

Prudential – scope of legal professional privilege confirmed



On 13 October 2010, the Court of Appeal gave judgment in the case of *R (on the application of Prudential Plc & Anor) v Special Commissioner of Income Tax & Anor* [2010] EWCA Civ 1094.

What did the Court of Appeal decide?

It will not come as a surprise to many that the Court of Appeal rejected the argument that legal professional privilege (LPP) should be extended to cover legal advice provided by accountants. The Court of Appeal upheld much of the reasoning in the High Court decision of Charles J., reiterating that the scope of LPP is properly an area for the determination of Parliament and emphasising the need for certainty, which it was considered would be undermined if LPP was widened by the courts (rather than by parliament) to cover advice given by other professional advisers. The Court of Appeal's decision therefore provides a timely reminder of the differences between the protections afforded to advice given by tax accountants and lawyers. This is of particular relevance in considering the scope of documents which may have to be disclosed in the context of investigations by HMRC.

The decision is also of wider interest in that it confirms that, in considering whether LPP applies to a communication, the function of the advice provided cannot be divorced from the identity of the advisor. However, whilst the decision shows that the identity of the advisor is of fundamental importance in the application of LPP, the function of the advice and the existence of the 'relevant legal context' remains the second and no less important limb that must be fulfilled in order for LPP to arise. The advice must therefore be both legal advice and provided by a legal professional in order for LPP to apply. The Court of Appeal's decision therefore also provides a timely reminder that not all communications between lawyer and client will be privileged; a "relevant legal context" is required. This is a particularly important consideration for in-house lawyers, whose role may extend beyond purely giving legal advice.

The decision is also of wider interest because the Court of Appeal disagreed with comments made by Charles J. that LPP might in future be limited in order better to level the playing field between accountants and lawyers. Charles J.'s sentiment perhaps echoed comments made by Lord Phillips in *Three Rivers DC (No. 10) v Governor of Bank of England* [2004] EWCA Civ 218 in which he doubted the justification for legal advice privilege and suggested that it was perhaps time for it to receive a further review, albeit these doubts were not shared by the House of Lords.

The decision may come as a disappointment not only to tax accountants hoping for their client communications to be accorded the same level of protection as that currently enjoyed by lawyers, but to other professional advisors to whom LPP might arguably have also been extended had the arguments for Prudential been upheld.

What are the key points in the ruling?

The ruling is of interest as it confirms the rationale for and scope of LPP.

- The judgment reiterated that the scope of LPP can only be widened or restricted by statutory intervention; the Court noted that Parliament has failed significantly to alter the scope of LPP despite numerous opportunities to do so over the past 40 years, and considered this to be no oversight or mistake on the part of Parliament.

"That there must be a 'relevant legal context' in order for the advice to attract legal professional privilege should not be in doubt".

- The importance of certainty, both in terms of the nature and content of LPP, was also emphasised. The court considered that as currently formulated, with the line clearly drawn at legal professionals, LPP provides the necessary certainty, whereas an extension to other professional advisers, "without statutory help or definition", would result in the scope of the rule being "lamentably uncertain".
- It had been argued for Prudential that the determining factor is not the status of the adviser but the nature of the advice, and thus the function of the adviser. However the Court of Appeal considered that the function of advice provided cannot be separated from the status of the advisor in determining the existence of LPP; the advisor must be a legal professional.
- The Court cited *Three Rivers District Council v Governor and Company of the Bank of England (No.6)* (2004) UKHL 48 in confirming that LPP will only apply to communications made between lawyer and client where there is a 'relevant legal context'. Therefore, not all communications between lawyer and client will necessarily attract privilege.
- The Court of Appeal accepted that the right of privileged and confidential communication with a lawyer is a fundamental human right under Article 8 of the European Convention on Human Rights 1998 but did not consider it to be even arguable that Article 8 protects communications for the purpose of obtaining legal advice from someone other than a legal professional.
- The Court of Appeal did not agree with Charles J's comments that the scope of LPP in relation to lawyers should potentially be reduced to even the playing field between accountants and lawyers. The Court considered that current scope of LPP in relation to lawyers is clear and correct.

How can we help?

The Court of Appeal's decision does not represent any change in the law. However it is important, whether in the context of tax investigations or otherwise, that businesses properly understand the scope of legal professional privilege and take steps to ensure that so far as possible 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 legal professional privilege 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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"Parliament (has) not created any statutory extension of LPP to legal advice sought from and given by accountants on tax matters... Parliament's failure to change the law in this respect is not an accident"