

Neutral Citation Number: [2009] EWHC 2494 (Admin)

Case No: CO/11501/07

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/10/2009

Before :

M R JUSTICE CHARLES

BETWEEN :

THE QUEEN on the application of
(1) PRUDENTIAL PLC
(2) PRUDENTIAL (GIBRALTAR) LIMITED)

Claimants

- and -

(1) SPECIAL COMMISSIONER OF INCOME TAX
(2) PHILIP PANDOLFO (HM Inspector of Taxes)

Defendants

Peter Whiteman QC and Conrad McDonnell (instructed by **PWC Legal LLP**) for the **Claimants**

Timothy Brennan QC and Diya Sen Gupta (instructed by **the Solicitor for HMRC**) for the **Second Defendant**

Hearing dates: 28 to 30 July 2009

Judgment

Charles J :

Introduction

1. This is a claim for judicial review in which the Claimants challenge two notices dated 16 November 2007. The notices were served under ss 20(1) and 20(3) respectively of the Taxes Management Act 1970 (the TMA). One was to the taxpayer (the Second Claimant) under s. 20(1) and the other to a third party (the First Claimant) under s. 20(3). Nothing turns on distinctions between the notices and I shall refer to the Claimants as Prudential. The First Defendant has, as one would expect, taken no part in the proceedings. I shall refer to the Second Defendant as the Revenue.
2. Sections 20 to 20D of the TMA confer powers of investigation. The notices were served with a view to investigating a commercially marketed tax avoidance scheme. The existence of this scheme was disclosed to HMRC pursuant to statutory obligations placed on the promoters of such schemes by the Finance Act 2004 (s. 306 and following).
3. The most relevant provisions of the TMA have now been replaced by provisions of the Finance Act 2008 s. 113 and Schedule 36 Parts 1 to 8 (in particular Part 1 and Part 4). I am however concerned with the sections at the time the notices were served.
4. The powers are intrusive and enforceable by penalty. They require taxpayers (or third parties) to deliver to an Inspector documents which the Inspector reasonably believes are or may be relevant to the tax liability of a taxpayer. Exercise of these powers requires the consent of a General or (as in the present case) a Special Commissioner, who is the independent person entrusted by Parliament with the duty of supervising the exercise of these intrusive powers by the Revenue.
5. The statutory safeguards in a s 20(1) or (3) case are, so far as relevant to the present case, the standards set by the following statutory thresholds:
 - (1) the Inspector's *reasonable* opinion: s 20(1), (3),
 - (2) the Inspector must be one of those inspectors *authorised by the Board of HMRC* for this purpose: s 20(7),
 - (3) the *consent of a Commissioner* must be obtained: s 20(7)(a),
 - (4) such consent must be given only if the Commissioner is satisfied that *in all the circumstances the Inspector is justified in proceeding under s 20*: s 20(7)(b), and
 - (5) the taxpayer concerned is entitled to a written summary of the Inspector's reasons for applying for the notice and to a copy of the notice itself: s 20(8E)(b), 20B(1A). (There are exceptions to this, concerning the maintenance of confidentiality of informers (and other providers of confidential information), and risk of prejudice to the collection of tax: s 20(8G), 20(8H).)
6. The grounds of challenge are that:

- (1) the notices seek material covered by legal professional privilege (LPP), and
- (2) the notices seek material that does not on any reasonable view contain information relevant to any tax liability or to the amount of any such liability within the meaning of ss. 20(1) and (3) TMA.

I shall refer to these challenges as the LPP Challenge and the Relevance Challenge.

7. The LPP challenge is based on the proposition that LPP applies:

“when a person obtains skilled legal advice about tax law from an accountant, as opposed to a lawyer”.

This formulation was stressed by Leading Counsel for Prudential, as was the point that he was not seeking to introduce an extension to the right to claim LPP by asserting that it applied to such advice given by an accountant rather than a lawyer.

8. At the heart of his submission was his point that he was asking the court to do no more than find that, in the modern context where skilled professional advice on tax law is obtained from accountants, the long-established common law rules regarding LPP apply to the communications between client and accountant, as the professional adviser, for the purposes of obtaining such legal advice on tax and conducting litigation concerning tax liabilities.
9. The Revenue do not accept that this is what Prudential are asking the court to do and assert that they are asking the court to extend LPP and thereby create a new or an extended right.
10. As appears below I reject both the LPP and the Relevance Challenges.

Consideration of the Section 20 powers by the House of Lords

11. These powers have been considered by the House of Lords in *R v Commissioners of Inland Revenue ex parte T C Coombs & Company* [1991] 2 AC 283 and *R (Morgan Grenfell) v Special Commissioners of Income Tax* [2003] 1 AC 563. Naturally they were so considered by reference to the provisions in force at the relevant dates.
12. The *Coombs* case was concerned with the decision to use s. 20 powers and the authorisation of the service of a notice under the section.
13. The *Morgan Grenfell* case concerned advice from, and communications with, lawyers as to which it was accepted the client had the right to claim LPP. The House of Lords was concerned with the issue whether by necessary implication the statutory provisions of the TMA had overridden the accepted right of the taxpayer to claim LPP. The House of Lords, allowing the appeal, decided that they did not.
14. As appears from paragraphs 5 and 6 of the speech of Lord Hoffmann a relevance challenge was also made in the *Morgan Grenfell* case and the Divisional Court found against the taxpayer on that point (it and the Court of Appeal also found against the taxpayer on the LPP point) and the taxpayer did not pursue the relevance point in the Court of Appeal.

15. The result of the *Morgan Grenfell* case demonstrates that the right to claim LPP is exercisable in response to a request or demand for information pursuant to investigatory powers and therefore that it is not confined to a right not to disclose information in, and for the purposes of, litigation.

The nature of the Challenges

16. The underlying background to the challenges is that as, by their terms, the notices do not cover material that has already been provided all that remains under the generic descriptions of the documents set out in the notices is covered by LPP, and further or alternatively is irrelevant.
17. As LPP can be waived, it seems to me that a generic description of documents in the notices which could cover LPP material is not of itself unlawful if the right to claim LPP is recognised. This was done here in the letters that enclosed both the notices and the written decision of the Special Commissioner.
18. In this case the way in which the Relevance Issue was put means that no point arises by reference to the description of the material in the notices.
19. The challenges are therefore all or nothing challenges. But, if either of them was to succeed, issues could arise in the future as to whether for example documents or communications recording certain matters (e.g. whether a step was pre-ordained) are covered by LPP and/or are properly described as legal advice and/or are relevant.
20. Also if, as I find that they do, the challenges fail I record (a) that Prudential reserved the right to assert that some of the material is privileged as being privileged from disclosure on the basis that it is part of the process of obtaining legal advice from counsel or solicitors, and (b) that the Revenue accepted that LPP could be claimed in respect of that material.

