



# No professional legal privilege for accountants

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**The Court of Appeal has ruled that privilege only applies to lawyers and not to accountants, even where the advice they give is legal or quasi legal in nature.**

On 13 October, the Court of Appeal delivered a decision in the case of *R (Prudential plc) v Special Commissioner of Income Tax* [2009] EWHC 2494 (Admin). This was a case which was considered to be of sufficient importance for the Law Society, the Bar Council and the Institute of Chartered Accountants in England and Wales (ICAEW) to intervene.

## Facts

Prudential, supported by the ICAEW, sought to establish an extension to the law of privilege. They asserted that when a person seeks advice on financial liabilities, which frequently requires a consideration of the law, they will often consult an accountant, rather than a lawyer. It was argued that such advice should be protected from disclosure as if it were given by a solicitor.

## Fundamental importance of privilege restated

The absolutely fundamental nature of the law on privilege was reasserted by the Court. Lord Justice Lloyd, giving the leading judgement, stated that privilege is a fundamental human right and a necessary corollary of the right of any person to obtain advice about the law. It is an absolute rule entitling the client to refuse to disclose documents.

## Three Rivers

The House of Lords last considered privilege in the Three Rivers case. The judgments given in Three Rivers were referred to by Lord Justice Lloyd and reaffirmed. In the context of litigation, both the provision of information and the legal advice are privileged and non-disclosable. In addition, it is established law that privilege does extend beyond the narrow context of litigation to allow a client freely to provide relevant information and to receive legal advice. However, the protection provided by privilege outside litigation is limited to cases in which legal advice is given by the lawyer to the client. It was noted that it is quite common practice for a client to seek business advice from, or to leave instructions with, his lawyer. It is clear law that where solicitor assists a client with business, rather than legal matters, then this is not covered by legal privilege.

## Status or function?

The argument made in the Prudential case, with reference to Three Rivers, was that the most important distinction in deciding whether a particular communication attracts privilege, is not the status of the adviser but rather the nature of the advice. It therefore, it was said, should not matter whether the adviser is a lawyer or whether he or she is another appropriately qualified person.

The law of privilege has been extended by legislation already variously to cover patent agents, trade mark agents and licensed conveyancers for communications with clients in their particular legal fields. However, it was argued on behalf of Prudential that as legal professional privilege is a judge made rule it was open to the Court to extend it to the accountants' advice in the case. This argument was considered and rejected by the Court of Appeal, which noted that no other common law regime in the world has extended the scope of legal professional privilege other than by statute.

## Clarity and certainty

Lord Justice Lloyd held that, even if it were open to the Court to extend the scope of legal professional privilege to other professions, it would decline to do so on the basis that it is of paramount importance that the law be clear and certain. If privilege were to apply to members of other professions who give advice on points of law in the course of their professional activity, serious questions would arise as to its scope and application. It was noted that "accountant" does not denote membership of any professional body, nor the obligation to comply with any particular set of professional obligations.

## Comment

Whilst the ruling will be a great disappointment to accountancy firms, whose tax advice remains disclosable in contrast to the same advice given by a solicitor, the Court of Appeal did reaffirm the importance of legal privilege. This echoes the stance of the Court of Appeal in the case of *Quinn v Law Society* [2010] EWCA 805, in which the status of legal privilege as a fundamental human right prevailed over an insurer's ability to review relevant documents of an insured. In deciding not to extend the doctrine of privilege

to categories of advisers other than lawyers, the Court effectively protected the existing doctrine from vagueness and uncertainty, which might otherwise, over time, erode its status and effectiveness.

The protective stance of the English Courts in these two recent cases is very interesting to note, particularly in the wake of the decision of the European Court of Justice in *Akzo Nobel Chemicals & Akcros Chemicals v Commission & Ors* [2010] EUECJ C-550/07 ([http://www.burges-salmon.com/Practices/commercial/competition/Publications/Are\\_your\\_documents\\_safe.pdf](http://www.burges-salmon.com/Practices/commercial/competition/Publications/Are_your_documents_safe.pdf)). Despite some attrition of the doctrine in relation to EU law, it seems clear that the English Courts will strive to maintain and support legal professional privilege, in its traditional form.

## New ABS regime

The decision of the Court of Appeal in *Prudential*, is of particular interest in light of the new Alternative Business Structure (ABS) regime, coming into force in October next year. From October 2011, non lawyers will be able to join lawyers freely in an ABS, giving legal and other advice to clients. It will be interesting to see how the Courts react to the new regime, and the extent to which they will be prepared to extend the doctrine of privilege. It is not difficult to imagine a scenario in which a senior accountant gives primary advice to a client of an ABS, with some minimal involvement of a junior lawyer. Would such an arrangement attract legal professional privilege? What about a situation in which legal advice is provided by a non lawyer working in a large

ABS carrying out volume work, with notional supervision provided by a legally qualified manager. Would this be privileged?

It will also be interesting to see whether Parliament intervenes to level the playing field on behalf of any new ABSs. It might be seen as a significant advantage for a client to instruct a traditional law firm and be protected by privilege, whereas instructions given to a non-lawyer at an ABS would be disclosable.

For now, however, there are no signs that legislation on privilege is being considered. The *Prudential* case suggests that the Courts will be slow to grant privilege as a matter of course, and any ABS would need to be very careful to shield its clients from disclosure.

### For further information please contact:



**David Hall**  
**Partner**

Tel: 0117 902 2798

Email: [david.hall@burges-salmon.com](mailto:david.hall@burges-salmon.com)



**Catherine Allen**  
**Senior Associate**

Tel: 0117 307 6898

Email: [catherine.allen@burges-salmon.com](mailto:catherine.allen@burges-salmon.com)