



Welcome to the March edition of *Insight*, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

In this issue we discuss the role of litigation privilege following the decisions in both *Walter Lilly and Prudential*.

Insight

Legal professional privilege part II - the Prudential appeal

Introduction

In issue 14 of *Insight* we looked at legal advice privilege in the wake of the decision in *Walter Lilly & Company v Mackay and Ors* [2012] EWHC 649. *Walter Lilly* made it clear that quasi-legal advice provided by non-lawyers (for example claims consultants) does not attract legal professional privilege and, as such, will be subject to disclosure in court proceedings. Legal professional privilege is a communication made between a client and a lawyer made in confidence for the purpose of giving or receiving legal advice.

Unsurprisingly the decision in *Walter Lilly* was criticised by some members of the construction industry for being anti-competitive and providing lawyers with an unfair advantage in respect of providing confidential advice in situations where litigation is not contemplated by the parties.

With the *Walter Lilly* case finally coming to an end earlier this year when the Court of Appeal refused to give permission to appeal, there was huge interest when it emerged that the concept of legal professional privilege was going to be considered by the Supreme Court following an application by Prudential in the case of *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax and another* [2013] UKSC 1.

This twenty-first issue of *Insight* examines (i) the practical impact of the decision in *Prudential* and (ii) the role of litigation privilege following the decisions in both *Walter Lilly* and *Prudential*.

Facts of the *Prudential* case

In 2004, accountants Pricewaterhouse Coopers ("PWC") were instructed

by Prudential plc ("Prudential") to provide tax advice in relation to certain overseas holdings. PWC advised Prudential to adopt a tax avoidance scheme that they had developed and marketed. The objective of the scheme was to enable a tax deduction from a foreign subsidiary to be set off against the profits of Prudential in the UK and therefore reduce corporation tax liability.

The Inspector of Taxes with the responsibility for this aspect of Prudential's tax liability was Mr Pandolfo. Mr Pandolfo considered it necessary to look into the transactions carried out by Prudential in respect of the advice given by PWC. Notice was served on Prudential under section 20B(1) of the Finance Act 2000 ("the Act") which required Prudential to disclose a number of categories of documents. Prudential duly provided many of the documents requested but refused to disclose certain documents ("the disputed documents") on the grounds that Prudential was entitled to claim legal advice privilege in respect of them. Prudential relied upon para 5(1) of Sch 1 AA to the Act which states that communications between a professional legal advisor and his/her client made in connection with the giving of legal advice were exempted from the disclosure obligations set out in section 20B.

Despite Prudential's objections, Mr Pandolfo sought authorisation from the Special Commissioners under section 20(7) of the Act which required Prudential to disclose the disputed documents. Such authorisation was duly given and on 16 November 2007, Mr Pandolfo served notice under section 20(1) and (2) on Prudential requiring disclosure of the disputed documents.



Insight

Thereafter, Prudential issued an application for judicial review challenging the validity of the notices issued by Mr Pandolfo on the grounds that the disputed documents attracted legal advice privilege and were therefore excluded from the disclosure requirements of section 20 of the Act.

The court at first instance rejected the application holding that whilst the documents would have been excluded from disclosure if the advice had been sought from a member of the legal profession, legal advice privilege did not extend to advice, even if identical in nature, provided by someone who is not a qualified lawyer.

Prudential appealed the decision, but on 13 October 2010 the Court of Appeal also rejected the application on the same grounds. Prudential therefore appealed to the Supreme Court. Given the importance of the issue, this final appeal was heard before seven members of the Supreme Court rather than the more usual five.

Unfortunately for the accountancy profession and consultants generally, the Supreme Court held (5:2) that the appeal should not be allowed. Lord Neuberger giving the leading judgment noted that, in principle, the case advanced by Prudential that legal advice privilege should be based on function of the communication rather than the status of the advisor was compelling.

However, it was a matter of fact that previous authorities, textbooks, statute and official reports have all proceeded on the basis that legal advice privilege can only be claimed over advice given by a qualified lawyer, and therefore it followed that if this principle were to be revised then it was a matter for Parliament rather than the courts.

Does the decision in *Prudential* change anything?

Following the decision in *Prudential*, it remains the case that only those clients who seek advice from legal professionals (i.e. solicitors, barristers, etc.) will be able to rely on legal advice privilege. In practical terms this means that nothing has changed since the decision in *Walter Lilly* and that legal advice privilege may not be claimed in relation to advice provided from construction consultants, claims consultants and commercial advisors.

What about litigation privilege?

The decision in the *Prudential* case (as in *Walter Lilly*) only concerned legal advice privilege rather than litigation privilege, the latter being the privilege that attaches to communications and advice provided at or during the stage at which legal proceedings are pending or contemplated.

In such circumstances, it remains the case that provided that the sole or dominant purpose for which the communication is created is the conduct of litigation or contemplated litigation, then legal advice provided by a non-legal professional (i.e. a claims consultant) will be privileged. This argument was not open to Prudential, who could not argue that the documents containing the details of the

transactions had been created for the purposes of litigation.

Adjudication

In edition 14 of *Insight* we noted that there was little authority on the issue of whether or not advice provided by claims consultants in connection with adjudication proceedings would attract litigation privilege.

This issue was not considered in the Supreme Court in *Prudential* and remains open to argument.

Conclusion

The decision in *Prudential* may be viewed by some as anti-competitive, but the law, for once, is at least clear cut and certainly helps clarify any remaining uncertainty that surrounded the extent to which quasi-legal advice attracts legal advice privilege.

Until such time that Parliament decides to address the issue, it is clear that you will only be able to rely on legal advice privilege where you have sought advice through a solicitor or barrister retained for the specific purpose of providing legal advice. It does not extend to other professions.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Chris Shilvock. cshilvock@fenwickelliott.com. Tel +44 (0) 207 421 1986

Follow us on  and  for the latest construction and energy legal updates

Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London WC2B 4HN
www.fenwickelliott.com