



23 January 2013

PRESS SUMMARY

R (on the application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents) [2013] UKSC 1
On appeal from [2010] EWCA Civ 1094

JUSTICES: Lord Neuberger (President), Lord Hope (Deputy President), Lord Walker, Lord Mance, Lord Clarke, Lord Sumption, Lord Reed

BACKGROUND TO THE APPEAL

This appeal concerns the scope of legal advice privilege. Legal advice privilege applies to all communications passing between a client and its lawyers, acting in their professional capacity, in connection with the provision of legal advice. The specific issue raised by this appeal is 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 raised by this issue is whether legal advice privilege extends, or should be extended, so as to apply to legal advice given by someone other than a member of the legal profession, and, if so, how far legal advice privilege thereby extends, or should be extended.

In 2004, PricewaterhouseCoopers (“PwC”) devised a marketed tax avoidance scheme (“the scheme”). PwC adapted the scheme for the benefit of the Prudential group of companies, who implemented the scheme through a series of transactions (“the transactions”). The inspector of taxes considered it necessary to look into the details of the transactions. To that end, he served notices under section 20B(1) of the Taxes Management Act 1970 on Prudential (Gibraltar) Ltd and Prudential plc (together “Prudential”) giving them the opportunity to make available specified classes of documents. Prudential refused to disclose certain documents (“the disputed documents”) on the ground that Prudential was entitled to claim legal advice privilege in respect of them, because they related to the seeking (by Prudential) and the giving (by PwC) of legal advice in connection with the transactions.

The inspector obtained authorisation from the Special Commissioners to require Prudential to disclose the disputed documents. Prudential issued an application for judicial review challenging the validity of those notices. Charles J rejected the application on the ground that, although the disputed documents would have attracted legal advice privilege if the advice in question had been sought from, and provided by, a member of the legal profession, no such privilege extended to advice, even if identical in nature, provided by a professional person who was not a qualified lawyer. His decision was upheld, substantially for the same reasons, by the Court of Appeal (Mummery, Lloyd and Stanley Burnton LJ).

JUDGMENT

The Supreme Court, by a majority of five to two (Lord Clarke and Lord Sumption dissenting), dismisses the appeal. Lord Neuberger gives the lead judgment for the majority.

REASONS FOR THE JUDGMENT

The majority hold that legal advice privilege should not be extended to communications in connection with advice given by professional people other than lawyers, even where that advice is legal advice which that professional person is qualified to give [51]. To do so would extend legal advice privilege beyond what are currently, and have for a long time been, understood to be its limits [37], [80]. It is universally believed that legal advice privilege only applies to communications in connection with advice given by members of the legal profession [29]. There are clear judicial statements of high authority to that effect [30]. The current editions of textbooks on privilege and evidence, as well as more than one significant official report, have proceeded on this basis [32], [33].

Extending legal advice privilege to any case where legal advice is given by a person who is a member of a profession which ordinarily includes the giving of legal advice would be likely to lead to a clear and well understood principle becoming uncertain, because it is unclear which occupations would be members of a profession for this purpose [52]-[55], [80], [100]. There would be room for uncertainty, expenditure, and inconsistency, if the court had to decide whether a group constitutes a profession for the purposes of legal advice privilege [56]. It is also unclear how a court would decide whether a profession is one which ordinarily includes the giving of legal advice [57], [91]. Where members of other professions give legal advice, it will often not represent the totality of the advice, so it may also be difficult to decide how to deal with documents which contain legal and non-legal advice [59].

Further, the extension of legal advice privilege 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 [52], [81], [92]. The consequences of extending legal advice privilege should be considered through the legislative process, with its wide powers of inquiry and consultation and its democratic accountability [62]. The extension of legal advice privilege to professions other than lawyers may only be appropriate on a conditional or limited basis, which cannot appropriately be assessed, let alone imposed, by the courts [65]. Parliament has on a number of occasions legislated in this field on the assumption that legal advice privilege only applies to advice given by lawyers. Therefore it would be inappropriate for the Supreme Court to extend the law [52].

The minority consider that legal advice privilege extends to advice given by members of a profession which has as an ordinary part of its function the giving of skilled legal advice [114], [148], and that recognising the privilege attaching to the legal advice of accountants would not be extending the scope of legal advice privilege [128]. English law has always taken a functional approach to legal advice privilege [123]. On this view, 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 [114], [142].

Lord Reed adds some observations about the case from a Scottish perspective, without intending to pre-empt a full discussion on the matter should the issue arise in Scottish proceedings [102]-[113]. These observations are made on the basis that the general principle, its fundamental importance, and the considerations of public policy which underlie it, are common to both Scots law and English law. Lord Reed concludes that if the question were to arise in Scotland whether the common law privilege should be extended to legal advice given by accountants, the courts would have to make a policy decision [113].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.gov.uk/decided-cases/index.html