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# LSLA

# A privileged position?

## Julian Copeman investigates the impact of the Prudential case on legal advice privilege

On 23 January 2013 in *R (on the application of Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1 the Supreme Court confirmed by a majority of five to two that legal advice privilege (LAP) cannot be claimed in respect of confidential communications between accountants and their clients for the purpose of requesting or providing legal advice, but can be claimed only where such communications are between qualified solicitors, barristers or foreign lawyers (including in-house lawyers) and their clients.

### Background

The case arose when HMRC gave formal notice to Prudential seeking production of documents relating to a tax avoidance scheme it had entered into. Prudential judicially reviewed the notices, arguing that they unlawfully required Prudential to disclose documents that were subject to LAP. In particular, Prudential asserted that documents by which it had sought or received legal advice on tax matters from its accountants were covered by LAP.

Prudential argued that LAP should be available for advice on tax law given by accountants because accountants provide the same services as lawyers in the context of giving tax advice, and that the determining factor should be the function of the communication (ie advising on the law) rather than the status of the adviser (ie whether or not a qualified lawyer).

At first instance and in the Court of Appeal the court held it was bound by *Wilden Pump Engineering Co v Fufeld* [1985] FSR 159 to find that LAP is restricted, at common law, to advice given

by lawyers. The Court of Appeal also held that, even if it had not been so bound, it would not have extended LAP to cover accountants' legal advice as any such extension was a matter for Parliament.

### Supreme Court decision

Lord Neuberger gave the leading judgment, with which Lords Walker, Hope, Mance and Reed agreed, dismissing Prudential's appeal. Whether Prudential's case was that the Supreme Court should change the common law or merely "clarify" it, he noted all previous authorities, textbooks and official reports had proceeded on the basis that LAP can only be claimed over advice provided by lawyers. He did say that the case advanced by the accountants that LAP should be based on the function of the communication rather than the status of the adviser was strong in principle, given that clients do seek legal advice from other professionals. Nevertheless, he concluded that, as a matter of policy, LAP at common law should remain restricted to communications between the client and a lawyer because:

- (i) extending LAP to confidential communications requesting or providing legal advice from professionals other than qualified lawyers would lead to uncertainty in the application of a rule that is currently clearly understood;
- (ii) any extension of LAP raises questions of policy that should be considered by Parliament; and
- (iii) Parliament has in fact enacted legislation relating to LAP such that it would be inappropriate for the court to extend LAP.

### Uncertain scope of the extension

Prudential changed its position on the question of who should be covered by any extension of LAP during the course of the case, recognising that it could not realistically limit any extension to accountants giving tax law advice as the same principle applies to a range of other professionals. Prudential's final position was that LAP should apply to communications requesting or providing legal advice between a client and any member of a profession that is recognised as competent to give legal advice and appropriately regulated when doing so. However, the majority of the Supreme Court still concluded that uncertainty in the application of that rule would be inevitable. Who is a member of a profession? On which areas of law is that profession competent to advise? How is that professional regulated when giving advice? Would evidence be required by the court, on a case-by-case basis, to answer each of these questions? Clearly, had Prudential been successful, the disclosure process would have become more complex. Decisions would have had to be made as to whether to claim privilege for certain aspects of advice by actuaries, auditors, architects, surveyors, town planners, engineers, and pension advisers. There would have been rafts of satellite litigation as the position of each body of each profession was debated.

### A policy decision for Parliament

This scope for uncertainty underlined the intricate policy issues which could arise such that the majority concluded it should be for Parliament, not the courts, to consider whether to extend LAP. Parliament could commission consultations and take evidence in relation to the likely impact of any extension to LAP in a manner that the Supreme Court cannot.

As a result of such processes, Parliament could conclude, for example, that LAP

should be extended to members of particular professions but only on a limited or conditional basis, such as restricting it to certain aspects of law, or only in proceedings against certain parties. Both the USA and New Zealand have extended LAP by statute to cover legal advice given by tax advisers but excluded LAP from advice concerning tax avoidance schemes.

### Parliament's intervention in the context of LAP

Further, it was relevant that Parliament has previously declined to extend LAP to advice given by tax accountants. In 1983, the Keith Committee on Enforcement Powers of the Revenue Departments recommended that a limited tax adviser privilege should be enacted, but Parliament did not do so. Further, in a range of statutes Parliament has recognised and preserved the distinction between legal advice by lawyers and other advisers.

