

## Editor's Note

# ***Re Prudential plc* [2013] UKSC 1: The Supreme Court leaves to Parliament the issue of privilege for tax advice by accountants, what Parliament should do is restrict privilege for tax advice given by lawyers.**

☞ Accountants; Legal advice privilege; Tax avoidance; Tax planning

In January 2013 the Supreme Court handed down its decision in *Re Prudential* holding by a majority of five to two that legal advice privilege did not extend to tax advice given by accountants.<sup>1</sup> The Supreme Court accepted that since the privilege was for the client's benefit there was no logical distinction to be made between legal advice provided by members of the legal profession and legal advice provided by other professionals. However, it was sharply divided on whether, contrary to long established practice, privilege should also attach to communications with other professionals made for the purpose of obtaining legal advice.

The majority ruled that legal professional privilege should remain confined to communications with members of the legal profession, subject to any statutory extension of the privilege. There were three grounds for the majority's decision as Lord Neuberger explained.<sup>2</sup> First, extending the privilege to communications with any person or organisation providing legal advice would create uncertainty about the types of advisors that would attract LAP. Lord Sumption, dissenting, was of the view that LAP should apply wherever legal advice is given by a person who is a member of a "profession [which] ordinarily includes the giving of legal advice". However Lord Neuberger pointed out that this definition left open the question of whether occupations such as town planners, engineers, or pension advisers would be members of a "profession" for this purpose.<sup>3</sup> This type of question may, in turn, require the court to delve into the qualifications or standing, and into the rules of a particular group of people to decide whether the group constitutes a profession for the purpose of LAP. Nor would it be easy to determine which profession was ordinarily engaged in the giving of legal advice or to disentangle the legal advice that such persons gave from their other professional advice.<sup>4</sup>

<sup>1</sup> *R (on the application of Prudential plc and another (Appellants) v Special Commissioner of Income Tax and another (Respondents)* [2013] UKSC 1; [2013] 2 W.L.R. 325; [2013] 2 All E.R. 247 Lord Neuberger, Lord Hope, Lord Walker, Lord Mance and Lord Reid, Lord Clarke and Lord Sumption dissenting. Hereafter "Prudential").

<sup>2</sup> *Prudential plc* [2013] UKSC 1 [52]; [2013] 2 W.L.R. 325; [2013] 2 All E.R. 247.

<sup>3</sup> *Prudential plc* [2013] UKSC 1 [55]; [2013] 2 W.L.R. 325; [2013] 2 All E.R. 247.

<sup>4</sup> *Prudential plc* [2013] UKSC 1 [53]–[60]; [2013] 2 W.L.R. 325; [2013] 2 All E.R. 247.

The second reason given against extending LAP was one of policy. The expanding of LAP beyond its longstanding boundary called for important policy decisions which the court was poorly placed to make and which were therefore best left to parliament. Parliament could decide which professional relationships were entitled to protection and the extent of that protection. Lord Neuberger observed that there were many pieces of legislation authorising the executive to demand disclosure of documents. Expanding LAP would in effect substantially cut down the executive's ability to obtain such disclosure, contrary to what was assumed by parliament when the legislation was passed.<sup>5</sup> Lord Mance drew attention to the sensitivity of removing from the tax authorities reach material which has so far not been protected by LAP.<sup>6</sup> In addition, Lord Neuberger explained, if parliament were to contemplate extension of LAP to other profession, it may wish to do so on a limited or conditional basis, which is not something that the court can do.<sup>7</sup> For example, New Zealand legislated a statutory privilege for tax advice documents which, while not limited to communications with members of the legal profession, was carefully circumscribed both in terms of the professionals that would qualify for the privilege and in terms of its reach. In particular, privilege was excluded from "tax contextual information", which, in effect, consisted of information required by the tax authorities to assess tax liability correctly. The Australian Law Commission supported the New Zealand model of carefully restricted tax advice privilege to ensure that parliament maintains control over the operation and scope of tax advice privilege.<sup>8</sup>

The third and final reason given by the majority was that parliament has on a number of occasions extended LAP to other professions, which suggests that had it been minded to extend it further it would have done so by now. While the parliament had recognized an accountant's right to withhold their own work product from disclosure,<sup>9</sup> it had not conferred on clients of accountants with the equivalent of a legal advice privilege over their communications. It would therefore be inappropriate, Lord Neuberger concluded, for the court to extend LAP, especially when it is known that the government was aware of the issue and has not chosen to address it.<sup>10</sup>