The LPP Challenge

Introduction

21. The Revenue assert and accept that the result of the *Morgan Grenfell* case is that Prudential are not required to disclose material that is subject to LPP, *properly so described* (my emphasis), under the relevant statutory scheme.
22. But, as I have mentioned, the Revenue assert that contrary to their assertion Prudential are seeking an extension of LPP, or a new right, and that therefore (a) they are seeking to refuse disclosure of material that is not covered by LPP properly so described, and (b) the statutory code precludes them from doing this in response to a s. 20 notice.
23. The Revenue submitted and I acknowledge (a) that the task of the court is to determine whether or not the documents sought by the notices must be disclosed to the Revenue under the statutory code, and (b) that the statutory code could expressly, or by necessary implication, require disclosure of material that is covered by an extension of LPP, or an equivalent new right.
24. But it is to be remembered that:

- (1) Prudential assert that they are not seeking to rely on an extension of an existing right (LPP) or a new right, and therefore using the Revenue's description they assert that the relevant material is LPP material properly so described, and
 - (2) the Revenue accept that Prudential do not have to provide LPP material properly so described.
25. Further, in my view correctly when introducing this point of construction and application of the statutory scheme the Revenue asserted in their skeleton argument that: "the substantial issue now to be determined by the Court is whether LPP covers advice about law which is given by those who are not qualified lawyers".
26. So in my judgment Prudential's arguments that they can claim LPP should be addressed first.
27. As I have decided that Prudential cannot claim LPP, or an equivalent right by extension or analogy:
 - (1) any classification issue as to the nature of that right, and
 - (2) the issue relating to whether on its true construction and application the statutory code overrides the right or precludes Prudential from asserting it,become academic and I shall not deal with them.
28. I was taken to a considerable amount of authority on LPP (much of which is well known). They included the cases listed in the Schedule to this judgment.
29. It was common ground before me that:
 - (1) there is no decided case in English law in which the point advanced by by Prudential has been specifically addressed and answered after a detailed examination of the cases, by reference to tax law and the professional adviser being an accountant, and
 - (2) because systems of law are different and countries can take their own approach to the relevant issues relating to a right to refuse disclosure, no relevant assistance is provided by authorities from other jurisdictions, European Convention Law, or the ECHR save to the limited extent that no example of a case where LPP, or its equivalent, had been applied in other jurisdictions to non-lawyers was identified.
30. As will appear later central aspects of Prudential's arguments have been addressed by the Court of Appeal in respect of Patent Agents in *Wilden Pump Engineering Co v Fusfeld* [1985] FSR 159. This case was referred to in a footnote to one of the text books cited to me but unfortunately was not cited by either side. I shall return to it. But before doing so I will consider the arguments put to me.
31. To my mind the cases on LPP show the following:

- (1) LPP is a fundamental right at common law founded on a conclusion that one aspect of the public interest in the administration of justice demands it.
- (2) It has been classified under two sub-headings, namely legal advice privilege and litigation privilege, which are integral parts of a single privilege or right.
- (3) It has been decided that the right to claim LPP is a necessary corollary of the right of any person to obtain skilled advice about the law, or when litigation is contemplated to prepare his case, on the basis that what is discussed will never be revealed without his consent. It is thus much more than a rule of evidence and it is a right of the client and not the adviser.
- (4) It is a right that can be claimed outside the context of litigation and thus, for example, in response to a notice served by an investigator, unless the right has been overridden expressly or by necessary implication by Parliament, or it is waived. (Indeed it is probably only in response to the exercise of a power to obtain information, or when a duty of disclosure exists, that the right is needed because in other situations the duty of confidence would be likely to preclude disclosure.)
- (5) There are limited exceptions to the right. (It was not asserted that any of them apply here.)
- (6) The right covers not only the advice given but also the information provided by the client in the relevant legal context.
- (7) It is not, or is no longer, based on any balancing of competing public interests. This is because the courts have for many years regarded LPP as a right that reflects, or gives effect to, the inevitable balance between (a) the public interests against disclosure to promote the administration of justice, and (b) the competing public interests within, and outside, the public interest in promoting the administration of justice that would favour disclosure. So it has been decided that in respect of material covered by LPP the balance must always come down in favour of giving the client the right to refuse disclosure unless Parliament has intervened.
- (8) The path taken by the common law in respect of material covered by LPP is therefore different to that taken in respect of other communications where it has been said that candour and confidentiality are essential, necessary or important if an adviser is to be able to give advice and assistance on a properly and fully informed basis, or decision makers are to be able to reach decisions on such a basis. For example, the law on the disclosure of confidential communications with doctors, bankers and other professionals, and the law on PII, have taken different paths to that on LPP. In such cases there is no right to refuse disclosure unless it is conferred by statute. Rather when the competing public interests for and against disclosure are strong enough to warrant it a balancing or judgmental exercise to determine which will prevail will generally have to be carried out in the context of litigation (e.g. PII), and in other contexts. But historically (and I include that caveat because I have not investigated the impact, if any, of Articles 6 and 8) in the context of legal proceedings the public and private interests in preserving confidence in respect

of *relevant* communications with a professional adviser that are not covered by LPP generally give way to the public interest in the court having all relevant material before it (and thus in such cases the aspect of the public interest in promoting the administration of justice in favour of disclosure prevails).

- (9) In formulating the common law on LPP, on the one hand, and on PII and confidentiality on the other, the courts have therefore given different weight and effect to competing aspects of the public interest relating to the proper administration of justice and other matters. In the case of LPP, the public interest against disclosure has been given predominance so as to create a right that is exercisable by the client when disclosure is sought for the purposes of litigation and other for other purposes.
 - (10) An aspect of the proper administration of justice and other functions is the exercise of investigatory powers given to promote the public interests supporting the disclosure of information to assist in the proper performance of those functions. Here that function is the proper administration of the tax system and the payment of tax that is due. But there are many others. In respect of those powers, the privilege against self incrimination and the right to claim LPP can be expressly removed, modified or addressed by Parliament and if they are not questions can arise as to whether those rights have been removed or modified by necessary implication.
 - (11) The legal advice to which LPP applies is not confined to telling the client the law; it also includes advice as to what should prudently and sensibly be done in the relevant legal context.
32. Pausing there the predominance given to an aspect of the public interest against disclosure in promoting the administration of justice in respect of LPP has to my mind founded the following approaches being made or recognised in the cases:
- (1) the right should not be undermined or qualified in respect of communications to which it applies because of its importance to the proper administration of justice,
 - (2) the right should not be extended to other communications because of the impact it has on the disclosure of relevant information and thus on a competing public interest relating to the administration of justice that courts and tribunals should have all relevant material before them, and
 - (3) the relationship between LPP and the duties of lawyers to the court and their clients in the context of the administration of justice is part of the background of LPP and its development.