Lord Mance concluded that Parliament “has...specifically decided to maintain a distinction between lawyers and tax advisers when it was suggested that the latter’s advice ought to give rise to a general LAP paralleling that existing in respect of lawyers’ advice”.

### Minority judgments

The accountants’ submissions received the support of two of the seven justices hearing the appeal. Lord Sumption, with whom Lord Clarke agreed, considered that LAP should be extended to reflect a business environment where professionals such as accountants, surveyors and pension advisers might all be said to have expertise in giving legal advice about particular areas of law. He held that LAP should attach to any communication between a client and his legal adviser made for the purpose of giving or receiving legal advice in the course of a professional relationship and 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 future

Prudential’s evidence was that 90% of all tax advice in the UK is provided by professionals other than lawyers. Thus it is reasonable to assume that chartered accountants provide the majority of such tax advice. Clients have not, therefore, selected their tax advisers to date based on

whether or not their advice is subject to LAP. It is unlikely that the continuation of the status quo by the Supreme Court will change that.

However, it is clear that the accounting profession will not give up on its attempts to extend LAP to legal advice given by accountants. It may now seek a change in the law via the legislative process. It would do so with the support of Lord Clarke, who “hope[d] that the whole issue will be considered by Parliament as soon as reasonably practicable”. However, Parliament has previously declined to give even a limited extension. It is hard to envisage Parliament agreeing to extend LAP to cover the 90% of advice on tax avoidance schemes that is not already covered.

Developments are therefore more likely to shift to the creation of multi-disciplinary partnerships of solicitors and accountants under the Legal Services Act 2007 (LSA 2007).

LSA 2007 provides that certain types of legal services are “reserved” and can only be provided by authorised persons or licensed bodies. These services include certain advocacy and litigation services, conveyancing services and probate services. Authorised persons are individuals, and licensed bodies are firms, that are authorised to provide a reserved legal activity by an approved regulator, such as the Solicitors Regulation Authority (SRA), the Bar Council, or the Council of Registered Conveyancers.

Where solicitors or barristers provide these reserved legal activities, their communications remain subject to ordinary common law rules of LAP. However, recognising that legal advice provided by a person who is not a solicitor or barrister is not subject to LAP at common law, s 190(2) of LSA 2007 provides that any communication relating to the provision of a reserved legal activity by an authorised person is privileged “as if [the professional] had at all material times been acting as [his] client’s solicitor”.

Where a licensed body undertakes a reserved legal activity on behalf of a client, the applicability of privilege depends on the involvement of a solicitor, barrister, foreign lawyer or authorised person (each, a “relevant lawyer”) in that activity. Under s 190(4), privilege will apply to any communication where the licensed body undertakes that activity through either a relevant lawyer or a person that acts under the direction and supervision of a relevant lawyer.

Accordingly, s 190 provides clients of authorised persons and licensed bodies with equivalent privilege protection to clients of solicitors and barristers, but the issue of supervision introduces an element of uncertainty.

Where a solicitor’s firm provides advice through a trainee solicitor, that advice is privileged because the SRA requires trainee solicitors to be supervised by a suitably senior partner or associate. But which employees of a licensed body act under the direction and supervision of a relevant lawyer? LSA 2007 does not provide any guidance. It will therefore be for the court to interpret s 190(4) to determine the level of direction and supervision required for privilege to apply. The Legal Services Board intervened in Prudential seeking guidance on such matters, but the Supreme Court declined to do so.

In a different context, the question of what constitutes adequate supervision has arisen in other jurisdictions. In *Law Society of Singapore v Tan Chwee Wan Allan* [2007] 4 SLR(R) 699, a solicitor faced disciplinary action for the actions of a clerk in his employ. The Singapore High Court held (following Australian authority) that a solicitor must maintain a sufficiently close oversight of his employees by reference to five factors:

- (i) knowledge of the law;
- (ii) proper application of the law;
- (iii) the efficient and effective completion of the individual transaction;
- (iv) observance of statutory and other requirements in respect of dealing with moneys received into a practice; and
- (v) observance of the general obligations of those involved in the conduct of a legal practice, relating to, for example, conflicts of interest.

If the English High Court takes a similarly fact-specific approach it may not provide sufficient certainty. However, this area represents accountants’ most realistic hope of providing privileged advice. It is therefore no surprise that an ICAEW (Institute of Chartered Accountants in England and Wales) representative has been quoted as saying “the next raft of cases will be on what constitutes supervision by a lawyer in a multi-disciplinary practice”. NLJ

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