



Sensitive advice might have to be disclosed

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Summary

In litigation, both parties are under a duty to disclose documents - even if these might harm a party's case. Often a party will not wish to disclose confidential advice it has previously received. An exception exists for legal advice known as Legal Advice Privilege ("LAP"). This means that a client and his advisors are free to speak as to matters in issue without fear that such exchanges will subsequently be made available to others and used against them.

A client is therefore able to take advice from their solicitor or counsel and that advice will remain confidential (or "privileged") so that it should not be available to other parties on disclosure or in the course of civil investigation.

Guidance from the Supreme Court

The recent Supreme Court decision of *R (on the application of Prudential Plc and another) v Special Commissioner of Income Tax and another* looked into whether LAP applied to advice given to Prudential Plc ("Prudential") by their accountants in relation to a tax avoidance scheme. HMRC was seeking the details of that advice which Prudential was not willing to disclose.

The advice received by Prudential had been legal in nature and it was common ground that if LAP applied to that advice then HMRC would not be entitled to have sight of it.

The Court decided that LAP applied only to communications in connection with advice given by members of the legal profession (including barristers, solicitors and legal executives). This had been the intention of Parliament and it was not for the Court to reverse this. Accordingly LAP did not attach to advice from accountants (or other non-members of the legal profession) even if the subject matter of the advice is legal in nature. Prudential are therefore likely to be forced to disclose the advice received from their accountants.

Comment

Clients need to take steps to ensure private advice does not need to be disclosed. Clients should understand the limited scope of LAP and ensure that communications containing advice remain confidential. In relation to investigations by HMRC, and more generally, only legal communications between a lawyer and client will be protected from disclosure. The safest course of action will be to try to channel any advice through solicitors and to ensure sensitive advice does not go outside of lawyer/client communications.

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