



A privileged position

Jason Collins discusses legal professional privilege in relation to the Liechtenstein Disclosure Facility



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In the UK, the concept of 'legal professional privilege' (LPP) can often invoke quite heated debate, and is seen by accountancy firms as an unfair competitive advantage given to lawyers who provide tax services. Where it applies, anything discussed confidentially between the lawyer and his client is absolutely protected from disclosure to the Courts or any public authority, including HMRC, the Serious Fraud Office, the Police and the intelligence services. It is also protected from disclosure to non-UK authorities. This article looks at the reasons why LPP does not apply to accountants' advice and how LPP actually operates in practice, in particular with regard to the Liechtenstein Disclosure Facility (LDF).

Own goal

The debate has been brought sharply into focus because the Prudential, backed by PricewaterhouseCoopers, has sought to challenge whether LPP should apply to tax advice given by law firms. The Prudential has lost the argument twice now, once in 2007 in the Special Commissioners (then, the UK's specialist tax tribunal), and again in the High Court of England and Wales in October this year.

Before the Prudential began its case, the UK Courts had never formally pronounced that accountants' advice was not covered by LPP. The nearest precedent is a decision of the Court of Appeal (the second highest appeal court in England and Wales) that LPP does not apply to patent agents, who are non-lawyers but in practice advise on the law. In order to succeed, Prudential therefore needs to take its

case to the Supreme Court (the highest court in the UK). Such litigation will take several years to conclude (assuming the Prudential is given permission to appeal as far as the Supreme Court). Having caused the Courts to formally consider the position of accountants' advice for the first time, the case remains an 'own goal' for the foreseeable future.

Different regulation

The Prudential's primary argument is that accountancy firms give legal advice on tax matters in the same way that law firms do, and there is no justification for the discrimination between what are comparable services. They say that the playing field is not level.

However, this does not take into account the wider context in which those services are being provided. One of the principal reasons why LPP applies to lawyers giving legal advice is because of the different way in which law firms and accountancy firms are regulated. Legal advice is given to assist a client to comply with the law and avoid ending up in litigation. Solicitors conducting litigation have an overriding duty to the Court, because of this they are part and parcel of the system of administration of justice, and have express duties to be helpful in their dealings with the Courts. They must not act for a client if they suspect that the client is saying something untrue to the Court.

The quid pro quo is that clients should be able to talk freely to their lawyer about their legal position without fear that anything discussed will be disclosed to the Court without consent. This feature of the system overrides the conflicting need for the Courts to be in possession of all relevant information when determining disputes.

It is noteworthy that the Court of Appeal once highlighted that the professional bodies governing accountancy firms can apply to have the same statutory status as the Law Society and be permitted to authorise their members to have rights to conduct litigation

before the Courts. Since the Law Society, in granting authority to its members (ie solicitors), imposes these various duties, one would expect that any other professional body with a similar power would be expected to impose similar duties. To date no such body has sought this authorisation.

This fundamental difference in regulation means that law firms and accountancy firms cannot really be compared on a like-for-like basis. If an accountancy firm truly wants to have the benefit of LPP, it must also submit to the same form of regulation.

Disadvantage?

The High Court dismissed the argument that LLP gives law firms a competitive advantage. It noted that the overwhelming majority of tax advice given in the UK is given by accountants, so any disadvantage cannot be that great.

This statistic is undoubtedly true, and it comes about because most advice taken on structuring a person's tax affairs is taken in advance, when the client is seeking accurate, rather than confidential, advice. However, LPP is more of an important issue where a client needs to take advice on potential non-compliance in prior periods. For example, where a tax fraud may have taken place and 'self-disclosure' might be the best way forward, such as using the LDF. Here, the client is likely to be more focussed on whether what he tells his advisor is going to be kept confidential, at least until the client instructs the advisor to make the disclosure to HMRC.

LPP in practice

LPP applies in two ways. First, there is 'legal advice privilege', which applies where a client seeks advice and assistance from a law firm in relation to his legal position. It covers all communications between the law firm and client in relation to the seeking and giving of that advice and assistance. It does not cover communications with third parties



(except where they act as mere agents of communication with the client – for example an interpreter). Secondly, there is ‘litigation privilege.’ This applies only where litigation is in ‘reasonable prospect.’ When it applies, the privilege extends to communications with third parties.

