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Prudential and Privilege

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What does it mean for ABSs?

"the Supreme Court decided that Prudential had to comply with a statutory notice from an inspector of taxes to produce documents containing legal advice in connection with its tax affairs."

In **Prudential v Special Commissioner of Income Tax** [2013] UKSC 1, the Supreme Court decided that Prudential had to comply with a statutory notice from an inspector of taxes to produce documents containing legal advice in connection with its tax affairs. It dismissed Prudential's claim that it could refuse to comply with the notice on the ground that the advice from its tax advisers, PricewaterhouseCoopers, was subject to legal professional privilege ("LPP").

For a decision which signaled no change in the law, it has spawned a significant amount of coverage in the legal, accountancy and general press. This article therefore attempts to look at some wider issues, while also addressing an audience of professions not solely comprised of lawyers. It therefore looks at –

- What LPP is;
- Why clients who instruct a lawyer enjoy protections which do not apply if they instruct accountants;
- The wider implications for Alternative Business Structures ("ABSs") and new forms of practice.

What is LPP?

LPP is the clients' right to withhold documents and information provided to, and advice from, practising solicitors and barristers, foreign lawyers and those acting under the direction of qualified lawyers, including in-house lawyers. Most professionals owe their clients a duty of confidentiality, but LPP is something different, though confidentiality is one of the preconditions for privilege to exist. It is not about the duty of the professional adviser, but about the *right of clients* to refuse disclosure. Its purpose is to encourage clients to give full disclosure to their lawyers. There are two types of LPP - legal advice privilege and litigation privilege.

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Legal advice privilege

Legal advice privilege applies to communications between a lawyer, acting in that capacity, and the lawyer's client which are both confidential and for the purpose of seeking legal advice from the lawyer or providing it to a client. It protects communications to and from the lawyer, instructions from the client, and advice to the client, including working papers and drafts, provided they relate to the lawyer acting in his or her capacity as a lawyer. It does not protect everything on a lawyer's file; detailed analysis of each document is required in cases where privilege is claimed.

The case of **Walter Lilly & Co Ltd v Mackay** illustrates how the choice of adviser can be important. The claimant had built a house for the defendants and sought disclosure of the defendants' correspondence with Knowles, the well-known firm of claims consultants, who had provided 'contractual and adjudication advice' before High Court proceedings commenced. It was suggested, though not conclusively established, that the two individuals at Knowles had qualified as barristers, but were

not practising as such, and the second defendant said he thought they were solicitors or barristers. The court rejected the defendants' claim of legal advice privilege and the defendants were required to disclose the documents.

Litigation privilege

Litigation privilege is wider than advice privilege. It protects confidential communications made after litigation has started, or is reasonably in prospect, provided they are for the sole or dominant purpose of litigation. It protects communications between the client and the lawyer, the lawyer and an agent (including non-lawyers) and between the lawyer and third parties. The communications must be for seeking or giving advice, obtaining evidence, or obtaining information for the purpose of obtaining evidence.

The Prudential decision

The Prudential case related to legal advice privilege. The company was obtaining legal advice relating to taxation from its accountants, PricewaterhouseCoopers. The Supreme Court held that extending LPP beyond lawyers was so fundamental a change that it should be done only by Parliament, and not by the courts. Parliament had had the opportunity to extend privilege when it passed the LSA 2007 and had chosen not to do so.

The Office of Fair Trading challenged the distinction in its report on *Competition in the Professions* in March 2001. However, the Government rejected the proposal for extending privilege in 2003. In the White Paper "The Future of Legal Services: Putting Consumers First" published in October 2005, the Government even indicated that it did not at that stage propose to extend legal professional privilege to include communications between a particular client and non-lawyer members of a firm providing legal and other services to the consumer. Interestingly, the Report by the Research Working Group on the Legal Services Market in Scotland in 2006 'concluded that the competition argument for abolishing legal professional privilege was not particularly strong and that legal professional privilege seemed necessary for the adversarial system to work.'

ABSs

There are now over 100 ABSs, mainly licensed by the Solicitors Regulation Authority ("SRA"), but some also by the Council for Licensed Conveyancers. In December 2012, the Institute of Chartered Accountants in England and Wales submitted an application to the Legal Services Board ("LSB") to become a regulator of probate services and of ABSs. Meanwhile, one accountancy practice has been licensed as an ABS licence by the SRA.

It appears that an increasing number of traditional (i.e. recognised body) law firms, including City firms and large regional practices, will become ABSs, if only initially to permit non-lawyer partners such as accountant finance directors.

The challenges presented by the Prudential case will in time, therefore, increase.

Section 190 of the LSA 2007 extends privilege to communications with authorised persons providing advocacy, litigation, conveyancing or probate services in ABSs, but only where the advice is provided at the direction and under the supervision of a lawyer. It is not enough to employ a token lawyer who has no involvement in matters in an attempt to protect privilege. The question of how supervision will be effected in order to preserve privilege under section 190 is a concern to the SRA on ABS applications.

Practical problems will doubtless emerge where advice is given by non-lawyers in ABSs, and this may be even more so in multi-disciplinary practices, of which the most obvious example will be a partnership of lawyers and accountants advising on tax – was the legal advice given by a lawyer or an accountant, and if the latter, do the provisions of section 190 of the LSA 2007 assist? This might be hard to establish in practice where the advice was provided by an accountant part-

ner, as it may be more difficult to establish that there was in fact supervision by a lawyer. More problematic, however, is that section 190 is restricted to advocacy, litigation, conveyancing and probate services.

A further issue is the precondition of confidentiality to any claim to privilege: care will be needed in relation to the rights and duties of external ABS owners. Whilst section 90 of the LSA 2007 provides that they must not do anything which causes or substantially contributes to a breach, this may not be sufficient on its own. Unless appropriate measures are implemented, shareholders could seek disclosure of information and documents in minority shareholder actions under section 994 of the Companies Act 2006, derivative claims under sections 260-264 or a 'just and equitable' winding up under section 122(1)(g) of the Insolvency Act 1986. Say, for example, the minority shareholder complained about losses caused by management's over-dependence on a client which was known to be unlikely to pay its bills.

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The Future

As more ABS regulators are approved by the LSB and more ABSs are licensed, there will be a wider variety of practices, and the challenges to the current restrictive application of LPP will doubtless increase.

In practice, LPP issues generally arise in difficult circumstances such as challenges by HMRC, as in the Prudential case, or when there are money laundering issues. Wider extension of privilege will doubtless fall to be reviewed by Parliament in the fullness of time.

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