Point (3) in some respects provides a check or balance in the system if and when an issue arises relating to the disclosure of relevant facts and matters known by the lawyer but which the client refuses to disclose. This can lead to conflict and a lawyer having to cease to act in circumstances which impliedly impart a clear message to the court or tribunal that relevant material has not been disclosed. This has a potential impact on the right of the client to insist on his right to claim LPP, and thus of maintaining the confidentiality of the communications covered by LPP.

The bases of LPP

33. In *R v Derby Magistrates, ex parte B* [1996] AC 487, at 510, Lord Nicholls of Birkenhead said:

“The law has been established for at least 150 years, since the time of Lord Brougham LC in 1833 in *Greenough v Gaskell* 1 M & K 98: subject to recognised exceptions, communications seeking professional legal advice, whether or not in connection with pending court proceedings, are absolutely and permanently privileged from disclosure even though, in consequence, the communications will not be available in court proceedings in which they might be important evidence.”

And the prior history of LPP was set out in the speech of Lord Taylor of Gosforth CJ in that case, [1996] AC 487 at 504 to 507, where he traces it back to its earliest instances in 16th century reports.

34. In *Three Rivers District Council and Others v Governor and Company of the Bank of England (No. 6)* [2004] UKHL 48; [2005] 1 AC 610 at paragraph 90, Lord Carswell describes *Greenough v Gaskell* as “the fons et origo of the modern law”.
35. In *Greenough v Gaskell* (1833) 1 My & K 98, 39 ER 618 (HL), a solicitor had provided legal advice to a client on a non-contentious transaction: litigation was not in progress or expressly contemplated at the time the advice was given. The papers included communications between the client and his lawyer and communications between the lawyer and his London agent. The main passage in the speech of Lord Brougham referred to in the two more recent decisions of the House of Lords is at pages 101 to 103. He said:

“To force from the party himself the production of communications made by him to professional men seems inconsistent with the possibility of an ignorant man safely resorting to professional advice, and can only be justified if the authority of decided cases warrants it. But no authority sanctions the much wider violation of professional confidence, and in circumstances wholly different, which would be involved in compelling counsel or attorneys or solicitors to disclose matters committed to them in their professional capacity, and which, but for their employment as professional men, they would not have become possessed of.

As regards them, it does not appear that the protection is qualified by any reference to proceedings pending or in contemplation. If touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, ... or, which amounts to the same thing, if they commit to paper ... matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any Court of law or equity, either as party or as witness. If this protection were confined to cases where proceedings had commenced, the rule would exclude the most confidential, and it may be the most important of all communications — those made with a view of being prepared either for instituting or defending a suit, up to the instant that the process of the Court issued.”

“... The protection would be insufficient, if it only included communications more or less connected with judicial proceedings; for a person oftentimes requires the aid of professional advice upon the subject of his rights and his liabilities, with no references to any particular litigation, and without any other reference to litigation generally than all human affairs have, in so far as every transaction may, by possibility, become the subject of judicial inquiry. ...”

“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.”

36. Repeated reference was also made by leading counsel for Prudential to the graphic reference by Lord Brougham in another case reported in 1833, *Bolton v Corporation of Liverpool* (1833) 1 My & K 98, 39 ER 618 (HL), to: “the original of a party’s brief being in his own counsel’s bag and a copy of it being in the bag of his adversary’s counsel”.
37. It can be seen from these descriptions of the underlying bases for LPP that it is based on the need for confidentiality of communications in two contexts, namely the giving of legal advice and litigation. There are many passages in the cases to this effect. One chosen by Prudential was *AM & S Europe Ltd v EC Commission* (Case 155/79) [1983] QB 878, [1982] ECR 1575, where Advocate General Slynn said in his Opinion:

“ ... privilege springs essentially from the basic need of a man in civilised society to be able to turn to his lawyer for advice and help, and if proceedings begin, for representation; it springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks.”

The central question here

38. This is whether LPP only applies if the legal advice is given by a lawyer. Put another way: Does the professional adviser have to be a lawyer or can he be an accountant?

39. This is the central question in this case because Prudential's argument is based on legal advice privilege and not on litigation privilege. But, and it is an important "but" stressed on behalf of Prudential, the central question falls to be considered against the background that both legal advice and litigation privilege are integral parts of a single privilege or right.
40. LPP is a common law principle and therefore (subject importantly to (a) the doctrine of precedent, and (b) the effect of statute suspending or precluding development of the common law) it can be developed and applied through the courts to have regard to changing circumstances. This means that, with those qualifications, the courts, at appropriate levels, can expand or restrict the concept by applying the relevant underlying principles. At heart, these principles involve an assessment of competing public interests.
41. Starting points are a consideration of what the law now is and then whether on an analysis and application of the relevant principles (a) it covers, or should cover a new situation, or (b) it should be restricted by, for example, removing from its ambit a class of communications.

The effect of the existing authorities of LPP

42. To my mind the parties were correct to acknowledge and assert that, at the time the principles that have been applied over the years to found LPP first were set out, the effective position in society was that the advice and communications referred to were given by, and were with, members of the legal profession as it then existed.
43. In my view the general expressions of principle upon which LPP is based are capable of being read as:
 - (1) applying only to purpose and content of the communications, provided that the person giving the advice or assistance has the relevant expertise, or role, or
 - (2) requiring that the advice and assistance is given by a member of the legal profession.
44. By reference to the arguments and authorities put before me, in my view the present law as developed, applied and understood is that for LPP to apply to legal advice and assistance it has to be given by a member of the legal profession with exceptions or extensions when the right or privilege arises in litigation, or when litigation is contemplated.
45. My reasons for this conclusion are set out in the following sub-paragraphs:
 - (1) The original statements of principle refer to persons having certain skills and expertise and, in their context, to members of the legal profession. The references to not attributing a special status to lawyers do not dissociate the privilege from that profession but indicate that (a) the right is that of the client, and (b) the skills and expertise of the legal profession relate directly to the administration of justice. For example, the reference by Lord Brougham to medical advisers, whose skills and expertise are not so directly linked, do not naturally lead to a conclusion that Lord Brougham would have contemplated

that communications with persons who were not members of the legal profession, but who had the skill to give legal advice and the assistance contemplated, would be within the privilege (albeit that his thought process would in large measure have flowed from the position in society at the time).

