

TRAVERS SMITH

Prudential Supreme Court declines to extend scope of legal advice privilege



On 23 January 2013, the Supreme Court gave judgment in the case of *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax and another* [2013] UKSC 1. By a majority of five to two, the Supreme Court confirmed that legal advice privilege (LAP) should not extend to communications in connection with advice given by professionals other than lawyers, even where that advice is legal advice which the professional in question is qualified to give.

Background

The decision follows the 2010 judgment of the Court of Appeal, which rejected the argument that LAP should be extended to cover legal advice provided by accountants. The Court of Appeal in turn upheld much of the reasoning in the High Court decision of Charles J., reiterating that widening or restricting the scope of LAP is properly a matter for Parliament, and warning that an extension of what is currently an absolute rule would make it *"lamentably uncertain"*. Lord Justice Lloyd noted that Parliament's failure to change the law after consideration of the position by several responsible bodies, most recently the Department of Constitutional Affairs in 2003, was *"not an accident"*.

The Supreme Court decision

In the lead judgment for the majority in the Supreme Court, Lord Neuberger revisited those arguments, concluding that the court should dismiss the appeal because (1) the consequences of allowing it would be unpredictable and likely to muddy the waters of what is presently a well-understood principle; (2) the issues in debate raise questions of policy best dealt with by Parliament; and (3) Parliament has already enacted legislation in relation to LAP on the assumption that it applies only to advice given by lawyers, which at the very least suggests that to extend the law would be inappropriate. Although he recognised there was currently *"some concern"* over the limits of LAP, Lord Neuberger maintained *"...there is no evidence that even gets near establishing a pressing need to change those limits."*

Lord Reed, also for the majority, made some observations from a Scottish perspective, adding that, were the question of extending LAP to arise in Scotland, the courts would have to make a policy decision, including consideration in the Scottish Parliament and subsequent legislation.

Lord Sumption however, for the minority, underscored the functional approach historically taken to LAP, whose availability, he said, depends on the character of the advice sought and the circumstances in which it is given, rather than the status of the adviser, provided that the advice is given in a professional context. He insisted the key issue was not whether LAP should be extended, but to identify the categories of adviser to which the existing principles apply, and dismissed as *"extravagant"* fears of a flood of privilege claims. Lord Clarke, providing the other dissenting judgment, concluded similarly that, *"Legal advice privilege is a creature of the common law. As such it should be capable of redefinition to cater for changed conditions."*

"It is ... inevitable that the common law will include some rules which, while entirely valid today, have limitations or other aspects which are only explicable by reference to historical practices or beliefs. LAP, as it is currently understood, is such a rule."

Lord Neuberger

What are the key points in the ruling?

- The judgment confirmed the ambit of LAP as it is generally understood, citing the "clear judicial statements of high authority" expressed over the past century and more; current textbooks on privilege; multiple official reports and the decision by Parliament in respect of the Finance Act 2008 to maintain the distinction between (1) a person with whom communications attracted "legal professional privilege" and (2) a "tax adviser".
- Lord Neuberger explained that to allow the appeal would not only extend LAP but extend it "considerably", given that accountants are merely a subset, albeit an important subset, of a much larger set of professional people who might also then be covered.
- In considering Lord Sumption's proposed methodology for ascertaining to which other professional bodies LAP might apply, Lord Neuberger concluded that any such analysis would be fraught with uncertainty, not only in terms of how to set the criteria for being a member of a "profession", but also for being in a profession which "ordinarily includes the giving of legal advice". The majority were therefore not prepared to risk such a loss of clarity in a sensitive area of law.
- Lord Neuberger was prepared to accept that restricting LAP to lawyers in a modern world where a great deal of legal advice is tendered by non-lawyers "can fairly be said to be illogical", but nevertheless argued, citing Oliver Wendell Holmes, Jr in *The Common Law* (1881), that the life of the common law has not been logic, but experience.
- Emphasising the need to defer to Parliament, the Court declared that the extension of LAP may only be appropriate on a conditional or limited basis, which cannot be adequately assessed, let alone imposed, by the courts.

"...there is no evidence that even gets near establishing a pressing need to change those limits [to LAP]."

Lord Neuberger

How can we help?

The Supreme Court decision does not represent a change in law. It does however underline the importance, whether in the context of tax investigations or otherwise, of understanding the precise scope of LAP (as well as litigation privilege, where appropriate) to ensure that communications containing or relating to legal advice are, and remain, privileged.

In the context of tax investigations, if HMRC seeks disclosure of transactional tax advice, the first line of defence may be that documents revealing the tax advice received by the taxpayer in the context of a transaction are irrelevant, particularly given the current tendency for HMRC information requests to be poorly targeted and very wide. However, whether or not a relevance argument is sustainable will depend on the facts of each case. HMRC may argue in appropriate cases that the tax advice received goes to the issue of the taxpayer's intention in undertaking the transaction, or aspects of the transaction, in question. In that event it is only privileged legal communications between a lawyer and client which will be protected from disclosure.

If you would like any advice as to the scope of LAP or practical advice as to how it may best be protected, whether in the context of tax investigations or otherwise, please speak to your usual contact at the firm or contact any of the partners listed below.

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