Lords Sumption and Clarke dissented. Both asserted that the test for LAP was a functional one, or should be. The privilege is conferred in support of the client's right to consult a skilled professional legal adviser, and not in support of his right to consult the members of any particular professional body.<sup>11</sup> To give effect to this principle Lord Sumption formulated a test to determine whether a communication between client and legal adviser would qualify for privilege. The communication had to be made: (i) for the purpose of enabling the adviser to give or the client to receive legal advice; (ii) in the course of a professional relationship, and (iii) in the exercise by the adviser of a profession which has as an ordinary part of its function the giving of skilled legal advice on the subject in question.<sup>12</sup>

<sup>5</sup> *Prudential plc* [2013] UKSC 1 [63]; [2013] 2 W.L.R. 325; [2013] 2 All E.R. 247.

<sup>6</sup> *Prudential plc* [2013] UKSC 1 [86]–[88]; [2013] 2 W.L.R. 325; [2013] 2 All E.R. 247.

<sup>7</sup> *Prudential plc* [2013] UKSC 1 [65]; [2013] 2 W.L.R. 325; [2013] 2 All E.R. 247. See also Lord Mance [87]–[88].

<sup>8</sup> *Prudential plc* [2013] UKSC 1 [87]–[88]; [2013] 2 W.L.R. 325; [2013] 2 All E.R. 247.

<sup>9</sup> Finance Act 2008 Sch.36, Pt 4.

<sup>10</sup> *Prudential plc* [2013] UKSC 1 [68]; [2013] 2 W.L.R. 325; [2013] 2 All E.R. 247.

<sup>11</sup> *Prudential plc* [2013] UKSC 1 [122], [142]; [2013] 2 W.L.R. 325; [2013] 2 All E.R. 247.

<sup>12</sup> *Prudential plc* [2013] UKSC 1 [114]; [2013] 2 W.L.R. 325; [2013] 2 All E.R. 247.

Both Justices argued that claims that this test would lead to uncertainty were overstated. Both Justices claimed that the boundaries of “professions who ordinarily give legal advice” could be kept within sensible limits. Lord Sumption suggested it may be so narrow as to only include accountants as tax advice is the very service clients seek from them. On the other hand, advisors that provide legal advice only as an incidental part of a broader service would not meet the definition.<sup>13</sup> Lord Clarke thought that in order to qualify as a profession an advisor needed to be a member of a properly regulated professional body.<sup>14</sup>

Lord Sumption stated that the task of keeping the privilege within sensible limits should not involve making arbitrary distinctions. His Lordship stated that if

“the scope of privilege at common law was thought to be too broad then the remedy was legislation to modify the common law principles as they apply to all professionals performing the relevant functions and not just some of them”.

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There is force in the conclusion that distinguishing between lawyers and other professionals providing legal advice is unsound in principle. The case for marking the boundaries of legal advice privilege based on the status of the advisor is weak given the modern reality that other professional advisers commonly perform an identical function to lawyers, namely giving legal advice, as members of professions that ordinarily give legal advice, like accountants.

Lord Sumption argued that the reason why the privilege was historically confined to barristers, solicitors, and in the early days of the doctrine, scribes who drew up wills, charters and other legal instruments is not because of the special status of those persons, but because they were only persons providing legal advice at the time.<sup>16</sup> By declaring accountants were entitled to the privilege the Supreme Court would be simply updating the privilege to reflect the modern practices as to how clients obtain legal advice.<sup>17</sup>

The justification of advice privilege (LAP) is to enable people to obtain legal advice secure in the knowledge that what they tell their legal advisers and what their legal advisers tell them will not be used against them. The aim of the privilege is therefore to create a safe and secure sphere in which legal advice may be obtained freely and without inhibition on the part of the person seeking advice. If this is the case, then privilege must follow legal advice. It should protect all communications for the purpose of obtaining legal advice, regardless of whether the person giving the advice is a member of the legal profession or not. The force of this reasoning was recognised by all the justices of the Supreme Court. Lord Neuberger said that

“it is hard to see why, as a matter of pure logic, that privilege should be restricted to communications with legal advisers who happen to be qualified lawyers, as opposed to communications with other professional people with a qualification or experience which enables them to give expert legal advice in a particular field”.

