Dispute Resolution

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DISPUTE RESOLUTION BULLETIN

Communications with your advisors about the law will always be confidential. Won't they?

Many might assume that legal advice obtained from professional advisors will always be confidential. However, a recent decision has made clear that the answer will depend on the occupation of the person giving the advice.

On 23 January 2013, the Supreme Court gave its eagerly anticipated judgment in the case of *R (Prudential Plc & Anor) v Special Commissioner of Income Tax & Anor*. This case concerned the scope of legal advice privilege (LAP). There is a second type of privilege, litigation privilege, which the case did not address.

It has long been recognised as a primary principle of English law that individuals (and all other "legal persons" e.g. corporate entities) are able to consult their lawyers in confidence and without concern that what they say and the advice they receive will be disclosed to third parties. In England this principle has been protected by law since as early as the sixteenth century.

Recently, it has become more important to clarify the scope of LAP. Non-lawyers now routinely give legal advice. For example, accountants are often consulted about tax legislation (it was argued in the *Prudential* case that the majority of legal advice on tax matters is now given by accountants). This trend is likely to continue following the introduction of alternative business structures and multi-disciplinary partnerships under the Legal Services Act 2007, whereby lawyers can enter into partnership with non-legal professionals.

The effect of this trend on the scope of LAP came to be considered by the Courts in the *Prudential* case. HM Revenue (in the persons of the Special Commissioners) required *Prudential* to provide disclosure regarding advice that it had received from accountants concerning a tax avoidance scheme. *Prudential* claimed that this advice was protected from disclosure due to LAP. At first instance, the Court ruled that

it was not protected because only advice given by a member of the legal profession could attract LAP. The Court of Appeal agreed. Prudential then appealed to the Supreme Court. Due to the significance of the case, the Institute of Chartered Accountants, the Law Society of England and Wales, and the General Council of the Bar all intervened in the appeal.

By a three to two majority, the Supreme Court upheld the trial judge and the Court of Appeal's decision to limit the operation of LAP to advice given by the legal profession only. The judges reached their decision notwithstanding the consensus that had a lawyer given the same advice, there would be no question that the communications attracted LAP.

The judges reasoned that were they to allow this appeal in relation to the accounting profession, it would necessarily follow that legal advice given by other professions as part of their *"ordinary professional activity"* may also be covered by LAP. LAP might then extend to advice given by, for example, pension advisors, town planners, surveyors, estate agents or engineers. Moreover, LAP might apply to advice given by certain individuals or categories of individuals within these professions but not to others. For those whose advice was covered by LAP, certain of their ordinary professional activities may attract privilege while others would not.

The Supreme Court was keen to maintain the clarity and certainty of the current application of LAP. It reasoned that the fundamental purpose of LAP is to protect the interests of the client, not the professional advisor, to ensure that clients are free to be open and frank with their advisors in order to obtain thorough, reliable advice safe in the knowledge that their communications will remain confidential. If Parliament were to broaden the ambit of LAP to include other professions, including accountants giving tax advice, it may be appropriate to apply any number of limitations, exclusions, conditions or distinctions in order to protect the clarity, certainty, reliability and essential function of LAP within the fabric of the justice system.

Ultimately, the Supreme Court was reluctant to effect a change to the law of LAP without the involvement of Parliament. It concluded that any change ought to be decided by Parliament after careful consideration through the legislative process.

It took into account that Parliament had in fact already debated the possibility of extending LAP to other professions, including tax advisors. Various parliamentary committees had also considered this proposal, but had consistently rejected expanding the scope of LAP to include tax advice given by non-lawyers. A handful of statutory provisions permit the application of LAP to advice from other professionals, such as patent attorneys advising on intellectual property rights. If the judges were to have found in favour of Prudential, they would effectively have been overruling Parliament's apparent intention to exclude other professions - and tax advisors specifically - from the ambit of LAP.

This decision will no doubt come as a blow to a number of professional advisors. For clients, the main outcome is clear: only advice obtained from lawyers will attract LAP. Advice obtained from other professional advisors remains at risk of being subject to future disclosure.

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What to expect from the Supreme Court in 2013

In our December 2012 bulletin, Jane Hugall considered the forthcoming "Jackson" reforms to the civil justice system in England and Wales, expected to take effect in April 2013. In this article, Jane looks at some significant decisions expected from the Supreme Court early in 2013.