- (2) A link to the legal profession was and remains a natural one given the necessary close relationship of lawyers with the administration of justice and their professional duties (which are also so linked). The link is also one that sets a practical limit to the extent of the right to claim LPP which runs counter to the competing public interest of all relevant material being before a court or tribunal. I accept that it can be said with some force that that line is vulnerable to attack on the basis that it could logically and rationally have been drawn elsewhere, particularly in modern conditions, but historically this attack has much less force because of the historical connection between the legal profession and the administration of justice, and what the legal and other professions then did. This line also gains some support from the reference in *Three Rivers (No 6)* case at paragraph 61 by Baroness Hale to there “being a clear policy justification for singling out communications between lawyers and their clients from other professional communications”, albeit that the other communications could be about matters other than law or litigation and this qualification can also be made in respect of the comments of Lord Scott in paragraph 28 of *Three Rivers (No 6)*.
- (3) In *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs* [1972] 2 QB 102 the Court did not approach the issue of employed lawyers on the basis that it was purpose and not profession that mattered.
- (4) When the courts have looked at the issue (admittedly on the cases referred to me without a detailed analysis) they have indicated that LPP is linked to the legal profession and not to just the purpose and nature of the advice and assistance. Examples are Lord Atkin in *Minter v Priest* [1930] AC 558 at 581 (cited in *Three Rivers (No 6)* at paragraph 109), *New Victoria Hospital v Ryan* [1993] ICR 201 at 203H, *Chantry Martin v Martin* [1953] 2 QB 286 at 293/4, *Mfongbong Umoh* (1987) 84 Cr.App.R. 138 at 143. I do not assert that these references (and others like them) are conclusive but they indicate a general understanding. References to a “legal adviser” in the cases seem to me to be referring to a member of the legal profession and not a person who advises on law. Also the references in the cases to the relevant legal context (e.g. by Lord Scott in *Three Rivers (No 6)* at paragraph 28) are concerned with the nature of advice and communication between lawyers and their clients (e.g. see the start of paragraph 28) and do not point to the right or privilege being defined by reference only to the purpose and nature of the advice and assistance.
- (5) The text books speak with a common voice that LPP applies to communications with lawyers and not other professionals apart from certain statutory exceptions and some exceptions relating to litigation privilege (see for example Thanki: The Law of Privilege (2006) at paragraph 1.48, Hollander: Documentary Evidence (2006, 9th edition) at paragraph 11-34, Passmore: Privilege (2006, 2nd edition) at paragraphs 1.142-1.445, Phipson: The Law of Evidence (2005, 16th edition) at paragraphs 23-27 to 23-30 and Cross & Tapper (2007, 11th edition) pages 469 to 470). The authorities cited,

and to which I was referred, suffer from the lack of a detailed analysis that focuses on advice on law being given by professionals other than lawyers mentioned earlier, but in my view the common voice of the authors accurately reflects the overall thrust of those authorities.

- (6) Importantly, because LPP is based on public interest and policy grounds, to my mind it is apparent that Parliament has proceeded on the basis that LPP is not based only on the purpose and nature of the advice and assistance and that special provision needs to be made if an equivalent right is to be conferred on clients of persons who are not members of the legal profession. For example, in my view it is apparent that this is the basis upon which Parliament proceeded when it enacted the provisions of Part 4 of Schedule 36 to the Finance Act 2008 and, in particular, paragraphs 23 and 25 thereof. Although I agree that the reference to legal professional privilege is in general terms (and that to a professional legal adviser relates to Scotland) it seems to me that these provisions, which follow the decision in *Morgan Grenfell*, seek to reflect that decision rather than to remove the privilege that was accepted to exist in that case and which the House of Lords held had not been removed by the earlier legislation (i.e. LPP between a client and his professional legal adviser). Also, and although I do not dispute that in paragraph 25 a tax adviser could include a lawyer, in my view the paragraph is more obviously directed at accountants. Further, in my view paragraph 25 is directed (a) to the tax advisers own documents, and (b) to the removal of a conflict between the tax advisers and their clients, based on a duty of confidence in respect of “relevant communications”, and point (b) would not be necessary if those communications were covered by legal professional privilege. I was not taken to other investigatory powers conferred by other legislation but my general understanding is that they indicate that Parliament has proceeded on the basis that LPP does not extend to legal advice given by professionals who are not members of the legal profession. This approach accords with the public interest in obtaining relevant information to promote the administration of justice and other public interests. It also accords with, and is supported by, the approach taken by Parliament in respect of Patent Agents and Trade Mark Agents by s. 280 Copyright Patents and Designs Act 1988 and s. 87 the Trade Marks Act 1994 which give a privilege against disclosure in legal proceedings in the same way as if the communication had been with his solicitor (and I have not investigated whether this would give a right to refuse disclosure sought by the exercise of an investigatory power).
46. These views are to my mind confirmed and supported by the authority mentioned earlier relating to Patent Agents that is binding on me, namely the *Wilden Pump* case. I cite from it at some length because in that case arguments advanced before me, or similar to those advanced before me, in respect of accountants were addressed square on by the Court of Appeal in the case of Patent Agents.
47. That case involved an action for infringement of the copyright in the design of drawings relating to certain air operated pumps. The Defendants relied upon the “innocence” defences in respect of the period after they had received advice from their patent agents. The Plaintiff’s solicitors sought discovery of all communications which had passed between the relevant Defendants and their patent agents in relation

to the Defendants' pump manufacturing project. The Defendants accepted that the communications in question were relevant to the issues of knowledge and innocence, but wished to claim privilege from production of the documents. The application was supported by evidence of the history of the patent agents' profession showing how their role in training had changed over more than 100 years and evidence that the patent agents' profession was the only profession which required its candidates to take examinations in which questions were set on industrial design copyright. It was accepted by the Defendants that the statutory privilege given by section 104 of the Patent Act 1977 was not wide enough to cover the position in that case. They submitted, however, that legal professional privilege arose at common law and the way in which their argument was formulated is set out by Dillon LJ (cited below). In the alternative they argued that the court should extend the common law privilege to cover patent agents.