<sup>13</sup> *Prudential plc* [2013] UKSC 1 [137]; [2013] 2 W.L.R. 325; [2013] 2 All E.R. 247.

<sup>14</sup> *Prudential plc* [2013] UKSC 1 [148]; [2013] 2 W.L.R. 325; [2013] 2 All E.R. 247.

<sup>15</sup> *Prudential plc* [2013] UKSC 1 [136]; [2013] 2 W.L.R. 325; [2013] 2 All E.R. 247.

<sup>16</sup> *Prudential plc* [2013] UKSC 1 [121]; [2013] 2 W.L.R. 325; [2013] 2 All E.R. 247.

<sup>17</sup> *Prudential plc* [2013] UKSC 1 [128]; [2013] 2 W.L.R. 325; [2013] 2 All E.R. 247.

Maintaining the status quo has other disadvantages. It helps support the monopoly that the legal profession has on the delivery of legal services. It thereby reduces the scope for healthy competition to the detriment of those who are in need of legal advice and cannot afford lawyers' fees. Economic theory suggests that limiting the privilege to lawyers necessarily increases the costs of obtaining confidential legal advice. This matter has come under scrutiny by the Office of Fair Trading (OFT), which recommended either a limited extension of the privilege to specified legal services provided by other professionals (recognising that there was need for these professions to receive adequate training and be bound by similar ethical codes as lawyers), or a reduction in the scope of the privilege.<sup>19</sup>

For these logical and practical reasons it is difficult to defend one set of rules for lawyers, including foreign and in-house lawyers, and another for other legal advisers. However, it is submitted that the majority was right to leave the question to parliament, and that what the parliament should do in this difficult area of tax planning and avoidance, is to consider restricting the privilege available to lawyers rather than extending it to accountants. This is because the case for recognizing a privilege over tax planning advice is weak whoever provides the advice. As explained below, it cannot be said that the harm done to the administration of justice in allowing tax payers to conceal information from the authorities relating to their tax planning strategies would be outweighed by the harm to the relationship between client and tax advisor from disclosure of this information. Taxpayers acting in good faith would still be able to obtain sound legal advice about their tax arrangements, as they presently do from accountants. The Canadian Federal Court of Appeal rejected an attempt to extend legal advice privilege to accountants noting that the worse that could happen to the client from the absence of a privilege was that they failed to take advantage of a tax saving opportunity, whilst recognizing a privilege would significantly hamper the verification and enforcement of tax obligations.<sup>20</sup>

## Tax planning and avoidance

Although most of the Supreme Court's focus was on the identity of Prudential's advisors rather than the subject matter of the advice, the context of Prudential's privilege claim loomed large in the Majority's opinions.

Prudential (Gibraltar) Ltd took advice from a firm of accountants, PriceWaterHouse Coopers LLP, in relation to a proposed transaction which was part of a commercially marketed tax avoidance scheme. The existence of this scheme was disclosed to Her Majesty's Revenue and Customs ("HMRC") pursuant to statutory obligations placed on the promoters of such schemes by the Finance Act 2004.<sup>21</sup> An inspector served notices on the company, under s.20(1) of the Taxes Management Act 1970, and on its parent company, Prudential PLC, under s.20(3), requiring them to produce documents containing information relevant to the

<sup>18</sup> *Prudential plc* [2013] UKSC 1 [39]; [2013] 2 W.L.R. 325; [2013] 2 All E.R. 247.

<sup>19</sup> Office of Fair Trading, *Competition in the Professions* (March 2001), p.11.

<sup>20</sup> *Tower v Minister of National Revenue* (2003), 231 D.L.R. (4th) 318, [2003] F.C.J. No. 1153 (F.C.A.).

<sup>21</sup> Section 306 and following.

company's tax liability.<sup>22</sup> The material sought included tax advice given to Prudential by their accountants about the tax avoidance scheme. Prudential sought judicial review of the issue of the notices on the ground, inter alia, that the material sought was covered by legal advice privilege.

