Case No: C1 2009/2544

Neutral Citation Number: [2010] EWCA Civ 1094

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE CHARLES
[2009] EWHC 2494 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 October 2010

Before:

LORD JUSTICE MUMMERY
LORD JUSTICE LLOYD
and
LORD JUSTICE STANLEY BURNTON

- -

Between:

THE QUEEN ON THE APPLICATION OF (1) PRUDENTIAL PLC (2) PRUDENTIAL (GIBRALTAR) LTD	**Claimants Appellants**
- and -	
(1) SPECIAL COMMISSIONER OF INCOME TAX (2) PHILIP PANDOLFO (HM Inspector of Taxes)	**Defendants Respondents**
(1) INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES (2) THE GENERAL COUNCIL OF THE BAR (3) THE LAW SOCIETY	**Interveners**

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Lord Pannick Q.C. and Conrad McDonnell (instructed by **PricewaterhouseCoopers Legal LLP**) for the **Appellants**
The First Respondent was not represented
Timothy Brennan Q.C. Diya Sen Gupta and Laura McNair-Wilson (instructed by **Solicitor to HMRC**) for the **Second Respondent**
Charles Flint Q.C. (instructed by **Simmons & Simmons**) for the **First Intervener**
Bankim Thanki Q.C. and Ben Valentin (instructed by **the Bar Council**) for the **Second Intervener**
Sir Sydney Kentridge Q.C. and Tom Adam Q.C. (instructed by **Herbert Smith LLP**) for the **Third Intervener**

Hearing dates: 14 and 15 July 2010

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Judgment

Lord Justice Lloyd:

Introduction

1. This appeal is about legal professional privilege (LPP) and in particular about that aspect of LPP which relates to the seeking and giving of legal advice. The advice relevant to this appeal is in relation to the area of law concerned with fiscal liabilities. The principles as regards LPP were first established in the sixteenth century but the continuing significance of the rule can be seen from the fact that the cases cited to us included a substantial number from this court and the House of Lords decided over the past 20 or so years.

2. In the present case, the Claimants and Appellants (whom I will call Prudential) seek to establish that the principle extends further than has yet been recognised. They assert (and it is not really in dispute) that, nowadays, on many if not most occasions on which a person seeks advice about fiscal liabilities, which often involves a consideration of, and advice about, the relevant law, that person does so by approaching accountants rather than lawyers. They contend that the rationale which lies behind the LPP rule requires that a client's communications with his advisers should be just as much protected from disclosure if the advice, being legal advice, is sought from and given by an accountant as it is if sought from and given by a solicitor or barrister.

3. Charles J, who heard and dismissed Prudential's application for judicial review, accepted much of what underlies Prudential's argument. At paragraph 70 of his admirable judgment, [2009] EWHC 2494 (Admin), he said this:

> "I … agree that by reference to the need for confidentiality in respect of the giving of legal advice and the logic, purpose and public interest underlying legal advice privilege there is real strength in the argument that the extent of the right to refuse disclosure should not relate to the nature of the legal qualification of the person giving the advice."

4. Nevertheless he felt constrained by the present state of the law to decide against Prudential.

5. The importance of the rule lies in the fact that, subject to very limited and presently irrelevant exceptions, it is an absolute rule entitling the client to refuse to disclose documents or answer questions, and to require the adviser and others so to refuse as well. It therefore creates a real conflict with the general public policy that cases should be decided by reference to all available relevant evidence. However, it is much more than a rule of evidence, and the present issue does not arise in the context of legal proceedings, as I will explain. One corollary of the nature of the rule is that it needs to be certain in its nature and content.

6. The reason underlying the rule and its importance were summarised succinctly by Lord Hoffmann in *R (Morgan Grenfell & Co) v Special Commissioner of Income Tax* [2002] UKHL 21 (*Morgan Grenfell*), at paragraph 7 as follows:

> "LPP is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain

> skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice."

7. In *R v Derby Magistrates Court ex parte B* [1996] 1 AC 487, in which the House of Lords rejected an argument that LPP should or could involve a balancing exercise in relation to the facts of the particular case, Lord Taylor of Gosforth CJ said at page 507:

> "Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

On the following page he said:

> "Putting it another way, if a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the 16th century, and since then has applied across the board in every case, irrespective of the client's individual merits."

8. In the same case, at page 510, Lord Nicholls of Birkenhead drew attention to the tension which may be created (and certainly was in that case) between the LPP rule on the one hand and, on the other, the public interest:

> "that all relevant material should be available to courts when deciding cases. Courts should not have to reach decisions in ignorance of the contents of documents or other material which, if disclosed, might well affect the outcome."

He too rejected the idea that a balancing exercise could be conducted as regards LPP on the facts of the particular case.

9. The importance of the issue whether LPP applies where legal advice is sought from and given by accountants led to the grant of permission to intervene in this appeal to the Institute of Chartered Accountants in England and Wales, the Bar Council and the Law Society. The court was favoured with advocacy of the highest quality on behalf of both parties and all three interveners, building on powerful written submissions, and drawing on a wide range of legal materials, including comparative material from other jurisdictions. I will not refer to all the points made but the range (as well as the quality) of the submissions made and the extent of the materials put before us have assisted me greatly in coming to my conclusion.

How the point arises in the present case

10. By the application for judicial review, Prudential sought to quash, or limit the scope of, notices under section 20 of the Taxes Management Act 1970 (TMA) requiring the production of documents. It was established in *Morgan Grenfell* that a notice under section 20 does not require a person to disclose documents to which LPP applies. Notices under the section were served on Prudential in November 2007. Prudential

assert that the notices require production of documents by which they sought or received legal advice on tax matters, in some cases from Counsel, in others from foreign lawyers, but in still others from the well-known accountants, PricewaterhouseCoopers. They argue that they are not obliged to disclose any documents relating to any of these processes of obtaining advice. They brought proceedings for judicial review to challenge the notices and to establish the point about LPP.

11. In substance the Defendant and Respondent is the Commissioners for Her Majesty's Revenue and Customs (HMRC). In form the First Defendant is the Special Commissioner who authorised the issue of the notices under section 20 (Dr Avery Jones CBE, who has taken no part in the proceedings) and the Second Defendant is the inspector of taxes who decided to issue them.

