

UK SUPREME COURT REJECTS EXTENSION OF LEGAL PRIVILEGE

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

Introduction

On 23 January 2013, a majority of the Supreme Court rejected an appeal which would have extended the application of legal advice privilege to accountants and other non-legal professionals.

Legal Professional Privilege

Legal professional privilege can be further sub-divided – legal advice privilege and litigation privilege.

Legal advice privilege protects communications between a legal adviser and his client which have been entered into for the purposes of giving legal advice. This applies whether or not litigation is pending or contemplated, but is limited in that it only applies as between a legal advisor and his client.

In contrast, litigation privilege only applies when litigation is pending or contemplated, and can apply to communications between a client, his legal adviser and a third party.

Despite a number of challenges, the courts of England and Wales have continually stated that in order for legal advice privilege to apply, the legal adviser concerned must be a ‘professional legal adviser’ or a ‘professional lawyer’. The *Prudential* case is the latest in a long line of cases to challenge this, and attempt to extend the application of legal advice privilege beyond the legal sector.

Background

In *Prudential*, the claimants sought judicial review of two notices which were issued under s20 Taxes Management Act 1970 (now been replaced by Schedule 36, Finance Act 2008) which requested disclosure of tax advice given to Prudential in relation to a commercially marketed tax avoidance scheme. Prudential refused to hand over tax advice given to it by its accountants, PriceWaterhouse Cooper, on the grounds that it was protected by legal professional privilege and that the material sought did not on any reasonable view contain information relevant to any tax liability or to the amount of any such liability.

Both the High Court and the Court of Appeal rejected the challenge, and held that legal advice privilege did not apply to advice given by the accountants. Prudential appealed to the Supreme Court. Given the importance of the case, a number of other entities also appeared as intervening parties – the Law Society of England and Wales, the Bar

Council, the Institute of Chartered Accountants in England and Wales, AIPPI UK and the Legal Services Board.

The specific issue for the Supreme Court was whether, following receipt of a statutory notice from an inspector of taxes to produce documents in connection with its tax affairs, a company is entitled to refuse to comply on the ground that the documents are covered by legal advice privilege, in a case where the legal advice was given by accountants in relation to a tax avoidance scheme. The more general question was whether legal advice privilege extends, or should be extended (and the extent of this) to apply to legal advice given by an advisor other than a member of the legal profession.

Judgment

The Supreme Court, by a majority of five to two (Lord Clarke and Lord Sumption dissenting), dismissed the appeal.

Lord Neuberger gave the lead judgment for the majority and stated that what the Supreme Court was being asked to do was “a matter for parliament rather than for the judiciary”.

In particular, Lord Neuberger, while stating there was “strong case in terms of logic” for allowing the appeal, rejected the extension of legal advice privilege on three related grounds:

- the consequences of allowing the appeal are hard to assess and would be likely to lead to what is currently a clear and well understood principle becoming an unclear principle, involving uncertainty.
- the question of whether legal advice privilege should be extended to cases where legal advice is given from professional people who are not qualified lawyers raises questions of policy which should be left to Parliament.
- Parliament has enacted legislation relating to legal advice privilege which suggest that it would be inappropriate for the court to extend the law.

Lord Sumption (who, as a barrister, appeared for the Bank of England in the *Three Rivers District Council v Bank of England* case, which was previously the leading authority on legal advice privilege) gave the lead judgment for the minority. He stated:

- legal advice privilege extended to advice given by members of a profession which has as an ordinary part of its function the giving of skilled legal advice.
- Legal advice privilege was a privilege of the client, not the adviser.
- The availability of legal advice privilege depends on the character of advice which the client is seeking and the circumstances in which it is given, and not on the adviser’s status, provided that the advice is given in a professional context.
- On this basis, recognising the privilege attaching to the legal advice of accountants would not be extending the scope of legal advice privilege

Comment

The judgment of the Supreme Court clearly confirms the limited scope of legal privilege, and rejects the extension of this principle to accountants. From a legal perspective, this is an unsurprising judgment, and is to be welcomed in confirming, once again, that legal advice privilege only covers advice given by members of the legal sector.

4th February 2013