The case highlights the fact that extending legal advice privilege to accountants would make it significantly harder for regulators to enforce compliance with tax laws. The UK Government is leading a campaign to crack down on international tax avoidance schemes that allow corporations to pay limited or no tax in the jurisdictions where they conduct much of their business.<sup>23</sup> This campaign came in response to statistics showing that large multi-national corporations were using tax avoidance schemes to pay virtually no tax on income generated in the UK.<sup>24</sup>

HMRC estimates that in 2010–11 approximately £5 billion was lost to Revenue through tax avoidance. HMRC further estimates that the present total tax at risk from avoidance over time is £10.2 billion.<sup>25</sup>

According to the House of Commons Public Accounts Committee there is a proliferation of contrived schemes which exploit loopholes in legislation and abuse available tax relief schemes, and that HMRC appears to be fighting a losing battle against tax avoidance.

A major source of the problem is that companies can devote considerable resources to ensure that they minimise their tax liability, with the assistance of advice from lawyers and accountants. There is a large market for advising companies on how to take advantage of international tax law, and on the tax implications of different global structures. The big four accountancy firms employ nearly 9,000 people and earn £2 billion from their tax work in the UK, and earn around \$25 billion from this work globally. HMRC has far fewer resources. In the area of transfer pricing alone there are four times as many staff working for the four firms than for HMRC.<sup>26</sup>

Extending legal advice privilege to accountants would invariably make it more difficult for HMRC to combat the tax avoidance strategies generated by this industry. There is a strong public interest to ensure that the tax authorities are not hindered in their task of collecting tax due from individuals and corporations. While some protection for communications with legal advisers is necessary, it would be undesirable if taxpayers could arrange their tax affairs in a way that much of the tax planning techniques could be concealed from the tax authorities under the blanket of privilege.

<sup>22</sup> The most relevant provisions of the TMA have now been replaced by provisions of the Finance Act 2008, s.113 and Sch.36, Pts 1 to 8 (in particular Pt.1 and Pt.4).

<sup>23</sup> In a letter to the President of European Council dated April 24, 2013 the UK Prime Minister described the level of tax avoidance as "staggering" and called for co-ordinated action to address the problem. The letter is available at <https://www.gov.uk/government/news/pm-letter-to-the-eu-on-tax-evasion-and-aggressive-avoidance>.

<sup>24</sup> "Tax paid by some global firms in UK an 'insult'" *BBC News* December 3, 2012; The House of Commons Committee of Public Accounts Report '*HM Revenue and Customs, Annual Accounts 2011–2012*' 19th report, December 3, 2012, available at <http://www.parliament.uk/business/committees/committeesaz/commons-select/public-accounts-committee/Publications/> [Accessed 27 April 2013]

<sup>25</sup> The House of Commons Committee of Public Accounts Report '*Tax avoidance: targeting marketed avoidance schemes*' 29th report, February 19, 2013, p 3. Available at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/Publications/> [Accessed May 16, 2013].

<sup>26</sup> The House of Commons Committee of Public Accounts Report "Tax Avoidance: the role of large accountancy firms" 44th report, April 26, 2013, p.3. Available at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/Publications/> [Accessed May 16, 2013].

In *Prudential* Lord Sumption argued that the main judicial safeguard against abuse of privilege lies in the right of the court to examine the legal and factual basis for any claim of privilege at the time when it is made. The court is in as good a position to do this when accountants are involved as it is when the advice was sought from lawyers.<sup>27</sup> This is true and a reasonable argument can be made that in very many cases legal advice about tax avoidance schemes would not qualify for privilege because it would be caught by the iniquity exception to LPP as articulated by the Court of Appeal in *Barclays Bank v Eustice*.<sup>28</sup> The principle is that where a communication is in furtherance of an iniquitous purpose—which has been defined to include conduct that is sharp<sup>29</sup> or underhanded in nature<sup>30</sup>—no privilege attaches to the communication.

However, the practical reality is that court scrutiny of privilege claims is unlikely to be effective in combating abuse. To begin with, it is hard for authorities to know whether a taxpayer's privilege claim is properly made without some knowledge of the contents of the communication. As regulators have pointed out “you don't know what you don't know.”<sup>31</sup> Moreover, the English courts are reluctant to conduct in camera inspections of privilege material because this would amount to revealing the client's secret in order to know whether it should be kept.<sup>32</sup>