Taxes Management Act 1970, section 20

12. The point about LPP is one of general principle, but it is as well to see how it arises in the context of the legislation relevant to the particular case. Section 20 of TMA gave power to require the production of documents both of the taxpayer and of any other person. There were differences between the two powers, but they do not matter for present purposes. Section 20(1) dealt with the taxpayer and section 20(3) with others:

> "20(1) Subject to this section, an inspector may by notice in writing require a person
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> (a) to deliver to him such documents as are in the person's possession or power and as (in the inspector's reasonable opinion) contain, or may contain, information relevant to
>
> > (i) any tax liability to which the person is or may be subject, or
> >
> > (ii) the amount of any such liability, or
>
> (b) to furnish to him such particulars as the inspector may reasonably require as being relevant to, or to the amount of, any such liability.
>
> …
>
> (3) Subject to this section, an inspector may, for the purpose of enquiring into the tax liability of any person ("the taxpayer"), by notice in writing require any other person to deliver to the inspector or, if the person to whom the notice is given so elects, to make available for inspection by a named officer of the Board, such documents as are in his possession or power and as (in the inspector's reasonable opinion) contain, or may contain, information relevant to any tax liability to which the taxpayer is or may be, or may have been, subject, or to the amount of any such liability …"

13. No notice under either provision could be given except with the prior consent of a General or Special Commissioner, to be given only if the Commissioner was satisfied

that in all the circumstances the inspector was justified in proceeding under the section: section 20(7).

14. Section 20A conferred a power on an inspector to call for documents to be produced by a person who had "stood in relation to others as a tax accountant" and who had been convicted of an offence in relation to tax or had had a penalty imposed on him under section 99 of TMA.

15. Section 20B sets out some restrictions on the powers conferred by sections 20 and 20A. Subsections (8) to (11) contain ancillary provisions of some relevance:

> "(8) A notice under section 20(3) or (8A) or section 20A(1) does not oblige a barrister, advocate or a solicitor to deliver or make available, without his client's consent, any document with respect to which a claim to professional privilege could be maintained.
>
> (9) Subject to subsections (11) and (12) below, a notice under section 20(3) or (8A) -
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> (a) does not oblige a person who has been appointed as an auditor for the purposes of any enactment to deliver or make available documents which are his property and were created by him or on his behalf for or in connection with the performance of his functions under that enactment, and
>
> (b) does not oblige a tax adviser to deliver or make available documents which are his property and consist of relevant communications.
>
> (10) In subsection (9) above "relevant communications" means communications between the tax adviser and –
>
> (a) a person in relation to whose tax affairs he has been appointed, or
>
> (b) any other tax adviser of such a person,
>
> the purpose of which is the giving or obtaining of advice about any of those tax affairs; and in subsection (9) above and this subsection "tax adviser" means a person appointed to give advice about the tax affairs of another person (whether appointed directly by that other person or by another tax adviser of his).
>
> (11) Subject to subsection (13) below, subsection (9) above shall not have effect in relation to any document which contains information explaining any information, return, accounts or other document which the person to whom the notice is given has, as tax accountant, assisted any client of his in preparing for, or delivering to, the inspector or the Board."

16. Section 20BA gives a power (not relevant to the present case) to make an order for the delivery of documents by any person who appears to have such documents in his possession or power. Section 20D(2) explains what is meant by "tax accountant":

> "(2) For the purposes of sections 20 and 20A, a person stands in relation to another as tax accountant at any time when he assists the other in the preparation or delivery of any information, return, accounts or other document which he knows will be, or is, or are likely to be, used for any purpose of tax; and his clients are all those to whom he stands or has stood in that relationship."

17. Schedule 1AA supplements section 20BA. By paragraph 5 it does not apply to "items subject to legal professional privilege"; these are defined by paragraph 5(2) as follows:

> **"**5(2) For this purpose **"**items subject to legal privilege**"** means-
>
> (a) communications between a legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;
>
> (b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and
>
> (c) items enclosed with or referred to in such communications and made-
>
> (i) in connection with the giving of legal advice; or
>
> (ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings,
>
> when they are in the possession of a person who is entitled to possession of them."

18. The provisions of TMA section 20 apply to the notices which are the subject of these proceedings. They have, however, been repealed since then. The equivalent now in force is in Schedule 36 to the Finance Act 2008. Like section 20 this allows notices to be served either on the taxpayer or on other persons. Paragraph 23 deals with LPP:

> "(1) An information notice does not require a person—
>
> (a) to provide privileged information, or
>
> (b) to produce any part of a document that is privileged.
>
> (2) For the purpose of this Schedule, information or a document is privileged if it is information or a document in respect of which a claim to legal professional privilege, or (in Scotland) to confidentiality

of communications as between client and professional legal adviser, could be maintained in legal proceedings.

…"

19. Paragraphs 24 to 26 contain ancillary provisions to much the same effect as section 20B(9) to (11).

20. An argument based on TMA section 20B(8) failed to persuade the House of Lords in *Morgan Grenfell* that there was no general protection as regards LPP in respect of notices served under section 20. In the context of the debate on this appeal, however, it is noteworthy that the legislation does make express provision in relation to tax accountants and to tax advisers. In particular, section 20B(9) and (10) create a carefully formulated equivalent of privilege, qualified by the limitation in subsection (11), in relation to a tax adviser who clearly would often be an accountant. That is neither here nor there if Lord Pannick is correct in submitting that LPP applies generally to the seeking and giving of legal advice on tax matters from and by accountants, Parliament having been mistaken if it thought otherwise. But it is at least relevant that specific and limited provision was made in the very legislation under which the present issue arises.

The scope of LPP: *Three Rivers (No. 6)*

21. The last decision of the House of Lords on LPP was that in *Three Rivers District Council v Governor and Company of the Bank of England (No. 6)* [2004] UKHL 48, [2005] 1 AC 610. The Court of Appeal had held that LPP applied only in respect of communications for the purpose of obtaining advice as to the legal rights and obligations of the Bank, and did not apply to communications relating to the presentation of its evidence to the inquiry set up in relation to the Bank's supervision of BCCI. The House of Lords allowed the Bank's appeal.

