

Rocky ground

31 May 2013

A surveyor's advice can stray into legal terrain, says Laurence Cobb, but a recent case means that your discussions with clients will not be covered by privilege and could be disclosable in court

The recent Supreme Court judgment of [R \(on the application of Prudential plc and another\) v Special Commissioner of Income Tax and another \[2013\] UKSC 1](#) considered whether legal advice privilege could be extended to non-legal advisers. The outcome, that it only applies to advice provided by lawyers, is of particular interest to surveyors who (inadvertently or otherwise) may provide advice to clients that could be construed as 'legal'.

This article does not consider the Prudential case in the context of the RICS practice statement and guidance note for Surveyors acting as expert witnesses, which concerns litigation privilege (we will discuss this in a future article). In contrast, the Prudential case concerns legal advice privilege, which protects written or oral communications made confidentially between a lawyer (acting in their professional legal capacity) and their client solely for the purpose of giving or obtaining legal advice.

Case summary

PricewaterhouseCoopers (PwC) advised Prudential on a tax avoidance scheme that was subsequently investigated by the HMRC, which sought disclosure of related documents. Prudential refused to disclose the documents from PwC, claiming that their contents were protected by legal advice privilege. The question was whether legal advice privilege could be extended to cover legal advice from advisers who were not members of the legal profession.

The Supreme Court held by a 5:2 majority that legal advice privilege can only be claimed if advice was provided by a lawyer (qualified solicitor, barrister or chartered legal executive and other jurisdictional equivalents). To extend privilege beyond the legal profession would lead to uncertainty and raise questions of policy that should be left to Parliament.

Two judges dissented because English law has taken a functional approach to legal advice privilege, so that the privilege depended on the character and circumstances of the advice sought, not on the adviser's status. The anomaly therefore remains: when looking at the same advice from a lawyer and an accountant, only communications with a lawyer are privileged from future disclosure.

Commentary

In most cases under English Law, full disclosure of all related documents is required from each party. In general, communications between a client and their lawyer made to obtain or give legal advice are exempt from disclosure requirements. The underlying principle behind this rule is that it allows lawyers and their clients to speak openly, without fear that discussions

may later be disclosed and used against them.

Despite Prudential, the argument that legal advice privilege gives the legal profession an unfair advantage remains powerful and a majority of the Supreme Court recognised that lawyers should not have a special status, but believed this policy decision was not one that the Supreme Court could extend because Parliament had legislated that it should only apply to lawyers.

The task of maintaining the certainty of the principle of legal advice privilege and preventing potential abuse, while balancing the practical realities of how modern-day legal advice is provided, is the challenge that Parliament now faces.

This case is clearly relevant to judicial and arbitration proceedings, less so with adjudication proceedings largely because of the short timeframe for proceedings and the fact that the Civil Procedure Rules do not apply to adjudication.

Impact on surveyors

Although this case concerned accountants providing specialist tax advice, the outcome is relevant to many professions, consultancies and surveying bodies that may provide legal and 'pseudo-legal' advice to clients.

Some tips for surveyors when providing advice to a client include:

- carefully review the terms of your engagement and the services you have agreed to provide
- ensure that you do not act outside the terms of your engagement and only provide advice on matters on which you have the expertise
- where your advice could be construed as straying into legal terrain, inform your client that legal privilege will not attach to this advice and so may be subsequently disclosable in court.

Laurence Cobb is a Partner with law firm [Taylor Wessing](#)

Further information

Related competencies include: [T051](#)