A further problem with the privilege over tax advice that was alluded to by the majority was that it can be difficult to disentangle legal advice from general commercial advice.<sup>33</sup> Extending the privilege to other professionals who regularly provide legal and non-legal advice would lead to difficulties in establishing whether a communication was made for the requisite legal purpose. What the majority's opinion overlooks is that lawyers are increasingly providing non-legal services too as Lord Taylor noted in the 1988 case of *Balabel v Air India*.<sup>34</sup> This trend has continued over the last two decades and the parliament arguably encouraged it when it significantly deregulated the legal services market.<sup>35</sup> Lord Neuberger's claim that there is strong, and justified, presumption that communications with a lawyer will be for the purpose of legal advice may be overstating the true position.<sup>36</sup> The courts will face greater challenges in the future in determining whether the professional advice given by lawyers, which often extends beyond mere legal advice, qualifies for LAP.

The majority's position was that it would be better not to magnify the problems that LAP already creates for tax authorities through extending LAP to accountants. However, Lord Sumption's claim that any restrictions in the scope of the privilege

<sup>27</sup> *Prudential plc* [2013] UKSC 1 [126]; [2013] 2 W.L.R. 325; [2013] 2 All E.R. 247.

<sup>28</sup> *Eustice v Barclays Bank* [1995] 1 W.L.R. 1156 (CA). In *Re McE* Lord Neuberger expressly left open whether this case was correctly decided: *McE, Re* [2009] UKHL 15, [2009] 1 A.C. 908 [109].

<sup>29</sup> *Eustice v Barclays Bank* [1995] 1 W.L.R. 1156 (CA). In *Re McE* Lord Neuberger expressly left open whether this case was correctly decided: *McE, Re* [2009] UKHL 15, [2009] 1 A.C. 908 [109].

<sup>30</sup> *BBGP Managing General Partner Limited & Ors v Babcock & Brown Global Partners* [2010] EWHC 2176 (Ch), [2011] 2 W.L.R. 496.

<sup>31</sup> A number of regulators made this point to the Australian Law Reform Commission in its review of client legal privilege law: Australian Law Reform Commission, “Privilege In Perspective Client Legal Privilege in Federal Investigations” (Report 107, 2007) [3.129].

<sup>32</sup> See, e.g. *West London Pipeline and Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm); [2008] All E.R. (D) 294 (Jul).

<sup>33</sup> *Prudential plc* [2013] UKSC 1 [59].

<sup>34</sup> *Balabel v Air India* [1988] Ch 317 (CA) 32.

<sup>35</sup> For example Pt.5 of the Act allows lawyers to provide legal services through multi-disciplinary partnerships and alternative business structures.

<sup>36</sup> *Prudential plc* [2013] UKSC 1 [59]; [2013] 2 W.L.R. 325; [2013] 2 All E.R. 247.

should apply equally to all professionals providing legal advice is unimpeachable as a matter of logic. Tax lawyers are important players in the tax avoidance industry, and it is questionable whether their advice regarding tax avoidance schemes should attract privilege if the case for protecting tax advice by accountants cannot be made out.

### **The case for restricting legal advice privilege over tax affairs**

In his treatise on the law of evidence, Wigmore argued that a privilege from compulsory disclosure was only justified where four criteria were met:

- (1) The communications must originate in a confidence that they will not be disclosed;
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
- (3) The relation must be one which, in the opinion of the community, ought to be sedulously fostered;
- (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.<sup>37</sup>

A privilege concerning tax advice meets the first criteria, but arguably fails all the others. It is possible that the community do not believe that the relationship between taxpayer and tax advisor should be sedulously fostered if, as a result of wealthy individuals and corporations having uninhibited access to specialist tax advisers, most of the community end up paying a greater share of the tax burden or suffer reduced public services. Community opinion is a matter of speculation but there is little doubt that a privilege for tax advice fails Wigmore's second and fourth criteria.

The fact that people frequently retain accountants to provide legal advice on tax matters, even without a privilege, was one of the reasons why the High Court rejected Prudential's claim to extend LAP to accountants.<sup>38</sup> Charles J. noted that there were many areas of life where there is a need for full and frank disclosure if an advisor is to be in a position to give fully informed advice. But:

“a general right to refuse disclosure of communications between client and professional adviser has not been given, and it seems that this has not led to assertions by non-lawyers and their clients that full and frank communications between them is inhibited.”