22. Lord Scott of Foscote spoke of the policy underlying LPP at paragraph 28:

> "So I must now come to policy. Why is it that the law has afforded this special privilege to communications between lawyers and their clients that it has denied to all other confidential communications? In relation to all other confidential communications, whether between doctor and patient, accountant and client, husband and wife, parent and child, priest and penitent, the common law recognises the confidentiality of the communication, will protect the confidentiality up to a point, but declines to allow the communication the absolute protection allowed to communications between lawyer and client giving or seeking legal advice. In relation to all these other confidential communications the law requires the public interest in the preservation of confidences and the private interest of the parties in maintaining the confidentiality of their communications to be balanced against the administration of justice reasons for requiring disclosure of the confidential material. There is a strong public interest that in criminal cases the innocent should be acquitted and the guilty convicted, that in civil cases the claimant should succeed if he is entitled to do so and should fail if he is not, that every trial should be a

> fair trial and that to provide the best chance of these desiderata being achieved all relevant material should be available to be taken into account. These are the administration of justice reasons to be placed in the balance. They will usually prevail."

23. The reference to the privilege being available only as regards communications with lawyers was relied on by Mr Brennan Q.C. for HMRC, but it is fair to say that the point now at issue was not on the agenda in that case. Lord Pannick Q.C. would say that Lord Scott's point would be the same if expressed, for example, in the third sentence, as "communications between professional adviser [instead of "lawyer"] and client giving or seeking legal advice".

24. After a review of relevant cases, Lord Scott went on to explain why he regarded the proper scope of LPP as extending beyond litigation, at paragraph 34:

> "None of these judicial dicta tie the justification for legal advice privilege to the conduct of litigation. They recognise that in the complex world in which we live there are a multitude of reasons why individuals, whether humble or powerful, or corporations, whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognise that the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest; they recognise that in order for the advice to bring about that desirable result it is essential that the full and complete facts are placed before the lawyers who are to give it; and they recognise that unless the clients can be assured that what they tell their lawyers will not be disclosed by the lawyers without their (the clients') consent, there will be cases in which the requisite candour will be absent. 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. But the dicta to which I have referred all have in common the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else (see also paras 15.8 to 15.10 of *Zuckerman's Civil Procedure* (2003) where the author refers to the rationale underlying legal advice privilege as "the rule of law rationale"). I, for my part, subscribe to this idea. It justifies, in my opinion, the retention of legal advice privilege in our law, notwithstanding that as a result cases may sometimes have to be decided in ignorance of relevant probative material."

25. He went on at paragraph 38 to refer, with approval, to what Taylor LJ had said in *Balabel v Air India (Balabel)*, in a passage relied on before us:

> "In *Balabel v Air India* [1988] Ch 317, Taylor LJ said, at p 330, that for the purposes of attracting legal advice privilege
>
> > "legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context".
>
> I would venture to draw attention to Taylor LJ's reference to "the relevant legal context". That there must be a "relevant legal context" in order for the advice to attract legal professional privilege should not be in doubt. Taylor LJ said, at p 331, that
>
> > "to extend privilege without limit to all solicitor and client communication upon matters within the ordinary business of a solicitor and referable to that relationship [would be] too wide".
>
> This remark is, in my respectful opinion, plainly correct. If a solicitor becomes the client's "man of business", and some solicitors do, responsible for advising the client on all matters of business, including investment policy, finance policy and other business matters, the advice may lack a relevant legal context. There is, in my opinion, no way of avoiding difficulty in deciding in marginal cases whether the seeking of advice from or the giving of advice by lawyers does or does not take place in a relevant legal context so as to attract legal advice privilege. In cases of doubt the judge called upon to make the decision should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law. If it does not, then, in my opinion, legal advice privilege would not apply. If it does so relate then, in my opinion, the judge should ask himself whether the communication falls within the policy underlying the justification for legal advice privilege in our law. Is the occasion on which the communication takes place and is the purpose for which it takes place such as to make it reasonable to expect the privilege to apply? The criterion must, in my opinion, be an objective one."

26. *Balabel* and *Three Rivers (No. 6)* are not the first cases in which a distinction has been drawn according to the basis of the lawyer's involvement. They and earlier such cases provide Lord Pannick with material in support of his argument that the determining factor is not the status of the adviser but the nature of the advice, and thus the function of the adviser, so that it should not matter whether the adviser is a lawyer as such or is another appropriately qualified professional person approached for, or giving, legal advice.

27. All members of the House of Lords were in agreement on these points. I could take quotations to similar effect from each of the speeches, but will content myself with two more. First, Lord Rodger of Earlsferry, at the end of paragraph 58, referred succinctly to the lawyer's task:

> "In relation to legal advice privilege what matters today remains the same as what mattered in the past: whether the lawyers are being asked qua lawyers to provide legal advice."

28. Secondly, Baroness Hale of Richmond expressed sympathy with the Court of Appeal's anxiety to set bounds on the scope of LPP, because it restricts the availability of what may be very relevant evidence. She went on at paragraphs 61 and 62:

> "61. … But the privilege is too well established in the common law for its existence to be doubted now. And there is a clear policy justification for singling out communications between lawyers and their clients from other professional communications. The privilege belongs to the client, but it attaches both to what the client tells his lawyer and to what the lawyer advises his client to do. 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. The client may not always act upon that advice (which will sometimes place the lawyer in professional difficulty, but that is a separate matter) but there is always a chance that he will. And there is little or no chance of the client taking the right or sensible course if the lawyer's advice is inaccurate or unsound because the lawyer has been given an incomplete or inaccurate picture of the client's position.
>
> 62. This rationale extends much more broadly than to advice about legal rights and obligations strictly so-called. I understand that we all endorse the approach of the Court of Appeal in *Balabel v Air India …*, and in particular the observation of Taylor LJ, at p 330, that "legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context". There will always be borderline cases in which it is difficult to decide whether there is or is not a "legal" context. But much will depend upon whether it is one in which it is reasonable for the client to consult the special professional knowledge and skills of a lawyer, so that the lawyer will be able to give the client sound advice as to what he should do, and just as importantly what he should not do, and how to do it. We want people to obey the law, enter into valid and effective transactions, settle their affairs responsibly when they separate or divorce, make wills which will withstand the challenge of the disappointed, and present their best case before all kinds of court, tribunal and inquiry in an honest and responsible manner."