‘Doubling-up’

I regularly hear law firms claim that they can work jointly with accountants in order to provide an umbrella of LPP over the work carried out by the accountancy firm. However, this is unlikely to work, especially in relation to disclosures under the LDF.

First, it is very difficult to say that litigation is in prospect; the LDF offers an opportunity to regularise one’s affairs in a non-contentious way. If litigation privilege does not apply, the only communications which will be covered by LPP are those between the client and law firm. Communications between the client and the accountancy firm, or the accountancy firm and the law firm are not covered, unless the accountancy firm (as opposed to the law firm) is acting as mere ‘post box.’ In particular, a communication between the accountancy firm and the client will not become privileged just because the law firm is copied into the communication.

For example, the accountancy firm’s remit might be for its ‘tax investigations’ team (who are tax-qualified or HMRC-trained specialists in investigating non-compliance and negotiating with HMRC) to review certain records in order to evaluate whether any tax is due and, if so, how much. To do this work it is, in the real world, necessary for the accountant to ask the client questions about the records, and to record the answers. Even if the law firm is present at, say, a meeting to discuss these matters, the purpose of the communications is to take the accountancy firm’s advice, not that of the law firm. Accordingly, LPP cannot apply, and no amount of ‘window dressing’ can alter this position.

Is LPP relevant?

There are two principal reasons why LPP can be relevant to the LDF. First, for many people, the decision to come forward to disclose to HMRC would be a difficult one. The decision should only be taken after consulting a professional advisor. If a person’s assets have remained undisclosed for a number of years, the additional comfort of knowing that what is told to the advisor remains (unless the person says otherwise) with the advisor can be very reassuring. There will be some taxpayers for whom the confidentiality position of the advisor is paramount and, for these, a law firm with the right expertise provides the best solution, especially in the early stages where the client wants confidential advice on what to do. It is even better if the law firm has its own ‘tax investigations’ capability, so that it can provide a one-stop solution (all covered by LPP) in relation to the disclosure, rather than need to involve an accountancy firm with that expertise (and blow open LPP) later down the line.

The second reason for using a law firm is that the LDF offers guaranteed immunity from prosecution – but only where no wider criminality (i.e. criminal activity other than tax fraud) has occurred. A prime example of wider criminality, of which we have seen a lot in practice, is corruption, or ‘bungs’, i.e. secret payments made to or received by a person as a reward for exercising their influence to secure that a job or contract is awarded to a particular party. This can be something approaching ‘market practice’ in certain industries and parts of the world, although the G20 is now taking firmer action to stamp it out. As a result, criminal activity of this nature is much more likely to be detected – and penalised – than was previously the case.

Where a person has been involved in such wider criminality, he needs to proceed with care before deciding what to do. Disclosure of the tax irregularities may still be advisable but this needs to be managed to minimise the ramifications in relation to the wider

criminality. In particular, information ‘gateways’, which operate between prosecuting authorities and information disclosed to HMRC to settle tax liabilities, can be used by, for example, the Serious Fraud Office (SFO) to mount an investigation into related corruption offences. There is a tendency for some accountancy firms to dismiss the risk as very low. However, as part of this international effort, new anti-corruption laws are in the process of being passed in the UK, and the SFO is taking a much tougher line on corruption than ever before. Consequently the risk of investigation has increased over the last few years and it should not be dismissed lightly.

Where wider criminality is in point, a client should seek advice from a law firm, as accountancy firms are not qualified (or insured) to advise on legal matters outside the tax offences. If a person talks to an accountancy firm without engaging a lawyer, there is a danger that anything discussed with the accountancy firm may be disclosable to the UK and ultimately overseas authorities.

Conclusion

LPP causes a lot of passionate debate. Some accountancy firms covet it. It can also lead to law firms recommending artificial arrangements in order to try to throw the cover of LPP over work done by an accountancy firm in a piece of joint working. LPP is a substantive right and, except where litigation is genuinely in prospect, it is very difficult to extend it beyond lawyers. On the face of it, this gives law firms the edge over accountancy firms if a client is at all concerned about confidentiality when seeking advice on the LDF. But the client must still ensure that he or she chooses a firm (whether law firm or accountancy firm) that has the right type of expertise to provide the requisite advice and assistance, and the ‘LPP tail’ should not wag the dog when it comes to selecting an advisor. ■