For your lawyers only: the UK Supreme Court ruling on legal advice privilege

The UK Supreme Court has upheld the current position that legal advice privilege may only be claimed in respect of communications between a client and a member of the legal profession who is acting in a professional capacity, made for the dominant purpose of giving or receiving advice; because the question of whether it ought to extend to advice on tax law given by accountants (or legal advice provided by other professions) is a policy decision best left to Parliament.

KEY POINTS

• Once one accepts that legal advice privilege must – as a matter of principle – be opened up to all professions which ordinarily give legal advice (and not restricted to advice provided by lawyers), the key control mechanism can no longer rest on the status of the advisor; it must instead be functional.

• However, a functional test is likely to be difficult to apply in practice as the law lacks well defined concepts of "a profession" or what constitutes "legal advice".

• The blunt instrument of restricting legal advice privilege to lawyers’ advice, which underpins the present law, may be illogical but it is well understood and simple to apply.

• Despite the calls for Parliament to act, the prospects for change look bleak after the majority of the Supreme Court held that the expansion of the current law was a matter for Parliament and that they could not recast it on a more principled basis.

OVERVIEW

For the busy practitioner, the result of the case is simple to understand and can be stated briefly: nothing has changed.

In R (on the application of Prudential Plc) v Special Commissioner of Income Tax [2013] UKSC 1, the UK Supreme Court decided to uphold the status quo by a majority of five to two, confirming that legal advice privilege (LAP) applies only to legal advice provided by members of the legal profession, which includes barristers, solicitors, foreign lawyers and members of the Chartered Institute of Legal Executives (CILEX) (for ease of reference, we refer to this group of professionals as “lawyers”). The law is therefore left in the unsatisfactory position where if a client consults both Leading Counsel and a tax accountant on the same point of tax law and receives identical advice from each, the advice from Leading Counsel will be privileged and can be withheld from disclosure, but the advice from the tax accountant will not and must be disclosed.

Despite having no immediate impact on the law of privilege, the judgments merit careful consideration because they: (i) send a clear message to Parliament that the distinction between lawyers and non-lawyers in the current
law is unjustified and ought to be revisited; and (ii) shed light on the differing views of the Justices regarding the constitutional role of the Supreme Court and its relationship to Parliament.

BACKGROUND

The dispute arose out of HMRC’s decision to investigate a marketed tax scheme devised by PwC and implemented by its client, Prudential Plc. HMRC served notices under ss 20(1) and 20(3) of the Taxes Management Act 1970 requiring Prudential to disclose certain documents. Prudential contested the validity of these notices by way of judicial review on the basis that the documents related to legal advice sought by Prudential and/or legal advice given by PwC. It relied upon the decision of the House of Lords in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21 that s 20 could not be invoked to require anyone to produce documents to which LAP attached and sought to extend the protection afforded by LAP to cover advice on tax law given by chartered accountants. The wider issue at stake was the extent to which legal advice given by professional people who were not qualified lawyers (including accountants) attracted LAP.

The High Court and Court of Appeal rejected the application on the orthodox basis that, although the disputed documents would have attracted LAP if the advice in question had been provided by a lawyer, no such privilege applied where the advice was provided by a person who was not a lawyer.

The constitutional significance of the issues was apparent from the fact that the Supreme Court sat as a panel of seven judges rather than the usual five and that the appeal featured five interveners representing the views of the various professions involved.

THE DECISION

The Supreme Court dismissed Prudential’s appeal, with Lord Neuberger giving the lead judgment for the majority (Lords Walker, Hope, Mance and Reed agreeing, Lords Sumption and Clarke dissenting).

A matter of principle

One remarkable feature of the case is that all seven Justices agreed that, as a matter of principle, legal advice is or ought to be privileged regardless of whether it is provided by a lawyer or a non-lawyer.

The primary arguments of principle advanced in favour of distinguishing between lawyers and non-lawyers centred around the proposition that lawyers were in a special position relative to other professions because they were subject to more stringent regulatory standards and the supervision of the court. These arguments were rejected on the bases that: first, LAP applied to advice provided by foreign lawyers regardless of whether their professional standards were the same as English lawyers’; and, second, the duty to keep privileged material confidential stemmed from the law of privilege and not the advisor’s professional obligations or duties to the court. If LAP extended to legal advice provided by accountants, it would be irrelevant whether their professional rules imposed less stringent obligations of confidentiality as accountants would be prohibited from disclosing privileged materials under the general law.