29. The decision in *Three Rivers (No. 6)*, therefore, restored the previous understanding of LPP as not limited to litigation, though recognising that it did not apply merely because the communication was between a lawyer and his client. In terms the decision applies only to communications with lawyers, but the point which is at issue on this appeal did not arise in that case.

30. Like the House of Lords in *Three Rivers (No. 6)* and many previous courts, we were shown the decision of Lord Brougham, Lord Chancellor (sitting in Chancery on appeal from the Master of the Rolls) in *Greenough v Gaskell* (1833) 1 My & K 98,

which seems to have been the first case in which LPP was recognised as existing outside the context of litigation. The much cited passage, from pages 102-3, deserves quotation again:

> "The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers.
>
> But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case. If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous."

31. Lord Pannick points to the general phrase "the aid of men skilled in jurisprudence", which he says, in relation to fiscal law, includes some accountants, and to Lord Brougham's discounting of "any particular importance" as being attached to the business of lawyers as such.

Status or function?

32. Already in *Wilson v Rastall* (1792) 4 Durn & E 753, a decision of the Court of King's Bench, Buller J, agreeing with Lord Kenyon CJ, said at 759:

> "The privilege is confined to the cases of Counsel, Solicitor and Attorney; but in order to raise the privilege, it must be proved that the information, which the adverse party wishes to learn, was communicated to the witness in one of those characters; for if he be employed merely as a steward, he may be examined."

33. Mr Brennan relies on the unqualified statement at the beginning of that passage, whereas Lord Pannick points to the reference to the nature of the task performed.

34. In *Balabel* Taylor LJ considered at [1988] Ch 331 what documents would fall to be disclosed on his formulation of the scope of LPP. After reference to some examples from decided cases, he referred to an illustration advanced in argument:

> "A hypothetical instance put in argument by Mr. Burton would be a case in which a client going on extended holiday instructed his solicitor to collect rents from his tenants. If an issue subsequently arose as to whether the landlord had waived any right to forfeiture, the

> communication of those instructions to his solicitor would be disclosable and admissible because there would be no question of their being related to the obtaining of legal advice."

35. Charles J said in *S County Council v B* [2000] Fam 76, at 82 E-G that:

> "I would add that in the modern age it is not easy to see why the logic, purpose and public interest underlying the privilege when litigation is not contemplated supports the privilege in respect of communications with a lawyer but not, for example, communications with an accountant on the same subject matter;"

36. Reminded of that in argument in the present case, he said what I have quoted from paragraph 70 of his judgment at paragraph [3] above.

37. However, he considered himself bound by precedent to hold that LPP was not available for a client in respect of communications for the purposes of getting legal advice from an accountant, and was only available if the advice was sought from a lawyer.

38. There is at least one unusual case which Lord Pannick relied on as showing that the function is what matters, rather than the status of the adviser. This is *Calley v Richards* (1854) 19 Beav 401, a decision of Sir John Romilly, Master of the Rolls. The client had written to a Mr Mullings who had been a solicitor but, unknown to the client, had since ceased to practise as such, though he was held out by the firm as being still in the firm and therefore in practice. The Master of the Rolls held that LPP applied, provided that the client did not know that the adviser was no longer a solicitor. However, that is an exceptional case, and it seems to me that it does not make out what Lord Pannick needs to take from it. If function had been the test, then it may be that a person who had been a solicitor but had recently retired might be regarded as every bit as qualified to give legal advice as he had been before retirement. But the judgment makes it clear that if the client had known that Mr Mullings was no longer a solicitor, then the privilege would not be available. This is an exception which proves (i.e. tests) the rule, but it does not seem to me that the recognition of this exception, by itself, alters the nature of the rule so as to apply more generally beyond the seeking and giving of legal advice from and by professional lawyers.

39. Another unusual case is *Smith v Daniell* (1874) 18 Eq 649 where Sir James Bacon VC held that a letter written by Lord Westbury, by then retired from his office as Lord Chancellor, was not privileged from production. It is true that this was because it was not sought or given on a professional basis, but rather as from and by a friend, whereas clearly in *Calley v Richards* the advice was sought from Mr Mullings on a professional basis.

40. Lord Pannick also pointed to the extension of the scope of LPP to foreign lawyers. *Lawrence v Campbell* (1859) 4 Drew. 485, where Sir Richard Kindersley VC held that it applied in relation to a Scottish lawyer, is an early example. There have been many others since then.

41. Furthermore, he referred to the availability of LPP as regards relevant communications between employed lawyers and their employers: *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs & Excise (No 2)* [1972] 2 QB 102. That is the position under English law, though a very recent decision of the ECJ shows that it is by no means common ground, even within the EU: see *Akzo Nobel Chemicals v Commission*, Case C-550/07 P, 14 September 2010.

42. It does not seem to me that any of these cases, which are all on the periphery of the principle, assists much either way. I will refer further to the European aspect later.

43. In passing I also mention here a decision of the Employment Appeal Tribunal, though it is not binding on us. In *New Victoria Hospital v Ryan* [1993] ICR 201, the Tribunal, Tucker J presiding, held that communications between the employer and a firm of employment consultants, not being about or in contemplation of litigation, were not the subject of LPP and must be disclosed. The Tribunal said at [1993] ICR, page 203:

> "in our opinion the privilege should be strictly confined to legal advisers such as solicitors and counsel, who are professionally qualified, who are members of professional bodies, who are subject to the rules and etiquette of their professions, and who owe a duty to the Court. This is a clearly defined and easily identifiable qualification for the attachment of privilege. To extend the privilege to unqualified advisers such as personnel consultants is in our opinion unnecessary and undesirable."

44. Lord Pannick fastened on the words "such as solicitors and Counsel" as showing that the class of legal advisers is not necessarily limited to solicitors and barristers, and he also relied on the references to professional qualifications, membership of professional bodies, and being subject to professional rules and obligations, which he said was true of chartered accountants as well.

45. I do not see that the use of the phrase "such as", rather than "namely" or some other such phrase, can be taken as showing that the rule is not restricted to members of the two English legal professions but extends to others who could be called legal advisers, but are not professional lawyers as such. On the contrary, I regard this as a decision that LPP applies only in relation to lawyers. As such it does not add to other previous cases, and of course it does not bind the Court of Appeal.