Prudential did not assert that full and frank disclosure between clients and their accountants was inhibited.<sup>39</sup> The market for legal advice from accountants suggests “that the conclusion underlying LPP that there is a need for absolute confidentiality in respect of legal advice may need revisiting.”<sup>40</sup>

<sup>37</sup> J. Wigmore, *On Evidence*, vol 8, 4th edn (Boston: McNaughton Revision, Little Brown & Co, 1961) p.527.

<sup>38</sup> *R (Prudential Plc) v Special Commissioner of Income Tax* [2009] EWHC 2494 (Admin) [80], [2010] All E.R. 1113.

<sup>39</sup> *R (Prudential Plc) v Special Commissioner of Income Tax* [2009] EWHC 2494 (Admin) [72], [2010] All E.R. 1113.

<sup>40</sup> *R (Prudential Plc) v Special Commissioner of Income Tax* [2009] EWHC 2494 (Admin) [72], [2010] All E.R. 1113.

Lord Sumption acknowledged that there may be cases where the assurance of confidentiality is not important to clients seeking legal advice.<sup>41</sup> However, he said it did not matter because the underlying principle was that clients who do wish to consult a lawyer on the basis of absolute confidence should be entitled to do so, notwithstanding that absolute confidence may be less important to others.<sup>42</sup>

With respect, the fact that some clients wish to consult a lawyer in absolute confidence is no basis for maintaining a privilege that can change the outcome of cases or legal investigations, with all the adverse effects this has on the administration of justice. Uninhibited access to legal advice is justified by the rule of law where access is sought for a legitimate purpose. It is necessary to explain why people acting in good faith might be inhibited from obtaining legal advice in the absence of a privilege. It is difficult to know what this inhibition would be in the case of a client seeking tax advice. As a matter of logic a client would not be deterred from seeking legal advice unconnected with litigation about their tax affairs. As the Court of Appeal in *Three Rivers No 3* noted, it is by no means clear that a person would refrain from seeking advice, or disclose all the relevant facts to the lawyer, in the absence of contemplated litigation. The person wants advice and the prospect of winning or losing a particular case will normally do nothing to cloud his judgment as to what facts he places before his legal adviser.<sup>43</sup>

While the House of Lords reaffirmed the importance of legal advice privilege in *Three Rivers No 6*,<sup>44</sup> the Court of Appeal's analysis is particularly apposite in the case of tax planning. If a client is interested in exploring tax saving opportunities, to obtain accurate advice as to how to take advantage of those opportunities he needs to lay all the relevant facts before the advisor. The only possible chilling effect of removing the privilege is that it might deter clients from engaging in tax planning schemes that a court might ultimately be deemed to amount to tax evasion. Such chilling effects would not be undesirable given that tax evasion is unlawful, and tax avoidance—using tax law to gain a tax advantage not intended by Parliament—is widely agreed to be socially undesirable.

There is a disconnect between the instrumental rationale for legal advice privilege and the tax planning advice accountants and lawyers are regularly providing to their clients. In *Three Rivers No 6* Baroness Hale stated “It is in the interests of the whole community that lawyers give their clients sound advice, accurate as to the law and sensible as to their conduct.”<sup>45</sup> Yet it would appear that much advice regarding tax planning is neither legally accurate nor sensible—at least from society's standpoint. According to the Public Accountants Committee the big four accountancy firms are willing to recommend schemes that have as little as a 50

<sup>41</sup> *Prudential plc* [2013] UKSC 1 [118]. Lord Sumption cited Lord Scott in *Three Rivers No 6* when his Lordship said it is “obviously true that in very many cases clients would have no inhibitions in providing their lawyers with all the facts and information the lawyers might need whether or not there were the absolute assurance of non-disclosure that the present law of privilege provides”: *Three Rivers (No 6)* [2005] 1 A.C. 610 [34].

<sup>42</sup> *Prudential plc* [2013] UKSC 1 [118]. Lord Sumption cited Lord Scott in *Three Rivers No 6* when his Lordship said it is “obviously true that in very many cases clients would have no inhibitions in providing their lawyers with all the facts and information the lawyers might need whether or not there were the absolute assurance of non-disclosure that the present law of privilege provides”: *Three Rivers (No 6)* [2005] 1 A.C. 610 [34].

<sup>43</sup> *Three Rivers District Council v Governor and Company of the Bank of England (Disclosure) (No 5)* [2003] EWCA Civ 474, [2003] Q.B. 1556 [26].

