



“Naked self interest or defending human rights?”

Summary and implications

Following the High Court’s decision last November to limit the benefit of Legal Professional Privilege (LPP) to lawyers alone, Prudential are appealing in an attempt to extend LPP beyond the legal profession.

In an unforeseen turn of events, the Court of Appeal has granted permission to the Law Society of England & Wales to intervene in the appeal based on the Law Society’s belief that:

- the benefit of LPP should remain solely with officers of the court; and
- the extension of the principle to non-legal professionals could bring about ambiguity and uncertainty.

Should the Law Society be successful, this would confirm the unique role of the legal profession in providing privileged advice to clients. In addition, it would strongly re-enforce the need for taxpayers to be aware that communications with non-lawyer tax advisors may be requested or inspected at their premises by HMRC.

The Appeal

Our briefing of November 2009 (see link) detailed the High Court’s judgement in relation to the broadening of *LPP in Prudential Plc & Anor, R (on the application of) v Special Commissioner of Income Tax and Anor* [2009] EWHC 2494. The Court ruled that advice given to Prudential, as financial services advisors, could not be classed as privileged, unlike advice given by a solicitor. Judge Charles recognised that Prudential put forward a compelling case in arguing that accountants now have the capabilities and expertise to advise on tax law but this was not enough to convince him to extend the boundaries of LPP.

Not content with the High Court’s decision, Prudential have commenced appeal proceedings against the ruling. However, the Law Society has stepped in and has been granted a right to intervene in the appeal.

Ask a question

If you have any questions please contact Michael Cant, Partner
T +44 (0)20 7524 6307
m.cant@nabarro.com

The Tax team

To find out more about the team, and our capabilities [click here](#)

Legal Advice Privilege applies to lawyers only: High Court rejects Prudential challenge [click here](#)

The common law doctrine of legal professional privilege

There are two types of LPP which protect against disclosure:

- **Legal Advice Privilege** – this protects confidential communications between lawyers and their clients relating to the giving of legal advice; and
- **Litigation Privilege** – this protects confidential communications between a lawyer and his client and between either the lawyer or the client and a third party (such as a witness) which relate to existing or contemplated litigation.

The Law Society contests that the matters raised in the appeal are “of considerable importance both to the solicitors’ profession and the public interest.” Law Society President, Robert Heslett, believes that LPP:

- is intended to have a very specific purpose;
- remains closely tied to the administration of justice; and
- is fundamental to the work of solicitors.

He adds that because solicitors have a duty to the court, there is limited scope for abuse of LPP. However, should LPP be applicable to non-regulated professionals, this would extend the potential for abuse as members of other professions do not have such a duty.

Mr Heslett further acknowledges that extending the benefit of LPP to non-lawyers is not a novel idea; indeed, it has been an on-going debate for some time. However, the Law Society argues that should an extension of LPP be granted to non-lawyers, it should be subject to parliamentary intervention in order to regulate and clearly define the boundaries within which LPP would apply.

“Officer of the Court” - A person who is charged with upholding the law and administering the judicial system, which includes solicitors and barristers, who are obliged to obey court rules and owe a duty of candour to the court.

Comment

In what has proved to be a long-standing point of contention between lawyers and other professionals, particularly accountants, the Law Society has made a bold move to defend the current position.

However, if the Court allows the appeal and extends LPP, not only will it blur the question as to when LPP is appropriate, it will also impact commercially on the work handled by solicitors. If tax advisors are able to offer legal tax advice within the shield of LPP, there begs the question as to whether the legitimacy and authority of the current role of solicitor in the administration of justice remains.

It is interesting to speculate on what motivates the various parties in the dispute. Is the Law Society acting like an old fashioned trade union or the selfless defender of human rights? Are the accountants interested in a fair and even playing ground for all professionals or a way to avoid disclosing nefarious tax planning? During a time when the boundaries between the professions are being blurred it may ultimately be for Parliament to legislate.

<p>London Lacon House, 84 Theobald's Road, London WC1X 8RW T +44 (0)20 7524 6000 F +44 (0)20 7524 6524</p>	<p>Sheffield 1 South Quay, Victoria Quays, Sheffield S2 5SY T +44 (0)114 279 4000 F +44 (0)114 278 6123</p>	<p>Brussels 209A Avenue Louise, 1050 Brussels, Belgium T +32 2 626 0740 F +32 2 626 0749</p>
Alliance firms		
<p>France August & Debouzy Gilles August T +33 (0)1 45 61 51 80 www.august-debouzy.com</p>	<p>Germany GSK Stockmann + Kollegen Rainer Stockmann T +49 (30) 20 39 07 - 0 www.gsk.de</p>	<p>Italy Nunziant Magrone Gianmatteo Nunziant T +39 06 695181 www.nunziantmagrone.it</p>

Nabarro LLP

Registered office: Lacon House, 84 Theobald's Road, London, WC1X 8RW.

Nabarro LLP is a limited liability partnership registered in England and Wales (registered number OC334031) and is regulated by the Solicitors Regulation Authority. A list of members of Nabarro LLP is open to inspection at the registered office. The term partner is used to refer to a member of Nabarro LLP.

Disclaimer

Detailed specialist advice should be obtained before taking or refraining from any action as a result of the comments made in this publication, which are only intended as a brief introduction to the particular subject. This information is correct on the date of publication. Nabarro LLP is not responsible for the operation or content of any external website or hyperlink referred to in this publication.

© Nabarro LLP 2010