

## Executive Summary

The case of *Prudential PLC and Prudential (Gibraltar) Limited v Commissioner of Income Tax and Philip Pandolfo (HM Inspector of Taxes) [2013] UKSC 1* has restated the scope of Legal Advice Privilege (LAP), a concept that has become increasingly eroded by the range of professionals now offering legal advice.

The issue examined by the Supreme Court was whether LAP extended to legal advice given by persons who are not members of the legal profession. The Supreme Court ruled by a majority of five to two that LAP remains limited to the special “relationship between a solicitor or barrister and his or her client”, therefore denying other professions admission to the “privilege club”.

The Supreme Court justified their landmark decision considering that LAP notwithstanding the rise in the number of professions providing legal advice is not an adequate reason in itself to extend the scope of privilege to other advisers falling outside the legal profession.

## Background

Legal professional privilege (LPP) applies to communications between legal advisers and their clients, with the effect that the client can (in specified circumstances) object to third parties viewing the communication for any purpose without their consent. The courts have defined LPP as including both LAP and litigation privilege (LP).

LAP arises in confidential communications or documents passed between a client and lawyer that are created for the purpose of seeking and/or obtaining legal advice. Legal advice is not limited to advice on the law but can involve broader guidance provided within the context of legal advice. Litigation does not need to be contemplated for LAP to be triggered. LAP does not extend to communications between clients and third parties (for example witnesses and experts) and, traditionally, it has not applied to legal advice provided by advisers outside the legal profession such as accountants and tax or pensions advisers. In contrast LP applies within a wider set of circumstances; it protects communications between a lawyer and their client or a third party where litigation is pending or reasonably contemplated, and the document has been created for the dominant purpose of the litigation.

## The Appeal

The parameters of LAP formed the crux of Prudential’s appeal before the Supreme Court. Prudential had sought to withhold documents detailing advice on a tax avoidance scheme (given by PricewaterhouseCoopers) from HMRC. The appellant, Prudential, considered the document to be privileged because it involved the giving and receiving of legal advice. This argument was rejected in the High Court and the Court of Appeal on the basis that although the advice would have been subject to LAP if delivered by a legal professional (solicitors, barristers and in-house counsel) such protection was not afforded to an accountant giving the same tax advice.

The Supreme Court held – five to two – that LAP should not extend to advice given by persons who are not legal professionals. The judgments delivered illustrated the divisive nature of LAP and the key philosophical and practical issues that underpin the concept. The Court clarified the area stating that legal privilege remains the preserve of legal professionals and clients seeking such protection should obtain advice from their typical legal advisers.

Lords Sumption and Clarke dissented forwarding the view that privilege should attach to the advice given not the identity of the professional delivering it. In particular, Lord Sumption highlighted that LAP is subject to a functional test and, as such, there is no principled reason for the advice of accountants to be distinguished from that given by solicitors and barristers. Moreover, they rejected the view that the Courts are not an appropriate forum to extend LAP. This argument was considered in light of the fact that, as a common law notion, any redefinition of the concept should not be exclusively the domain of Parliament.

In contrast with these arguments Lords Neuberger, Hope, Walker, Mance and Reed rejected the appeal favouring the preservation of LAP in its existing form.

Their decision was supported by **three key considerations**:

- Firstly, LAP is a clear well-understood notion and any revision to its application would jeopardise its status as a consistent principle;
- Secondly, any development or redefinition of LAP is a matter for Parliament, not the Courts, due to the inherent socio-economic issues that must be considered; and
- Finally, existing legislation prohibits the judiciary leading any redefinition of the concept.

## Conclusion

The Supreme Court has declined to revise the well-understood parameters of privilege and in doing so has confirmed that legal privilege remains a domain exclusive to legal professionals. Despite sticking to the status quo, the Court considered there to be persuasive argument for a revision to the area due to the risk that LAP in its current form has become an anachronism. However, the Court was keen to emphasise that any redefinition is a matter best reserved for Parliament.

Lord Neuberger dismissed the notion that alternative business structures would demand a change to LAP. He insisted that the Legal Services Act 2007 would not impact on privilege and summarised that the Act simply confirms two realities: that legal advice is now given by a variety of professional persons and that lawyers can work in firms with other professionals. He dismissed Prudential's reliance on this as a justification for any revision to the principle. Whether his view will reflect reality remains to be seen, however the blurring of lines between professions will inevitably cause practical and political problems for all professionals seeking to privilege their legal advice. Professionals and their clients will need to tread carefully when circulating documents and ensure specific employees are charged with the management of privileged information.

## Practical pointers on protecting privilege

- **Document labels**

'Private and Confidential' "Privileged Material" – headers are not conclusive evidence of privilege but will reinforce the nature of the document.

- **Staff training**

Ensure your workforce understands the need to protect sensitive information. Emphasise that once information has been identified as privileged further dissemination should be avoided.

- **Foreign jurisdictions**

Rules on privilege will vary across foreign jurisdictions – update employees where applicable.

- **External advisers**

Use legal professionals to instruct external advisers when seeking legal advice.

- **Limited document access**

Protect confidential information and advice by limiting access to specific employees.

- **In-house counsel**

Avoid combining legal advice with other functions to ensure advisory documents remain protected.

- **Document creation**

Limit the creation of unnecessary written documents and avoid references to contents of privileged documents in non-privileged documents.

- **Separate functions**

Separate legal and business advice where appropriate to ensure legal advice does not lose protection.

- **Document retention**

Draft document retention policies that encourage the continued protection of documents containing legal advice.

- **European Commission Investigations**

Documents created by in-house counsel will not be privileged where they are subject to a European Commission Investigation. Where such competition law issues arise external lawyers should be instructed.

- **Non-adversarial inquiries**

Litigation privilege will not generally extend to documents created for non-adversarial inquiries/investigations; these may sometimes be within the ambit of LAP.

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