<sup>44</sup> See, e.g. *Three Rivers (No 6)* [2005] 1 A.C. 610 [34].

<sup>45</sup> *Three Rivers (No 6)* [2005] 1 A.C. 610 [61].

per cent chance of succeeding if challenged in court.<sup>46</sup> It is difficult to know whether tax lawyers give more prudent or equally borderline advice under the cloak of privilege. However, the disclosure of this advice to tax authorities would do no harm to taxpayers acting in good faith. If the advice is prudent and accurate then that could be verified by the authorities, and the matter would end there. But if the advice relates to a scheme that is possibly unlawful, then there is a strong interest in ensuring the authorities have access to the advice. The fact that taxpayers are willing to seek advice from accountants, and accountants are willing to give advice, in relation to aggressive tax planning schemes without the promise of confidentiality demonstrates that LAP is not the cause of the problem. However, LAP over tax advice undoubtedly exacerbates the difficulties in enforcing compliance with tax law.

Restricting or abrogating LAP over tax advice would not of course affect a taxpayer's right to legal professional privilege in litigation. Once a legal dispute has arisen about a taxpayer's liability they should be entitled to communicate in confidence with their legal advisor in order to prepare for any legal proceedings. Litigation privilege is an important component of the right to a fair trial. But in the absence of contemplated litigation, the case for protecting tax advice from disclosure is weak.

A tax specific exception to LAP would raise some difficult questions about where to draw the line. For example, should advice about trust arrangements that have tax implications or are motivated by tax considerations be part of the exception? In the case of family trusts the client may be equally concerned to protect personal relationships, sensitivities and reputations as much as their own self-interest. Therefore the client may need an assurance of confidentiality before she is willing to fully and frankly instruct her lawyer, in the same way as a testator who wishes to instruct a solicitor to draw up her will. In *Three Rivers No 6* Lord Rodger noted that the instructions of a client may be motivated by

“jealousies, slights, animosities and affections, which the testator would not wish to be revealed but which he must nevertheless explain if the solicitor is to carry out his wishes”.

<sup>47</sup>

While it is not clear how such motivations would be relevant in a legal dispute regarding the testator's will, or a family trust, there is a real risk that unless the client knows that such information will not be disclosed she may materially alter her instructions, or refrain from seeking advice altogether.

On the other hand there are no scenarios in which a sound case can be made for LAP for corporations seeking tax advice. Personal relationships and reputations should not be relevant considerations in corporate decision making. Company directors are subject to elaborate corporate governance rules that regulate their decision making processes. There is a strong argument that a director's duty to manage the company's affairs with reasonable care, skill and diligence already provides directors of large and public corporations with sufficient incentives to

<sup>46</sup> The House of Commons Committee of Public Accounts Report 'Tax Avoidance: the role of large accountancy firms' 44th report, April 26, 2013, p.3. Available at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/Publications/> [Accessed May 16, 2013].

<sup>47</sup> *Three Rivers DC v Governor and Company of the Bank of England (No.4)* [2004] UKHL 48 [55], [2005] 1 A.C. 610.

obtain accurate and relevant legal advice on important matters affecting the company including its tax liabilities.<sup>48</sup> Lord Sumption stated it is the function of the courts, and in particular the Supreme Court, to ensure that changes in legal, commercial or social practice are properly reflected in the way that the law is applied. Those changes must include the legal, commercial, and social changes that suggest persons who are currently entitled to the privilege may no longer need it, just as much as the changes suggesting a privilege should be available in situations where it is not currently available.

However, for the reasons outlined by the Majority any extensions or restrictions to LAP, whether it is based on the identity of the client or the advisor and/or the subject matter of the advice, is a policy issue that Parliament is best placed to consider. Lord Sumption noted that restricting LAP in relation to tax advice should be straightforward if there is enough parliamentary support for it.<sup>49</sup> Given all major parties are concerned about the levels of tax avoidance in the UK there may be more parliamentary support for restricting LAP over tax advice than extending it.

**Andrew Higgins**

**Adrian Zuckerman**

<sup>48</sup> A. Higgins, "Legal Advice Privilege and its Relevance to Corporations" (2010) 73 MLR 371.

<sup>49</sup> *Prudential plc* [2013] UKSC 1 [136]; [2013] 2 W.L.R. 325; [2013] 2 All E.R. 247.