The effect of legislation

46. LPP is a judge-made rule, and Lord Pannick therefore submitted that it is open to the court to declare the law by stating that LPP is available as regards communications for obtaining or giving legal advice, whether or not the adviser is a lawyer. However, in considering whether the court can, and if so should, take that step, it is necessary to consider both the existing case law, to see whether this court is bound by any previous decision on the point (as Charles J thought he was) but also to see what statutory provision has been made in this area. I do not take the provisions of TMA to be determinative for this purpose, for the House of Lords held that they were insufficient to displace the general principle of LPP, and on that basis they could also be insufficient to alter its scope. However, they are relevant, as are several other statutes

which have applied LPP expressly (and for limited purposes) to particular professions other than lawyers.

47. The earliest extension appears to have been as regards patent agents. Since then there have been other such provisions for trade mark agents and licensed conveyancers. As part of the reforms introduced by the Legal Services Act 2007 other changes have been made, and some of the provisions referred to below have been amended, but none of these alterations seems to be of particular significance either way, so I will not complicate my brief review of the position further by referring to them.

    i) By the Civil Evidence Act 1968, section 15, any communication between, on the one hand, the patent agent of a party to proceedings pending or contemplated before the Comptroller of Patents or the Patents Appeal Tribunal, and that party or any other person, on the other, was to be privileged from disclosure "in like manner as if" the proceedings had been in the High Court and the patent agent had been the party's solicitor. To much the same effect (substituting the Patents Court for the Patents Appeal Tribunal) was section 104 of the Patents Act 1977, which replaced it. Section 280 of the Copyright, Designs and Patents Act 1988 confers a more general equivalent of privilege as regards patent agents, in relation to any matter relating to the protection of any invention, design, technical information or trade mark or as to any matter involving passing off.

    ii) Section 87 of the Trade Marks Act 1994 confers an equivalent privilege in relation to communications with trade mark agents as to any matter relating to the protection of any design or trade mark or as to any matter involving passing off.

    iii) The Administration of Justice Act 1985, section 33, gave privilege as regards communications with a licensed conveyancer acting as such for a client.

48. Each of these three provisions relates to a particular profession, members of which are regulated, and it relates to the particular subject matter relevant to that profession. At common law LPP generally (as hitherto understood) applies to members of the legal professions of England and Wales, that is to say, barristers and solicitors, each of those professions being regulated, and by extension it applies to members of foreign legal professions. By contrast with the statutory extensions, it applies to advice sought or given in relation to any area of the law.

49. Lord Pannick's submission is that LPP should be recognised as extending to the seeking and giving of legal advice by accountants. I will come later to his proposition as to how the profession of accountant should be understood for this purpose. He accepts and asserts that the privilege would apply in relation to the seeking and giving of advice in relation to any area of law, as it would in relation to a lawyer. Although in practice tax law is what matters there could be other areas of law, such as company law, where some accountants have specialist legal expertise. In that respect, a judge-declared extension of LPP to accountants (however defined) would differ from the statutory extension of LPP to patent agents, trade mark agents and licensed conveyancers in not being limited to particular areas of law likely to be relevant to the given profession.

50. It is of interest in this context to note that the question whether LPP should be extended to accountants by statute has been addressed on a number of occasions over the last 40 years or so.

i) The Law Reform Committee in its 6th report, on Privilege in Civil Proceedings, in 1967 (Cmnd 3472), made recommendations, some of which were implemented by the Civil Evidence Act 1968. One of these was the extension, already mentioned, to patent agents in relation to specific proceedings only (see paragraphs 24 to 26). The Committee considered the relationship between accountants and their clients, and concluded that there was no need for this relationship to be covered by any statutory privilege (paragraph 54). It is fair to say that no particular attention was given in the Committee's report to the proposition that legal advice on tax matters was sought from and given by accountants.

ii) The Committee on Enforcement Powers of the Revenue Departments (the Keith Committee) in its report in March 1983 (Cmnd 8822) considered confidentiality and LPP at chapter 26. At paragraph 26.6.13, by a majority, the Committee recommended that LPP should be extended to duly appointed tax agents who have been admitted members of an incorporated society of accountants or of the Institute of Taxation, and should apply only to advice given by the agent. This recommendation by the Committee has not been implemented.

iii) The Director-General of Fair Trading, in a report on Competition in Professions in March 2001, expressed the view that the rule by which LPP applies only where the advice is sought from and given by a lawyer restricted and distorted competition. In July 2002 the Department of Constitutional Affairs undertook a consultation on the issues raised by that report. In July 2003, having carried out that consultation process, the DCA stated that it would not propose any change to the law as regards LPP.

51. Thus, not only has Parliament not created any statutory extension of LPP to legal advice sought from and given by accountants on tax matters, but this position has been reached after consideration of the position by several responsible bodies, making diverging recommendations on the point, including two committees, some of whose recommendations did lead to legislation. Parliament's failure to change the law in this respect is not an accident.

52. Moreover, as already noted, in the statutory context which is directly relevant in these proceedings, TMA section 20 (and since then the Finance Act 2008, Schedule 36), general reference is made to documents which are the subject of LPP, but specific provision is made as regards what a tax accountant or a tax adviser can and cannot be required to produce. Parliament has, therefore, addressed the point expressly in the material provisions.

Wilden Pump Engineering Co v Fusfeld

53. This judgment of the Court of Appeal (Waller LJ and Dillon LJ), reported at [1985] FSR 159, was decisive for Charles J in his concluding that it was not open to him to accept the arguments on behalf of Prudential.

54. The action was for breach of copyright in design drawings relating to certain pumps, the infringements alleged being both manufacture and sale. On discovery it became clear that the defendants had taken advice from patent agents both before embarking on the manufacture of the pumps, and thereafter. The plaintiff alleged that the defendants knew at the time of the sales that the manufacture constituted an infringement of the plaintiff's copyright, in response to which the defendants relied on innocence defences including in respect of the period after they had had advice from the patent agents. The plaintiff sought disclosure of the correspondence with the patent agents. The defendants admitted its relevance but claimed that it was covered by LPP at common law, even though not under section 104 of the Patents Act 1977. Upholding the decision of Falconer J to order disclosure, the Court of Appeal held that LPP was limited to lawyers, and did not extend to patent agents.

