances of the advice should determine whether LAP applies, and not the nature or professional qualifications of the relevant advisor.

¹ *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax and another* [2013] UKSC 1.

Both the UK High Court and Court of Appeal held that LAP is restricted under the common law to advice sought from, and provided by, members of the legal profession. The taxpayer appealed to the Supreme Court.

The Supreme Court decision

The seven-judge panel of the Supreme Court held, by a majority of five to two, that LAP should not be extended to communications in connection with legal advice given by professionals other than lawyers (meaning barristers, solicitors, members of the Chartered Institute of Legal Executives and foreign lawyers). Accordingly, the taxpayer's appeal was dismissed.

The leading judgment from Lord Neuberger (with which the other majority judges agreed) acknowledged that clients now seek legal advice from professionals other than lawyers, in contrast to the position when LAP was first developed as a principle of common law. However, he concluded that LAP should not be extended to communications with other such professionals on the basis that:

- (i) such an extension would introduce uncertainty and lack of clarity into an area of the law that is currently clear and well understood, and the implications of such an extension are difficult to determine;
- (ii) the extension of LAP involves wider questions of policy which the UK Parliament is better placed than the courts to consider; and
- (iii) the UK Parliament has legislated in relevant fields, but has specifically declined to extend LAP to communications with professionals other than lawyers, meaning that such an extension by the Supreme Court would be inappropriate.

The dissenting judgment by Lord Sumption (with which Lord Clarke agreed) accepted the taxpayer's submission that the character of the advice and the circumstances in which it is sought should determine whether LAP applies. He considered that privilege is a substantive right of the client, and therefore that the status of the advisor should not determine whether LAP can apply.

Comment

The decision of the Supreme Court maintains the current position on privilege, and puts to rest – at least for the time being – a significant issue of contention. The majority judgment makes clear that the courts will not allow privilege to be claimed in relation to communications with non-lawyers, without specific amendments to the law by Parliament. Given the policy implications and the difficulties that would be faced in crafting a clear and workable extension to LAP, it is perhaps understandable why the court concluded that any consideration of amendments should be pursued through the legislative process.

The case featured a number of interventions from interested professional bodies (The Law Society of England and Wales, the General Council of the Bar of England and Wales, the Institute of Chartered Accountants in England and Wales (**ICAEW**), Association Internationale pour la Protection de la Propriété Intellectuelle UK Group and the Legal Services Board) and it can be expected that that the ICAEW will seek to lobby Parliament for the law to be amended. In light of other priorities facing Parliament at present, whether it will consider any such amendment is far from clear.

If you have any questions, please feel free to contact any of your regular contacts at the firm.

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