One can therefore be forgiven for wondering how this consensus did not manifest itself in a change to the status quo allowing for legal advice provided by a non-lawyer to attract LAP. At first sight, it would seem that something has gone badly wrong with the legal system if the highest court in the land unanimously accepts that LAP contains an illogical distinction but is unable to do anything about it.
The present scope of LAP
Lord Neuberger adopted a realist stance, recognising that whilst the common law grows over time and rules developed in one century may well become illogical in the next, this did not mean that those rules did not represent the present law. An illogical law could therefore still be a valid law. The challenge for the courts was to decide how and when to change the law to reflect changing social conditions.

Lord Neuberger explained, by reference to case law, textbooks and legislation, that LAP was generally understood to apply only to communications in connection with legal advice given by a lawyer. In the 19th century, when the principle developed, the only people who gave legal advice were lawyers. The practice of accountants and other professionals giving legal advice developed much more recently. Despite there being no principled reason to distinguish between legal advice provided by a lawyer and a non-lawyer, this did not mean that the court should do away with the limitation that LAP applied only to advice provide by the former. The matter had to be looked at on a case by case basis and, for the reasons examined below, Lord Neuberger considered that this was not a case where the courts could legitimately expand LAP beyond its present limits.

Lord Sumption also approached the matter from a historical perspective. However, he concluded that LAP had never been limited solely to legal advice provided by lawyers. None of the decided cases rested on whether the advisor was a lawyer or a member of another profession. Instead, the test was functional, focussing on the nature of the advice provided. References in the case law to the privilege attaching to advice provided by a lawyer simply reflected the assumption (based on experience at the time) that only lawyers provided professional legal advice. Saying that a piece of advice was privileged because it was provided by a lawyer was simply another way of saying that the advice had the necessary quality of being legal advice. Since it had become common practice for other professions to provide legal advice, it was no longer appropriate to use such shorthand.

Despite the broad consensus of what the law ought to be as a matter of principle, the majority concluded that they were unable to extend LAP beyond its present limits because:

- Such an extension would risk opening the floodgates and make the principle too uncertain, potentially catching a very substantial volume of legal advice;
- It was a policy decision best left to Parliament; and
- Parliament had already legislated in this area on the basis that LAP was limited to legal advice provided by lawyers.

The floodgates argument
Lord Neuberger highlighted the practical difficulties of extending the law and its possible unintended consequences. Although the present appeal was concerned with tax advice provided by accountants, equal treatment dictated that if it was right to extend LAP to legal advice provided by accountants then it was right to extend it to legal advice provided by other professionals (it was common ground that legal advice did not attract the privilege if it was given in a non-professional (ie social) context).

The law as understood at present was relatively clear and straightforward to apply. Lord Neuberger was concerned that the extension sought would require the courts and practitioners to grapple with the thorny issue of whether the particular profession in question attracted the privilege. Although Lord Sumption’s solution that LAP should apply only to legal advice given by a person who was a member of a “profession [which] ordinarily included the giving of legal advice” was powerful, Lord Neuberger considered even this formulation too uncertain.
Would occupations such as town planning, engineering or pensions advice qualify as professions, and how would one determine whether the profession “ordinarily gave legal advice”? Would one look at the profession generally or the practice of the particular professional who gave the advice in question?

Lord Sumption clearly intended his proposal to be interpreted narrowly so that it would not extend to professions where the provision of legal advice was incidental to another (non-legal) advisory functions (although query how one distinguishes between the substantive and incidental). Accountants providing tax advice would qualify as they are routinely approached for the very purpose of providing advice on tax law; however, Lord Sumption doubted that there were many other professions who would find themselves to be in a similar position. He recognised that his approach would in practice lead to an increase in the number of claims to privilege. This was not, however, a good reason to maintain an illogical distinction based on the profession to which the advisor belonged. His starting point was that the law had always recognised that professional legal advice provided by a non-lawyer was privileged. The fact that an increasing number of people sought legal advice from non-lawyers (compared to when LAP was first established in the 19th century) and that those people would now assert claims to privilege once they understood its true scope could not justify disregarding a law that had been in place for over 250 years.

Lord Neuberger was also concerned that an extension of LAP would create problems as it would be difficult to identify and separate out the legal and non-legal parts of a non-lawyer’s advice. The problem did not typically arise when the person giving legal advice was a lawyer as, in his view, lawyers normally only gave legal advice. By way of example, Lord Neuberger referred to the decision in Three Rivers DC v Bank of England (Disclosure) (No 4) [2004] UKHL 48 where the House of Lords held that LAP attached to advice as to the manner in which the bank should present evidence to the Bingham Inquiry. He asked whether advice given by a town planning expert on how to present a case at a planning inquiry would attract the privilege.