48. Dillon LJ at pages 164 to 168 said (with my emphasis):

“ The professional privilege relied on is a well-known legal professional privilege, and that is conveniently summarised by Lord Watson in *Lyell v Kennedy* (1883) 9 AC 81 at 90, where he said:

“ The general principle of law relating to the protection of communications between a client and his agent was very well stated by the late Vice Chancellor Kindersley in the case of *Lawrence v Campbell*. He says, “ the general principle is founded upon this, that the exigencies of mankind require that in matters of business which may lead to litigation men should be enabled to communicate freely with their professional advisers, and their communications should be held confidential and sacred, and that no one should have a right to their production. And again the learned Vice Chancellor observes, “ It is now necessary, as it formerly was, for the purpose of obtaining “ protection ” (the word is printed “ production” but he clearly ought to stand “ protection”) that communications should be made either during or relating to an actual or even to an expected litigation. It is sufficient if they pass as professional communications in a professional capacity””

It is quite clear that the reference to "professional advisers" is to be understood as meaning "legal advisers." That is made clear by the judgment of Sir George Jessel in *Anderson v Bank or British Colombia* (1876) 2 Ch D 644, especially at 651 where, after citing Lord Cottenham he says " professional men means members of the legal profession, and nothing else" and again by Sir George Jessel in *Slade v Tucker* (1880) 14 Ch D 824.

More recently the same point has been made by Ormrod J in *Re Duncan Decd* [1968] P 306. He then held that the privilege extended to communications with foreign legal advisers, as had indeed been held in various earlier cases, but he emphasised that the relationship of lawyer and client must subsist between the advisers and their client. It is not any adviser whose advice is protected; it has to be a legal adviser.

It was held by Chitty J in *Moseley v The Victoria Rubber Co* (1886) 3 RPC 351, that there is no general professional privilege covering communications between a person and his patent agent.

It is not disputed by Mr Prescott, for the appellants, that that case was rightly decided, as matters then stood. But he says that matters have changed a lot since 1886. Chitty J's 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.

In the same way advice given by a solicitor in the capacity of a friend - or in some capacity other than that of a lawyer and client - would not be privileged.

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.”

Mr Prescott's submissions are, I think, essentially these: In view of the developments that have been made in the status and practice of patent agents (1) within certain fields of law, including the law of industrial copyright, a patent agent is, in modern circumstances, to be regarded as a legal adviser within the common law exemption; alternatively; (2) in line with the course adopted by the House of Lords, in *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, the court should extend the privilege if hitherto limited to solicitors, counsel and foreign lawyers to cover patent agents.

[He then briefly sets out the history of the development in the status of patent agents]

Since 1919, therefore, no person can practice as a patent agent unless he is registered as such - and to be registered, he has to pass examinations, including examinations on certain aspects of law.

In 1932 the Patents Appeal Tribunal was created, and patent agents had the right of audience before the Patents Appeal

Tribunal as in the Patent Office. Then, in 1968, by the Civil Evidence Act of that year section 15 (to which I will have to refer in greater detail later), statutory privilege was given to certain communications for the purposes of certain proceedings under the Patents Act. That privilege was confirmed and extended by the Patents Act 1977, and inasmuch as, by the latter Act, the Patents Appeal Tribunal was abolished, and appeal from the Patent Office was made to lie to the Patents Court, which was a branch of the High Court. Patent agents were given the right of audience in the High Court on appeals from the Patent Office. They also have rights to act as European patent attorneys though, as this case has no special European element, I do not need to explore that further.

The examinations which the would-be patent agent has to pass include, in the aspects of law covered, not merely patent law but registered designs, trademarks and industrial copyright.

The patent agent has, in addition to the right of audience in the Patents Office and formerly the Patents Appeal Tribunal (and now in the Patents Court) the right of access to counsel direct without the intervention of a solicitor, and it is understandable that a patent agent with access to the register, will often be asked, by an inventor, to consider whether a particular invention can be safely proceeded with. In answering that he will, if he is conscientious and has an adequate knowledge of law, not merely search the register to find out if there is any prior patent which the invention would infringe, but also warn his client, at least, of other possible risks under the law of copyright or registered designs.

It is important, however, to bear in mind that there are many other circumstances in which a person may seek or obtain advice on a point of law from someone who is not a solicitor or barrister in this country or a foreign lawyer. For instance, a trade mark agent may often be asked to give, or will give, advice on matters of trade mark law. A trademark agent has the right of audience in proceedings in the Trade Mark Registry, and also he has direct access to counsel without the intervention of solicitors in matters of trade mark law. There is, however no statutory registry of trade mark agents, and no detailed provision as to their qualifications.

In the next place accountants may very often be asked by clients to give advice on tax matters or on matters of company law, and there are many people who would regard an accountant as better qualified than a solicitor to give advice on tax matters. There is no statutory Register of accountants; there is no statutory qualification they must have before they can style themselves "accountant." They may be members of the Institute of Chartered Accountants, but they do not have to be. They have the right of audience, on Tax Appeals before the Commissioners, though not in the High Court.

Architects, in the next place, may incidentally advise or be asked to advise on matters of planning or building law, or advise on a proposed building project or development. They have to be registered and cannot call themselves architects unless they are

registered, and if registered they have to pass examinations to show their professional competence - but I do not think anyone would regard architects as a genus of lawyers.

Then, finally, there are the more nebulous categories of people who style themselves "tax consultants" or "planning and design consultants."

Mr Prescott would accept that all those categories are not covered by professional privilege for one reason or another, because they do not satisfy his test - there is no Register except for architects, and architects have never been recognised by the legislature as qualified to advise in law. But it emphasises the difficulty in drawing a line between barristers and solicitors, the recognised categories of legal advisers, and others.

In point of fact, as I read Mr Prescott's definition, it does not help patent agents, because I do not see that Parliament has ever recognised patent agents as fit to advise on the law of industrial copyright, or to be concerned with copyright litigation.

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 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.

As to the extension of the privilege by analogy, Mr Prescott's first difficulty is that Parliament has intervened by the Civil Evidence Act 1968, section 15, which I have mentioned [and he sets this out]

It is conceded - and indeed, it is obvious from the wording of the section - that what passed between these defendants and their patent agents is not remotely within the area of privilege described by the section. 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.