55. Dillon LJ gave the principal judgment. He stated that LPP was only available in respect of communications for the purpose of getting or giving legal advice from or by members of the legal profession. He referred to a decision of Chitty J, *Moseley v The Victoria Rubber Co* (1886) 3 RPC 351 to the effect that there was no general professional privilege covering communications between a person and his patent agent. He commented, at [1985] FSR 164, that this decision is of interest

> "in that the person whose advice was in question seems to have been both patent agent and solicitor, and the essence of the decision was that the advice which he gave was privileged as advice of a solicitor only insofar as it was advice given by him in his capacity as a solicitor, but not insofar as he was merely acting as patent agent."

56. The propositions put forward for the defendants in *Wilden Pump* were summarised by Dillon LJ at pages 164-5 as follows:

> "In the judgment of Falconer J the test for which Mr Prescott was arguing is formulated in two propositions: the first, which is not disputed:
>
> > "where legal advice is sought in confidence from a qualified legal adviser in his professional capacity, privilege may be claimed for the communications made for that purpose".
>
> The second, which is disputed:
>
> > "A qualified legal adviser is one who is officially recognised by the competent authorities in this country, or a foreign state, as being a member of a profession of persons fit to advise on the branch of law in respect of which the said advice is sought.""

57. Dillon LJ referred to other situations in which advice might be sought and given on legal matters by a person other than a member of the legal profession, including trade mark agents for trade mark issues, and accountants for tax law or company law points. He pointed out that although patent agents were regarded as qualified for certain purposes, and indeed had the benefit of a limited statutory privilege for those

purposes, they were not regarded as qualified to advise on the matter in hand, namely issues of industrial copyright. Lord Pannick submitted that this point was sufficient to dispose of the case, but that was not how Dillon LJ dealt with the matter.

58. At page 167 he said this:

> "Leaving aside, however, whether Mr Prescott fails by his own test, it seems to me that the position is that it is impossible to uphold an utterly wide test of privilege extending to any communication by the litigant with any person from whom he has sought, or happens to have received, advice on any point of law relevant to the litigation in question. It is far too wide, and the courts have never adopted such a wide approach. The narrow approach of the common law is to recognise certain types of person as being legal advisers, communications with whom on matters of law are privileged. Besides barristers and solicitors, this, it seems from the old authorities, originally also included scriveners and doctors of the civil law practising in Doctors' Commons and Proctors in the Ecclesiastical Courts - whether or not they were solicitors. But those were regarded as varieties of lawyer.
>
> I do not regard the patent agent as a variety of lawyer, and I take the view that the patent agent is not within the common law privilege."

59. Furthermore, at page 168, having referred to the statutory provisions in the Civil Evidence Act 1968 and the Patents Act 1977, he went on to say this:

> "But it seems to me that it would be quite impossible for this court, in the face of that limited grant of privilege by Parliament, to hold that there exists a much wider, general privilege covering the advice of patent agents to their clients on matters of law - not even limited to matters arising under the Patents Act.
>
> Moreover, if the court is to declare that a privilege is to be established by analogy, there must be a clear indication that the public interest so requires. I can see no such indication in the present case; in particular, no such indication which would warrant extending the general privilege to patent agents, but denying it to members of other professions, not being barristers or solicitors, who happen to give advice to their clients on matters of law."

60. He also referred to the report of the Law Reform Committee and said that its recommendation of a limited, but not a general, extension of privilege to patent agents made it even more difficult to argue in favour of a general extension of LPP at common law to patent agents. Waller LJ agreed with Dillon LJ, despite anomalies which had been identified in the persuasive argument of Mr Prescott for the defendants.

61. Charles J considered that to be a binding decision of the Court of Appeal to the effect that LPP applies, at common law, only as regards advice by members of the legal

professions, and cannot be extended to someone who is not a lawyer, even if the advice they are giving is legal advice which they are competent to give.

62. Lord Pannick submitted to us that *Wilden Pump* was not decisive of the present appeal. He argued that the ordinary advice of a patent agent, especially (as in that case) in an area outside his recognised special field, might well not be legal advice in any event. That might be so, but it was not the basis on which the case was decided. He also argued that, if decisive on the present point, it was wrong, and furthermore he said that it was not binding on the Court of Appeal now because of the impact of the Human Rights Act 1998 which, necessarily, was not at issue in 1984.

63. Leaving aside for a moment the human rights aspect, which does not seem to have been argued below, it seems to me that Charles J was right to hold that *Wilden Pump* is a decision binding on the Court of Appeal to the effect that, at common law, LPP only applies in relation to advice by lawyers, that is to say members of the legal professions of England and Wales, and by extension foreign legal professions.

64. Lord Pannick pointed out that there is no equivalent in the present case to the statutory provisions expressly applying LPP, but on a limited basis, to accountants, as there was for patent agents. That is true, though the ancillary provisions of TMA section 20 have a bearing on the point, as showing that Parliament has addressed the issue. He also submitted that the Court of Appeal's decision was not conclusive because they did not consider any intermediate position between LPP being available only in relation to professional lawyers on the one hand and an entirely general position on the other: see the passage from Dillon LJ's judgment quoted at paragraph [58] above. No alternative position was addressed under which LPP would apply if advice was sought from a relevant professional other than a lawyer so long as appropriate criteria were satisfied as regards the status and qualifications of the professional. That is true in terms of Dillon LJ's judgment, but Mr Prescott's second proposition (see paragraph [56] above) is not at all far from the essence of Lord Pannick's submission in this case. As I set it out at paragraph [74] below the latter is more elaborately formulated, but similar in substance. The case is authority for what it did decide, namely that LPP is only available in respect of advice sought from or given by lawyers. The fact that Dillon LJ did not deal in terms with the carefully articulated proposition put forward by Mr Prescott does not mean that the decision is not binding as to the basis on which the court did decide it. Nor does it seem to me that the absence of a specific provision equivalent to those extending LPP to patent agents, for limited purposes, is a sufficient basis for distinguishing the decision.