This question is difficult to answer not because the professional is not a lawyer but because the law lacks a well-defined concept of legal advice. By limiting the scope of LAP to advice provided by lawyers, the courts have obscured the deficiencies inherent in the test of what constitutes legal advice. It has allowed the courts to give an extraordinarily wide definition of what constitutes legal advice (as opposed to other professional advice), safe in the knowledge that any advice which attracted LAP would inevitably have a legal flavour to it as it must, by definition, have been given by a lawyer. However, once one accepts that the privilege must – as a matter of principle – be opened up to all professions which ordinarily give legal advice, the key control mechanism can no longer rest on the status of the advisor; it must instead be functional, focussing on whether the advice in question is legal or some other type of advice. In such circumstances, it is essential to have a clear and easily understood definition of legal advice which operates within sensible boundaries.

Lord Sumption’s response was that the current appeal was not concerned with defining the scope of LAP, only with identifying the categories of advisors to which it applied. It was open to Parliament to legislate to narrow the scope of LAP if it was thought to be too broad, although it was clear that he thought it should only do so on a principled basis, which meant amending the privilege as it applied to all professionals, rather than identifying legal advice by reference to the status of the advisor.

A matter of policy for Parliament
The second main reason advanced for refusing to extend the ambit of the current law was that such an extension raised issues of policy which were best left for Parliament to decide. This argument goes to the heart of the role of the Supreme Court in our constitution.
The scope of LAP is not obviously a policy matter, unlike, for example the hypothetical question of whether the country ought to spend more of taxpayers’ money on healthcare rather than defence. The majority nevertheless concluded that the matter ought to be left to Parliament, advancing two main reasons:

(i) (building on the floodgates argument) the implications of extending LAP to legal advice provided by non-lawyers are uncertain and potentially wide-ranging and ought therefore to be considered in inquiries and consultations during the legislative process; and (ii) it may be appropriate to extend LAP to non-lawyers on a conditional or qualified basis only (as had been proposed by the Keith Committee in relation to tax advice) and this was an inherently legislative exercise.

The minority dealt with the first argument by pointing out that LAP was a creature of the common law; therefore, if the courts had the power to create the principle in the first place then they were at liberty to extend it or declare its true scope. Further, they emphasised that LAP was a fundamental human right designed to protect the freedom to obtain legal advice from a professional in confidence. One of the most important functions of the Supreme Court (indeed of all courts) was to protect such fundamental rights from capricious distinctions based on policy determined by the legislature.

The second argument fails once one accepts that there are no reasons in principle to treat lawyers and non-lawyers differently. The scope of the privilege ought to be the same for all professions; there should not be a “second class” or qualified privilege attaching to advice provided by non-lawyers.

Parliament has already spoken
The third and final argument can be dealt with briefly (although the judgments address the relevant legislation in more detail). The majority cited a number of statutory provisions which showed that Parliament considered that LAP did not extend to advice provided by accountants. Chief amongst the legislation cited was s 20B of the Taxes Management Act 1970 (now replaced by provisions of Sch 36 of the Finance Act 2008) which distinguished between a solicitor’s or barrister’s right to withhold certain documents and what was defined in that section as a “tax advisor’s” right to withhold documents. Such a distinction would not have been necessary had Parliament considered that LAP attached to legal advice regardless of the status of the professional.

In contrast, Lord Sumption considered that, put at its highest, the legislation relied upon demonstrated that Parliament had assumed (in line with the prevailing, but incorrect, understanding at the time) that LAP did not extend to legal advice given by non-lawyers. He drew parallels to the House of Lords’ decision in Woolwich Equitable Building Society v Inland Revenue Commissioners [1993] AC 70 where the fact that Parliament had legislated in the area of restitution for unlawfully demanded tax did not prevent the court from extending the common law of unjust enrichment. In that case (and in Lord Sumption’s judgment), the court concluded that it must take the initiative; it was for the courts to declare what the common law was. He added that if Parliament did not like the result then it could legislate to cut back the advances of the common law. Of course, there would be circumstances in which the court had to bow to Parliament’s previous enactments; for example, where a legislative scheme would be unworkable if the courts developed the common law in a particular way, but this was not such a case.

CONCLUSION

Practitioners accustomed to marshalling large disclosure exercises are likely to thank the court for upholding the status quo. The blunt instrument of restricting LAP to lawyers’ advice may be illogical but it is well understood and simple to apply.
Despite the arguments of principle and calls for Parliament to act, the prospects for change look bleak. A proposal which would curtail the powers of the tax authorities to investigate tax avoidance schemes is never going to be a populist policy, particularly in the current economic climate with public "outings" of companies accused of not paying their fair share of tax.

From a constitutional perspective, it is to be hoped that the Supreme Court adopts a more interventionist approach the next time fundamental rights are at stake and the support of Parliament to carry through the necessary changes cannot be relied upon.

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