[He then goes on to deal with matters relating to a report of the Law Reform Committee on Privilege in Civil Proceedings and comments thereon in the House of Lords in *D v National Society for the Prevention of Cruelty to Children*]

Waller LJ agreed with Dillon LJ and said:

“ In my judgment, as Dillon LJ has already said, there are no grounds here of public policy for enlarging the privilege; indeed, in a case such as the present to which my Lord has already drawn attention, the onus of proof is on the defendants, and if there were any real need for altering the nature of the privilege, the court would not necessarily be in favour of enlarging it.

The other matter which I regard as conclusive against the case put forward by Mr Prescott was the provision, in the Civil Evidence Act 1968, which deals with this particular problem, because Mr Prescott had to argue before us that the court ought not to conclude that that provision did not limit the privilege of a patent agent. However, when one looks at the 16th Report of the Law Reform Committee it becomes absolutely clear, even if one wished to say otherwise, that that provision was conclusive because the Committee, as my Lord has pointed out, set out what the precise legal position was, without that provision.”

49. There are of course some differences between the arguments rejected in that case and those advanced here, in particular that based on the Civil Evidence Act 1968. But the points that the old authorities are to be understood to:

- (1) apply to legal advisers only, and
- (2) not to extend to other professionals (there Patent Agents) with an important specialist knowledge of the law who advise on the law,

are to my mind both important and binding on me. In addition the remarks concerning the extension of the right to claim LPP (or its equivalent) are relevant.

50. Pausing here in my view for the reasons I have given Prudential's arguments fail. However their arguments contained other aspects and I move on to consider them to see whether they lead to a different result.

Extensions beyond lawyers in respect of litigation privilege and the point that legal advice privilege and litigation privilege are integral parts of a single privilege or right

51. As I have already mentioned the cases support the proposition that the two heads are integral parts of the same privilege or right.
52. Also I accept that there are examples of extensions of litigation privilege to the clients of non lawyers, and to litigants in person, in respect of legal advice concerning litigation and in the preparation and conduct of litigation. They include:

- (1) *Ventouris v Mountain* [1991] 1 WLR 607 at 612 where Bingham LJ says:

“ The expression "legal professional privilege" is unhappy, because it falsely suggests a privilege enjoyed by the legal profession when in truth it is not the legal profession but the client who enjoys the privilege. It also suggests, surely wrongly, that a litigant in person is denied in preparing his litigation, the protection of secrecy which is enjoyed by a litigant who instructs a lawyer. The expression "litigation privilege," which has also and perhaps increasingly been used, avoids that objection but is itself open to the objection that it suggests a privilege pertaining to litigation, whereas it is clear that the privilege covers communications between the client and his agent and his professional legal adviser even when no litigation is pending or contemplated. ”

and

- (2) *M & W Grazebrook Ltd v Wallens* [1973] ICR 256, where in relation to the predecessor of the industrial tribunal, which like Tribunals dealing with tax litigation is a statutory tribunal with rights of audience for non-lawyers with relevant expertise, Sir John Donaldson concluded that the communications between the client and his non-lawyer representative, and communications between that representative and third party witnesses, are privileged despite the fact that the representative may have no professional qualification. Sir John Donaldson gave these reasons at 259 B/C:

“Before industrial tribunals it is the rule, rather than the exception, for parties to be represented by persons other than lawyers. Indeed, it is the policy of Parliament to encourage such representation. If the law to be applied to industrial tribunals were not as stated in the note in the county court rules [see p.258G: “Communications not only with legal advisers, but with other agents, with an actual view to the litigation in hand, and the mode of conduct of it, also are privileged”], the position would arise that, for example, a personnel officer, when examining as a witness a works foreman, could, at the end of the works foreman's evidence, be called upon to hand over the proof of evidence from

which he had been examining the witness. Obviously, that would be a wholly untenable situation.”

53. I acknowledge and accept, as did the Revenue, that as asserted by Prudential:
- (1) at Tribunal level most (or at least much) litigation concerning tax matters is conducted by accountants,
 - (2) in the event of legal proceedings which are conducted by an accountant, the accountant gives legal advice and advice relating to the preparation and presentation of the litigation, and
 - (3) where an accountant has conducted proceedings before the Tribunal (whether or not as advocate), the accountant may, as a solicitor would, have the conduct of subsequent appeal litigation in the High Court or the Court of Appeal and instruct Counsel for that purpose, without any solicitor being instructed, for example see *Agassi v Robinson* [2005] EWCA Civ 1507.
54. The Revenue did not argue that the client of an accountant who acts for him in, and in the preparation and presentation of tax litigation could not claim litigation privilege and for present purposes I shall assume that he can.
55. But in my judgment this assumption does not lead to a conclusion that legal advice privilege also extends to advice given by accountants on tax law in circumstances, such as the present, where if the accountant had been a solicitor the claim to LPP would not be one based on litigation privilege.
56. I comment that issues may arise in a given case as to when litigation is contemplated but to my mind it cannot be said that the nature of tax law results in litigation always being contemplated or differentiates it from advice on law in other areas that might lead to litigation.
57. I acknowledge that the position relating to litigation privilege in the cases and my assumption found arguments that:
- (1) as it is a part of a single privilege or right this supports the view that advice privilege covers, or should be extended to, legal advice, particularly perhaps when it involves the interpretation and application of tax law or equivalent issues of law in which professionals outside the legal profession specialise and where there may well be a future dispute and litigation, and
 - (2) it is the purpose and subject matter of the advice and confidential communication, rather than the identity of the adviser, that matters

But in my view the main force of these arguments relate to an assessment of the public interest and policy consideration as to where the line defining the extent of the right to assert legal advice privilege should be drawn rather than to a conclusion that the present law (which in my view binds me) supports the conclusion that both parts of LPP apply to accountants as Prudential assert.

58. My reason for this view is that in my judgment the two parts of a single privilege or right can have different elements or cover different situations. This situation already

exists in respect of legal advice and litigation privilege because the latter extends to the gathering and preparation of evidence and communications with third parties. This extension relates to the purpose of the communications as well as to the persons between whom they take place and, to my mind, confirms that as a matter of principle, logic or definition the two parts of the same right or principle do not have to relate or extend to the same range of advisers.

