Legal advice privilege has traditionally been restricted to confidential communications between a client and a lawyer in connection with the giving of legal advice and entitles the client to refuse to disclose (and to have his lawyer refuse to disclose) those communications. A recent decision of the UK Supreme Court appears to suggest that legislation could extend this privilege to cover advice given by professional accountants, as Sarah Conroy explains.

A recent decision handed down by the UK Supreme Court appears to leave the door ajar for the UK Parliament to legislate to extend Legal Advice Privilege (LAP) to professional accountants. It remains to be seen whether Irish courts would take a similar view.

Legal advice privilege (LAP) has traditionally been restricted to confidential communications between a client and a lawyer in connection with the giving of legal advice and entitles the client to refuse to disclose (and to have his lawyer refuse to disclose) those communications. LAP is not available to any other profession, including accountants, even where the advice that the accountant has given would be characterised as legal advice if given by a lawyer. A recent decision of the UK Supreme Court has confirmed this; however, the decision appears to leave the door ajar for the UK Parliament to legislate in this regard. It remains to be seen if the Irish Courts would take a similar view.

BACKGROUND

In 2004, an international firm of accountants devised a tax avoidance scheme which it marketed to clients and disclosed to the authorities in the UK. The scheme generated a substantial tax deduction for a company which it could set against its profits. Under the UK tax code, notices were served on a company to make available certain classes of documents. The company refused to disclose certain documents on the basis that it was entitled to claim LAP. A question then arose as to whether the notices were valid on the basis that LAP was claimed. It was not disputed that if such advice had been given by a member of the legal profession privilege would extend to the advice; the question was whether, if identical advice was obtained from an accountant, the same privilege would extend to that advice. While the UK Supreme Court upheld the traditional view, there were some dissenting opinions from certain members of the Court.

The issue was whether LAP should attach to communications passing between Chartered Accountants and their clients. In its decision the Court gave certain hints that it believed that the limited common law position should be altered by Parliament; it did not believe that the Court had the power to extend this privilege to accountants.

A number of reasons for this were given:

➤ The Court took the view that the consequences of extending LAP to non-lawyers would be difficult to assess and could make the principle unclear (the “floodgates” argument);
➤ Extension of LAP to accountants raised policy questions better left to Parliament;
➤ Parliament has already enacted legislation extending LAP to certain related professions, suggesting that it would be inappropriate for the Court to extend it to other professions.

There were two strong dissenting opinions given by members of the Court. They made the following points:

➤ If the same advice had been given by a lawyer, it would definitely have attracted the protection of LAP;
➤ The courts can assess a claim of privilege over an accountant’s advice as easily as it can assess a similar claim over a lawyer’s advice;
➤ The “floodgates” argument is not
sustainable since the court is simply recognising the admitted fact that accountants give advice which would otherwise be classified as legal advice and would attract protection;

➤ It is for the courts to define the extent of privilege;
➤ The fact that the UK Government has refused to legislate in relation to privilege and accountants does not mean that the court cannot rule on this;
➤ The court is not being asked to extend the scope of LAP, just the categories of advisors whose advice is covered by LAP.

HISTORIC POSITION
The question of whether LAP should be extended to accountants has been considered on a number of occasions over the years in the UK and in Ireland. One of the difficulties identified by the English courts in placing parameters on the categories of advisors to which LAP would extend is that there is no recognised profession of accountants as such, i.e. no statutory definition of the term “accountant”. There are several professional bodies to which accountants may belong but there is no restriction on a person setting up as an accountant and providing advice on any relevant matter including tax. However, this hurdle is easily overcome on the basis that legislation could clearly define professional accountancy bodies, members of which could avail of the benefit of LAP, together with the types of advice that would be covered.

An analogy can be drawn in relation to patents agents, trade mark agents and licensed conveyancers in the UK where there have been specific legislative provisions extending LAP to advices given on members of those professions.

EXCEPTION
There is an exception to the rule restricting LAP to lawyers, which is where a non-lawyer professional seeks or receives counsel’s advice or drafts or transmits instructions to counsel. In these circumstances, he can be said to be acting as his client’s agent and the communications may be privileged within the rule. However, this would not cover the situation which arose in Prudential which involved original advice generated by a firm of Chartered Accountants.

PROTECTING THE ADVICE
It is also worth being mindful of the provisions of the Irish equivalent of the sections of the UK Statute at issue in the Prudential decision. Section 905(2)(c) of the Taxes Consolidation Act 1997 (as amended by section 92 of the Finance (No. 2) Act 2008) provides that

“nothing in this section shall be construed as requiring any person to disclose to an authorised officer … professional advice of a confidential nature given to a client”

This goes further than its UK equivalent as it certainly gives an accountant grounds on which to base an argument that it should not be forced to disclose such advice; however, it is important to be aware that this does not mean that an advisor will never have to produce such advice. The Act simply provides that nothing in the section should be interpreted as meaning that the accountant cannot rely on the confidential nature of the advices in seeking to withhold them from the Revenue; for example it is still open to the relevant authorities to seek a court order to compel the accountant to produce such advices.

Members of the accountancy profession will need to consider what steps need to be taken by them in order to protect their advice. Any good advisor will identify the strength and weaknesses of their client’s case in the context of giving appropriate professional advice to their client but also in terms of protecting themselves in future. It is here that the problem can sometimes arise as the identification of the weaknesses in a client’s position could lead to the quality of the advice being challenged by another party such as the Revenue if it subsequently reviews such advice.

Furthermore, all such advice should be marked “Privileged and Confidential” although clients and advisors should be aware that this will not guarantee that a claim of privilege will be successfully maintained in the future if the documents are sought by another party.

Non-professional clients need to be advised at the beginning that the advice given by the accountants will not be protected by legal professional privilege. Consideration should be given to giving only the blandest of advice and caveat this during a telephone conversation. However, this will not serve the purpose of protecting the client in relation to the advice that they are being given, particularly if such advice is recorded electronically or on paper, as those records will not be privileged either. Furthermore, accountants risk being criticised by clients for failing to give commercial advice or failing to identify the risks inherent in what the client intends to do.

A reference is made in the Prudential decision between “legal” and “technical” advice. It may be worth assessing at an early stage whether it is possible to distinguish between the legal and technical aspects of the above to be given and if such advice can be given in separate tranches. In practice such a distinction would be very difficult.

MULTI-DISCIPLINARY PARTNERSHIPS
The Irish Legal Services Regulation Bill 2011 allows for the establishment of multi-disciplinary practices (MDPs). However, the Bill does not refer to nor does it extend the principle of LAP to any non-lawyers which might be employed in such practices. Before MDPs are permitted it would be necessary to consider whether LAP would be extend to the non-lawyer members of the MDP if the Bill is enacted in its current form.

CONCLUSION
There needs to be recognition of the fact that advices which might have constituted legal advice in the past are now advanced by other professionals including accountants. However, for the moment, there is no such recognition. Accountants should continue to be aware that such privilege will not extend in its current form to their advices, even though such advices would be covered by LAP if given by a lawyer. It is unlikely that the Irish courts will see fit to extend the privilege, given the reluctance of their UK counterparts to do so. It will be necessary to await an intervention by the legislature in this regard.

References:
1 R (on the application of Prudential plc and another) v. Special Commissioner of Income Tax and another 2013 UKSC 1

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