



Privileged or what?

I'll say it before you do: you thought lawyers were always privileged...

In **this** context, what I mean by “privilege” is that discussions between a client and his or her solicitor have to be free from what English law calls “discovery” by another party. Those discussions should be private so that the client can properly prepare for litigation. That’s logical because, if the other litigating party could force discovery and disclosure, then one could never safely plan any litigation tactics or indeed have a full discussion about the strengths and weaknesses of the client’s position. So far, so obvious.

The Court of Appeal (in England) has just issued what may well be an important ruling in this area in the case of *Prudential Plc v. Special Commissioners of Income Tax*. The importance of the decision is that the court held that legal professional privilege does **not** apply (at common law in England) in relation to any professionals **other** than qualified lawyers (meaning solicitors, barristers or appropriately qualified foreign lawyers). As will often be the case in tax-related cases, some of the key correspondence for which discovery was sought was between Prudential and its tax advisors, not its solicitors. Prudential lost.

So, where does this leave us?

- It is very likely that a Scots court would come to the same decision as the Court of Appeal in England.
- It isn't **completely** clear whether correspondence between clients and their solicitors that is **not** in contemplation or pursuance of a dispute is privileged. However what is clear is that private discussions with any adviser **other** than a qualified lawyer are not private at all.

Summary

Given that we live in a “freedom of information” age, one should generally be aware that what may be disclosable or discoverable is increasing. For example, nothing said to an auditor can be assumed to be private. The auditor has statutory and professional duties that can cut across the privacy of such discussions. Therefore better safe than sorry and, in complex commercial disputes and transactions, you should probably assume that any advice given to you by anyone other than qualified lawyers will now be “fair game”.

Be warned!

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