59. It seems to me that what makes legal advice and litigation privilege two parts of the same right or privilege (LPP) is the exceptional nature of the right or privilege the two parts result in, namely the right to refuse disclosure when generally disclosure of relevant material is regarded as beneficial. The point that the two parts are founded on a common base concerning the promotion of confidentiality in the public interest does not, in my view, mean that as a matter of principle, logic or definition it is only the purpose and nature of the advice and assistance that can matter. Rather, it seems to me that when considering legal advice privilege a logical application of the underlying principles and purpose that found both parts of LPP includes a consideration of the position and qualifications of the person giving the legal advice and therefore it is permissible, as a matter of logic and principle, to draw a line by reference to that criteria. Indeed part, and in my view a necessary part, of Prudential's argument focused on the position and qualifications of accountants in giving legal advice rather than simply on the point that they gave legal advice.
60. The points that (a) in many situations there can be an overlap between the two parts of LPP and classification between them is unnecessary, and (b) the place where the line is drawn by reference to the position and qualifications of the adviser, do not alter that view.

Some cases where the advice has not in fact been from a lawyer, or a lawyer with particular qualifications or independent status, but it was found that the client had the right to refuse disclosure

61. The following are examples of the above that were relied on by Prudential to found an argument that the status of the adviser was not determinative of the existence and scope of the privilege and that this was determined by the nature, purpose and content of the advice and confidential communications:
- (1) *Calley v Richards* (1854) 19 Beav 401, in which the Court of Appeal held that the decision in *Fountain v Young* (1807) 1 Esp 113, to the effect that if the client mistakenly thinks the person he is obtaining legal advice from is a lawyer but the person is not in fact a lawyer then no privilege attaches, was incorrect. Lord Romilly MR said "it is not now the rule of this court".
 - (2) *Alfred Crompton Amusement Machines Ltd v C&E Comrs (No 2)* [1972] 2 QB 102, a value added tax case, in which the Court of Appeal held that the legal advice given by employed lawyers to their employers, rather than lawyers in independent practice was privileged.
 - (3) *New Victoria Hospital v Ryan* [1993] ICR 201, at 203-204, where Tucker J referred in an *obiter* passage to advisers "such as solicitors or counsel", and thus it was said that he was not seeking to limit legal professional privilege to these categories of legal advisers.

(4) *Great Atlantic Insurance v Home Insurance* [1981] 1 WLR 529 C.A. at 536, and *R v Middlesex Guildhall Crown Court ex p. Tamosius* [2000] 1 WLR 453, D.C. at 455 and 459D where LPP has been held to apply to foreign legal advisers whose qualifications and status may not be the same as English lawyers.

62. In my judgment, if and to the extent that these are examples of an application or extension of the right to clients of non lawyers the reasoning is not focused on purpose rather than on, or to the exclusion of, profession and thus the qualification and expertise of the adviser (or in the cases mentioned in sub-paragraph (1) what the client thought they were). For this reason and by analogy to the reasons given under then last heading I do not accept that this line of argument founds the result sought by Prudential.

Application of the cases having regard to modern conditions, policy and public interest

63. Tax is payable by law and only because of law (see for example *Vestey v IRC* [1980] AC 1148). So advice on tax is advice on law.

64. In my view Prudential have put forward a compelling, and indeed unanswerable, case that in modern conditions accountants have the expertise to advise on tax law and it is firms of accountants, rather than firms of solicitors, who do give such advice and represent clients in disputes with the Revenue on many aspects of their tax affairs. Further many firms of accountants now employ lawyers to advise on tax and what they, and qualified accountants in the same firm, do in this context is the same. (Both points are referred to in the *Wilden Pump* case.)

65. So, in my view, Prudential have shown that accountants do what lawyers are described as doing in the cases that establish LPP. This has been the case for some time and in my view an equivalent position can be said to exist in respect of other professions.

66. But, for the reasons I have set out, I have concluded that the cases do not provide existing authority that clients of accountants and other professions (apart for lawyers) have a right to claim LPP on the basis of legal advice privilege. Indeed it is accepted by Prudential that if I was to hold that accountants have such privilege this would be a first.

67. Although I acknowledge that the courts have power to develop the common law by the application of existing principle to modern conditions I am of the view that the conclusions I have reached and set out above mean that the doctrine of precedent excludes me from so developing the law.

68. But if that is wrong the issue still remains whether as an application of the existing principles and the points that underlie them, or the development of those principles, policy and public interest support the result urged by Prudential, namely that clients of accountants can have a right to refuse disclosure of legal advice given to them on tax law by accountants on the basis of advice privilege.

69. Unsurprisingly, given its content I was referred by Prudential to a decision of my own, *S County Council v B* [2000] Fam 76 in particular at 82 E/G where, having referred to a citation from the *Derby Magistrates Court* case, I said:

“As that citation shows it was pointed out it was not easy to discover why a like privilege had been refused to others and 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, an accountant on the same subject matter”

70. I maintain that view, and 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 although, for the reasons I have given, I have concluded that that drawing of the line is what has been done in accordance with a logical and principled approach to promote the purpose and public interest upon which is LPP is based.

71. But, the strength of that argument and the points that run with it that the drawing of such a distinction is illogical do not necessarily lead to the conclusion sought by Prudential (whether classified as an application, development or expansion) of the existing principles and law. Rather, it could lead to a conclusion that to achieve parity between the client of different professionals who are all by reason of their qualifications giving legal advice, the right given to clients of lawyers to refuse to disclose the legal advice they have been given (and related confidential communications) should be removed.

72. In this context it seems to me that:

(1) the point compellingly advanced by Prudential that accountants rather than solicitors now advise clients on many aspects of tax law carries with it the points (a) that clients of accountants have not been put off creating this situation by the generally accepted view that they do not have the right to refuse to disclose that legal advice, and related communications, which they would have had if they had been given by, and were with, a solicitor, and therefore (b) that the conclusion underlying LPP that there is a need for absolute confidentiality in respect of legal advice may need revisiting,

(2) the view that the need for absolute confidentiality in respect of legal advice may need revisiting can be also be based on the points that, in many other areas of modern life, if an adviser is to be in a position to give fully and properly informed advice there is a need for full and frank disclosure; but a general right to refuse disclosure of the communications between client and professional adviser has not been given and it seems that this has not led to assertions by non lawyers and their clients that full and frank discussion between them is inhibited. I add that it was no part of Prudential’s argument that full and frank disclosure between clients and their accountants was inhibited, and

- (3) the point that in many cases, as has been shown in other areas (e.g. PII), confidentiality can be preserved on the basis that the disclosure is not relevant,

are factors that support the view that rather than applying legal advice privilege to a wider range of professionals its application to advice given by lawyers should be restricted on a review of the policy and public interest considerations that underlie LPP.