65. I have quoted at paragraph [6] above from Lord Hoffmann's speech in *Morgan Grenfell* as to the fundamental nature of the right which LPP represents. The European Court of Human Rights has held that interference with the privacy of a person's communications with his lawyer is a breach of article 8 of the European Convention on Human Rights: see *Campbell v UK* (1992) 15 EHRR 137 (a prisoner) and *Foxley v UK* (2001) 31 EHRR 25 (a bankrupt, subjected to the re-direction of his correspondence).

66. In *Campbell,* at paragraphs 46 and 48, the court said:

> "46. It is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which

> favour full and uninhibited discussion. It is for this reason that the lawyer-client relationship is privileged.
>
> …
>
> 48. … the Court sees no reason to distinguish between the different categories of correspondence with lawyers which, whatever their purpose, concern matters of a private and confidential character. In principle such letters are privileged under article 8."

67. In *Foxley* the court endorsed that proposition without developing it in any manner significant for present purposes. We were not shown any other decision of the court which casts any light on this point.

68. It does not seem to me to follow from the clear acceptance that the exercise of the right of privileged and confidential communication with a lawyer is protected by article 8, that the same article protects communications for obtaining legal advice from someone other than a member of the legal profession. Lord Pannick had recourse to article 14 in order to reinforce his argument on this point. Starting with the privileged nature of the process of seeking and obtaining legal advice, he argued that a position under which the privilege only exists if the advice is sought from and given by a member of the legal profession was inconsistent with the requirement that the enjoyment of the rights afforded, here by article 8, should be enjoyed without discrimination on any ground such as "other status". However, as Mr Brennan pointed out, the discrimination in the present case, if there is any, is not on the basis of the status of the person enjoying the right, but of the person to whom he wishes to turn to get the advice. I do not see that this falls within article 14.

69. More generally, it seems to me that while article 8 guarantees protection for correspondence with a lawyer, it cannot be taken to require the extension of that privilege to communications with any other person who may be asked to give legal advice. Given that LPP represents a significant restriction on the powerful public interest in all relevant evidence being capable of being made available for the determination of legal proceedings, it is manifestly a matter of public policy what the bounds of LPP should be. Article 8 confers a qualified right. It seems to me plain that a rule which limits LPP to communications with a member of a relevant legal profession (a) is in accordance with law and (b) can properly be regarded as necessary in a democratic society in one or more relevant interests, in particular for the protection of the rights and freedoms of others.

70. As already noted at paragraph [41] above, the scope of LPP varies as between Member States of the European Union, so that, in particular, some allow it as regards employed lawyers and others do not. If Lord Pannick's submission were correct, a restriction so that it does not apply as regards employed lawyers might be challenged as being in breach of article 8. That restriction raises different issues from those applying in relation to accountants but the argument could open the scope of LPP potentially very widely. Despite Lord Pannick's advocacy on the point, I cannot accept that there is even an arguable breach of article 8, with or without reference to article 14, in a limitation of LPP to advice by members of the legal professions, to the exclusion of accountants.

71. Moreover, a requirement of human rights law is that the relevant legal position should be appropriately certain. The significance of the rule, and its potentially controversial nature, as a virtually absolute exception to the general rule as to the availability and disclosability of relevant evidence, which does not give rise to any ad hoc balancing of competing interests (as some issues of privilege do) are exemplified by the amount of litigation over the past decades in which issues arising from it have been debated before the courts, up to the highest level. In that context, it seems to me that it is particularly important that the rule should be certain, so that its application can be readily understood. As presently understood, it seems to me that the rule does stand up to that test in practical terms. If it were to be regarded as extending, without statutory help or definition, to the seeking and giving of advice from and by professionals other than lawyers, subject to some criterion as to the status and qualification of the adviser (a point to which I will refer further below), then it seems to me that the scope of the rule would be lamentably uncertain, and that this in itself might fail to satisfy the human rights test of being "in accordance with law".

72. I therefore conclude that neither this nor any other point affords a basis for declining to follow the Court of Appeal's previous decision in *Wilden Pump,* which is binding on us. While Lord Pannick is correct in contending that function enters into the test, because the lawyer must be consulted in his professional capacity and must give (or be asked to give) advice as such, nevertheless status is also central to the test. *Wilden Pump* requires us to hold that LPP only applies (apart from statute and an exceptional case such as *Calley v Richards*) to communications with a member of a relevant legal profession.

Who is an accountant?

73. Even if that were not so, it seems to me that there would be a serious hurdle for Lord Pannick's argument to overcome, namely to what kind of adviser would LPP apply as extended? Just as, in *Wilden Pump*, Mr Prescott for the defendants sought to emphasise the professional status of patent agents, so in the present case Lord Pannick accepted that it would not be acceptable to put forward a rule that LPP applied to communications with any person who can be described as an accountant for the purpose of obtaining or giving advice on a legal aspect of a client's tax affairs. There is no recognised profession of accountant as such; there are several professional bodies to which accountants may belong in the United Kingdom, but there is no restriction on a person setting up as an accountant and providing advice on any relevant matter, including tax. Equally, of course, there is no restriction on a person setting himself up as a lawyer or legal adviser, hence the well established restriction of LPP to solicitors and barristers.

74. To meet this point, Lord Pannick Q.C. argued that the court should identify a suitable criterion for applying LPP to relevant and appropriate professionals other than lawyers. He contended that the essence of LPP is that it applies, in principle, if the person from whom the legal advice is sought or by whom it is given is a member of a profession which has as one of its functions the giving of professional legal advice to clients, if the profession is recognised by the courts for that purpose, and the person in question is a member of a relevant professional body which makes provision for maintaining proper standards by controlling entry and regulating the conduct of its members. That would cover the legal professions, but he argued that it would also cover members of at least some of the professional bodies to which accountants

belong, whether or not also members of other professions, in relation to areas of professional activity to which the law is relevant.

75. In order to propose a formula which would limit the scope of LPP to communications with appropriately qualified professional accountants, he referred to section 330 of the Proceeds of Crime Act 2002 (POCA). He argued that section 330(14) provides a suitable formula which the court should adopt in order to define the class of accountants in relation to which LPP applies.