Readers will already be aware of the Supreme Court's judgment in *R (Prudential Plc & Anor) v Special Commissioner of Income Tax & Anor (23 January 2013)*, confirming that legal advice privilege does not extend to legal advice given by non-lawyers, which Charles Caney considers in detail in the previous article.

Banks will be awaiting with interest the forthcoming decision in *The Financial Services Authority v Sinaloa Gold plc and others*, expected early this year. The case concerns the issue of whether, when applying for a freezing order under its law enforcement powers, the FSA is required to give a cross-undertaking to compensate innocent third parties for losses caused as a result of the order.

In *Sinaloa*, the FSA had applied for a freezing order under its law enforcement powers and was therefore exempt from the usual requirement to

give a cross-undertaking in damages to compensate the respondent for its costs and losses, in the event that the court decides the applicant was not entitled to the order. Following an intervention by Barclays Bank, the High Court had ruled that the freezing order should contain a cross-undertaking to compensate third parties for their costs of complying with the order and any losses they incurred as a result of the order.

The FSA appealed to the Court of Appeal. It was common ground between the parties that the FSA would not be required to give a cross-undertaking to the respondents and that it would undertake to pay the reasonable costs incurred by innocent third parties in complying with the order. The issue was whether the FSA should be required to compensate those innocent third parties for any wider losses incurred as a result of the freezing order. The Court of Appeal ruled that the FSA was not obliged to compensate them for any wider losses. This leaves banks at risk of suffering unrecoverable losses as a result of freezing orders. Barclays appealed to the Supreme Court. The appeal was heard on 12 December 2012 and judgment is expected soon.

Also expected shortly is the Supreme Court's decision in *VTB Capital plc v Nutritek International Corp and others*, concerning the issue of whether an individual who has used a company to mask his own wrongdoing can be held to be a party to contracts entered into by the company.

VTB brought a claim against Nutritek for deceit, alleging that it was induced to enter into a contract with another company (R) by fraudulent misrepresentations made by Nutritek under a common design between Nutritek and the other defendants. Nutritek and the other defendants were not parties to the contract with R.

VTB then sought permission to amend its particulars of claim to add a claim for breach of contract against the other defendants. VTB wanted to claim that R's corporate veil should be pierced to enable the other defendants to be held jointly liable under the contract because they had used R as a vehicle to conceal their wrongdoing. The High Court refused permission to amend, ruling that where a claim of wrongdoing is made against the controllers of a company, it was not appropriate to pierce the corporate veil to enable a contractual claim to be brought against them.

On appeal by VTB, the Court of Appeal upheld the High Court's decision and overruled an earlier decision, *Antonio Gramsci Shipping Corp. & Others v Stepanovs [2011] EWHC 333 (Comm)* as having been wrongly decided. The Court of Appeal confirmed that where the corporate veil is pierced, the court may give discretionary, equitable relief, but it cannot hold that those in control of the company were party to the company's contracts. VTB appealed this decision to the Supreme Court. The appeal was heard on 12 November 2012 and judgment is expected soon.

Next month, Jane will consider recently announced amendments to the Brussels Regulation, EC 44/2001, on jurisdiction and the recognition and enforcement of judgments within the EU.

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News

International Arbitration Seminars - Australasia

HFW will be holding a series of International Arbitration seminars in Sydney, Melbourne, Perth and Hong Kong in March and April 2013. Anyone with an interest in this area is welcome to attend. Those with enquiries about the seminars should contact our events team at events@hfw.com.

HFW Partner wins award for article

HFW Partner, Matthew Parish, and his co-author Charles Rosenburg, Legal Adviser at the Iran-United States Claims Tribunal in the Hague, have been awarded the 2012 CPR (International Institute for Conflict Prevention and Resolution) award for Outstanding Original Short Article, which recognises a short article that advances understanding in the field of ADR. Their article *Investment Treaty Law and International Law* was published in The American Review of International Arbitration 2012/Vol.23 No.1. The CPR presented its 30th Annual Awards for Outstanding Scholarship in ADR on 17 January 2013 in California.

Conferences & Events

Alternative Dispute Resolution for Commodity Trading
Beau-Rivage Hotel, Geneva
(26 February 2013)
Jeremy Davies

International Arbitration client seminars
Sydney, Melbourne, Perth, Hong Kong
(19, 20 and 22 March and 11 April 2013)
Chris Lockwood, Damian Honey,
Nick Longley, Julian Sher,
Guy Hardaker and Peter Murphy

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