

Accountant and non-legal professional's advice is not privileged



The UK Supreme Court delivered its decision in the case of R (On the application of Prudential PLC and Another) (Appellants) the Special Commissioner of Income Tax and Another (Respondents) 2013 UK SC 1, upholding the Court of Appeal's decision.

Background

The UK Supreme Court has upheld the decision of the Court of Appeal in these proceedings and has refused to extend legal advice privilege to advice given by accountants in relation to a tax avoidance scheme. The key question raised is whether legal advice privilege extends to legal advice given by someone other than a legal advisor and if so how far it is extended.

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 i.e. advice which relates to the rights, liabilities, obligations or remedies of the client either under private or under public law. The key question in this case was the breadth of legal advice privilege in the sense of the types of advisors with whom communications can attract legal advice privilege.

The Court indicated that there are a number of sources which indicate that legal advice privilege only applies to communications in connection with advice given by members of the legal profession.

These are:

1. Judicial statements of high authority.
2. A number of recent decisions which have refused to extend legal advice privilege to legal advice given by trade mark agents, patent agents or personnel consultants.
3. Current text books on legal privilege.
4. Official reports.
5. The rejection by the UK Government of a proposal made by the Director General of Fair Trading that legal advice given by accountants should also have privilege extended to it.
6. The manner in which Parliament has legislated in relation to this.
7. The enactment of the relevant provisions of the Taxes Management Act 1970.

The Court indicated that the implications of allowing the appeal would be that it would obviously extend legal advice privilege beyond what has been understood to be its limits for a very long time i.e. to all professionals.

However, the Court indicated that there was a strong case in terms of logic for extending legal advice privilege in the manner in which the appellant sought. Having said that, the Court refused to extend the ambit of legal advice privilege beyond what is currently understood for three reasons:

- The consequences of allowing the appeal are difficult to assess. The Court's view was that it might open the floodgates. It also indicated that trying to determine the professions to which this would apply would be fraught with risk.
- It raises questions of policy which should be left to Parliament. It further indicated that here was no pressing need for such a change.
- Parliament has already legislated legislation in relation to legal advice privilege which suggests it would be inappropriate for the Court to extend it in this instance. The Court took the view that there must be a reason why it has refused to do so.

The minority took the view that legal advice privilege extended to members of the profession which has as an ordinary part of its function the giving of skilled legal advice and recognising that such privilege would not be extending the scope of legal advice privilege, therefore supporting the view that the availability of legal advice privilege depends on the character of the advice and the circumstances in which it was given and not the status of the advisors.

Conclusion

The majority decision represents the current position and is supported by the sources listed above. However it is clear that there was a strong dissenting view. It appears that the Supreme Court has invited the legislature to regulate this particular area in light of recent developments, in particular the emerging role of other professions and the provision of legal advice by the members of those professions. It remains to be seen whether Parliament will accept the challenge. Furthermore, in the majority decision there was recognition of the fact that there has been an evolution in the nature of legal advice and the advisors by whom it is being given which is a recognition that this issue is not yet closed.

Accountants and other professionals who give advice that might be classified as legal advice if given by a lawyer should warn their clients in advance of such advice being given that they could be compelled to disclose such advice in the context of any legal proceedings that might ensue.

This article was originally written by Beale and Company Solicitors and has been reproduced with their permission. For more information about Beale and Company please visit their website at: <http://www.beale-law.com>