76. Section 330 does not deal with privilege. It sets out circumstances in which some professional persons do not commit offences under POCA. As the Act stands now (since 2006) it is not limited to professional legal advisers although previously it was so limited. Section 330(6)(b) refers to a person being "a professional legal adviser or relevant professional adviser", and to the person receiving information in "privileged circumstances". Section 330(10) explains what is meant by this. Information or other matter comes to a professional legal adviser or relevant professional adviser in privileged circumstances if it is communicated or given to him (a) by (or by a representative of) a client of his in connection with the giving by the adviser of legal advice to the client, (b) by (or by a representative of) a person seeking legal advice from the adviser, or (c) by a person in connection with legal proceedings or contemplated legal proceedings. A relevant professional adviser is defined by section 330(14) as:

> "an accountant, auditor or tax adviser who is a member of a professional body which is established for accountants, auditors or tax advisers (as the case may be) and which makes provision for (a) testing the competence of those seeking admission to membership of such a body as a condition for such admission; and (b) imposing and maintaining professional and ethical standards for its members, as well as imposing sanctions for non-compliance with those standards."

77. Lord Pannick invited the court to hold that LPP is available in respect of communications by which legal advice on tax matters is sought from or given by a person within that statutory definition. Eloquently as he put it, it seems to me that this contention shows that, if LPP is to be extended so as to apply when tax advice involving legal issues is sought from or given by accountants, the appropriate scope of that extension is a matter for Parliament, not for the courts. The majority of the Keith Committee recommended a fairly simple formula, which might have been refined in the course of parliamentary drafting (see paragraph [50(ii)] above). If their recommendation had been acted on, it is possible that something along the lines of section 330 of POCA might have emerged. I do not see how that could be an exercise that it would be proper for the courts to undertake, by way of declaring the scope of LPP as a matter of the common law.

78. As has been recognised in some previous cases, and by Charles J in this case, there could be other professional advisers to whom the same principles might apply. To take only one example, advice on pension law is given by specialist solicitors and barristers, but it may also be given by pension consultants, who may not be legally qualified but may well have ample knowledge and experience to advise clients about the intricacies of English pension law and regulation. If Lord Pannick's proposition is

correct as a matter of the common law, LPP might well apply to advice sought from or given by these advisers, as well as from or by other professionals in different areas.

79. This would introduce a substantial degree of uncertainty as to the scope of the rule, which would be most undesirable, for reasons already mentioned at paragraph [71] above. Even as regards accountants, let alone other professionals, it would also be likely to lead to unintended and unforeseen consequences, particularly in relation to the application of legislation which refers to LPP in general terms, adding still further to the uncertainty.

Comparisons with other jurisdictions

80. We were shown some material about the position in Canada, Australia, New Zealand and the United States of America, and in some other jurisdictions. In New Zealand and the USA there is legislation on the point. In Australia legislation has been proposed. In Canada the application of LPP in relation to accountants appears to have been rejected. We were not shown any example of LPP applying in relation to accountants except as a result of legislation.

81. It does not seem to me to be safe to draw any particular conclusion from the varying treatment of the point in other countries. For one reason, it may depend on what protection is given under the relevant law to work carried out by one profession or another, and what activities are protected or regulated in this respect. However, it is noteworthy that no example of the application of LPP in relation to any professional adviser other than lawyers has been found except as a result of statutory intervention. That seems to me to be consistent with the conclusion to which I have come, namely that, even if there is a strong case for applying LPP in such a way, it is not a matter which can properly be achieved by the courts; it requires legislation.

Conclusion

82. I consider that this court is bound to hold that LPP does not apply, at common law, in relation to any professional other than a qualified lawyer: a solicitor or barrister, or an appropriately qualified foreign lawyer. That is the effect of *Wilden Pump*, and it is binding on us despite Lord Pannick's arguments, whether based on human rights or on an attempt to distinguish the case.

83. Even if we were not so bound, I would conclude that it is not open to the court to hold that LPP applies outside the legal profession, except as a result of relevant statutory provisions. It is of the essence of the rule that it should be clear and certain in its application, since it is not the subject of any ad hoc balancing exercise but is, to all intents and purposes, absolute. As applied to members of the legal professions, acting as such, it is sufficiently clear and certain. If it 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. To which accountants should it apply, given that "accountant" does not by itself denote membership of any particular professional body, or the obligation to comply with any, or any particular, professional obligations? To which other professional advisers would it apply? To what areas of the law would it apply as regards the advice of any adviser who is not a lawyer as such? These questions are serious and important, and

would require a clear answer in order that the scope and application of the extended LPP should be known and understood.

84. In my judgment, only Parliament can provide the answers to such questions as these. It is not a proper task for the courts to undertake. In other countries where LPP does apply in relation to accountants it is as the result of statutory intervention. In our jurisdiction, Parliament has conferred limited protection in respect of accountants by TMA section 20, and its successor, the Finance Act 2008. The enactment of an extension of LPP to accountants, more general than that of TMA though not as general as that for which Lord Pannick argues, was proposed by the majority of the Keith Committee, but that recommendation has not been taken up.

85. For those reasons, even if *Wilden Pump* were not (as I think it is) binding on us, I would have held that the arguments advanced on behalf of Prudential could not be accepted.

86. As it is, I agree with almost everything in the judgment of Charles J. The only exceptions to that are what he said at paragraphs 71 and 72 about possibly levelling the playing field by reducing the scope of LPP as it applies in relation to lawyers, and also that I do not share his view, expressed at paragraph 74, that it would be possible for the court to prescribe the conditions subject to which an accountant would qualify as regards LPP. The argument before us was developed more widely, both on behalf of Prudential (by different Leading Counsel) and with the advent of the interveners. Notwithstanding the various new points made, in particular those relying on the Human Rights Act 1998, I consider that the judge was right to reject the argument that LPP applies in relation to accountants, and to dismiss the judicial review application. I would dismiss this appeal.

Lord Justice Stanley Burnton

87. I entirely agree with the judgment of Lloyd LJ, to which I can add nothing useful.

Lord Justice Mummery

88. I also agree.

ORDER

IT IS ORDERED THAT

1. The Appeal be dismissed.

2. The Appellants do pay the Second Respondent's costs of this Appeal, such costs to be subject to detailed assessment on the standard basis if not agreed.

3. The Appellants do pay £25,000 to the Second Respondent on account of costs by 4pm on Wednesday 27 October 2010

4. No order be made as to the costs of the Interveners.

5. Permission for the Appellants to appeal to the Supreme Court is refused