73. As shown by the *Wilden Pump* case, it is for Prudential to show that the principles underlying legal advice privilege should now be applied to give the right it creates to clients of accountants in respect of tax advice. In my view because of the three points made in the last paragraph:

- (1) They have failed to do so.
- (2) Albeit that, I accept that there is force in the argument that a level playing field on the disclosure of legal advice to clients of lawyers and accountants (and other professionals with expertise in a particular field of law or perhaps other matters where a full and frank exchange of information is necessary or desirable if sound advice is to be given) should be created. If this is not done by restricting or removing the right given to clients of lawyers, then
- (3) the balance of the competing public interests, having particular regard to the general desirability that relevant material should be disclosed (and this applies with force in the context of powers of investigation given to the Revenue and other public authorities seeking information to assist them in the performance of their functions), favours the conclusion that the right to claim legal advice privilege should not be extended beyond legal advice given by the legal profession.

Miscellaneous

74. The Revenue raised a point (also touched on in the *Wilden Pump* case) relating to the definition of an accountant for the purposes of the right claimed by Prudential and a linked point concerning the professional duties and regulation of accountants. I acknowledge that these are problems that would have to be faced if LPP (or its equivalent) was to be applied to legal advice (or indeed other advice) given by accountants, but I have not given them weight in reaching my conclusions. This is because it seems to me that if it does not already exist (and some of the material I was shown indicated that it did) equivalent provisions to those for lawyers relating to professional duties and regulation could be put in place, and an accountant whose clients could claim legal advice privilege or its equivalent could be defined or described.

The Relevance challenge

75. In opening Prudential sought to reserve this challenge but in my view correctly accepted that this was not the correct course.

76. As argued orally the challenge focused on the assertion that in seeking disclosure of skilled advice on tax law given by accountants the Revenue were unlawfully departing from their earlier stance and practice.
77. It was asserted that until recently the Revenue did not normally seek disclosure of any advice documents because they did not normally consider advice documents to be relevant to the determination of tax liabilities. Reliance was placed on:
- (1) Inland Revenue “Tax Bulletin 46” (April 2000), issued following the Revenue’s success before the Special Commissioner in the *Morgan Grenfell* case (*An Applicant v. An Inspector of Taxes* SpC 189), in which the Revenue said:

“This is the article on Information Powers and Legal Advice foreshadowed in Tax Bulletin Issue 41 (June 1999, page 676). Its purpose is to explain our view on the question of claims to professional or legal privilege which are sometimes made in response to requests for information. ...”

“... The same principles apply equally to advice provided by lawyers and that from tax advisers. References to ‘legal advice’ in this article should therefore be read as covering all tax advice whether or not it is given by lawyers.”

After then setting out the Revenue’s view (at that time) that common law legal professional privilege did not apply to any tax advice, being displaced by the statutory protections from disclosure. The article continued by explaining that even so, not all advice was disclosable, since in order to be disclosable it had also to meet the test of relevance.

“... We recognise that this [the Section 20] test of relevance will not often be satisfied where legal advice is concerned. ‘Pure’ legal advice, that is advice concerned with whether specific pieces of legislation apply to a given transaction, is simply opinion on the law and will be exempt from disclosure save in wholly exceptional circumstances. ...”,
 - (2) Tax Bulletin 62, issued in December 2002 following the decision of the House of Lords in the *Morgan Grenfell* case by which the Revenue confirmed that Tax Bulletin 46 should be read “subject to the proviso that documents subject to the legal professional privilege of the person under enquiry are excluded from the scope of [the section 20] information powers”, but it was recognised that
 - (3) more recently (in December 2003 and in December 2005 respectively) these articles in Tax Bulletin 46 and Tax Bulletin 62 have been said by the Revenue (in their index of Tax Bulletin articles) to have been “deleted”, although it was asserted that no reason for that has been given and there has been no formal withdrawal of any of the statements made and no substituted statement.
78. In my judgment there is nothing in this argument that there has been a departure from a policy or practice argument because there is no relevant policy or practice and, in

any event, the Revenue accept that in many cases pure legal advice will be irrelevant (a point I have referred to above as a reason for non-disclosure of confidential material).

79. The written argument on the Relevance challenge was directly focused on the allegation that the material sought is irrelevant to the determination of the proper tax treatment of the actual transactions carried out. As to this Prudential observed that a similar argument was rejected by the Divisional Court in *R (on the application of Morgan Grenfell & Co) v Special Commissioner of Income Tax* [2000] STC 965 D.C.; [2002] 2 WLR 255 C.A., see determination of “Issue III” by the Divisional Court at paragraph 52, and neither the Court of Appeal nor the House of Lords expressed a view on the relevance question. It was this that prompted the stance of seeking to reserve this issue.
80. In my judgment for the reasons set out by the Revenue there is nothing in this challenge. I summarise those reasons as follows:
 - (1) The statutory test is whether the documents, in the officer’s reasonable opinion, contain or may contain information relevant to the tax liability or its amount.
 - (2) Information which ‘may be relevant’ to tax liability is not limited to ‘factual material’. Whether the information is ‘necessary’ for the officer to form a view on a tax liability or its amount is not the test. If there was no possibility that the information would be relevant, or if it merely repeated something that the officer already knew and accepted, he would not be justified in proceeding under s 20. But as the Special Commissioner decided that is not this case.
 - (3) The documents sought by the officer are set out in the relevant notices. Prudential has listed in paragraph 5 of their Grounds what they assert are the documents in dispute, but it is to be remembered that their legal challenge is not to their own list of what they say they retain, but to the terms of the two statutory notices, which are expressed differently. (As I have mentioned they are in fairly general terms but were accompanied by a letter making it clear that the production of documents covered by LPP was not sought.)
 - (4) The re-categorisation by Prudential of the documents said to be in dispute (at paragraph 5 of their Grounds) is not helpful. For example, there are a number of documents referred to, such as instructions to Counsel, which are not in dispute since the Revenue (in accordance with the decision of the House of Lords in Morgan Grenfell) do not seek LPP material. Additionally, the First-tier Tribunal can determine whether a particular document is or is not subject to LPP on the basis that legal advice privilege does not extend to the process of obtaining legal advice from accountants (the overarching question in the LPP Challenge).
 - (5) The challenge to the rationality of the decisions in respect of the notices under the Relevance Challenge should be determined by reference to the terms of the notices, which the Special Commissioner authorised the Inspector to give, and not by reference to some other (and not agreed) categorisation of documents.

(6) The Revenue have been provided with a bundle of finalised transactional documents and copies of some internal correspondence in relation to the implementation of the avoidance scheme. The Revenue have formed the view that these do not include all the documents in the power or possession of Prudential. This view gains support from the contents of certain e-mails included in Prudential's previous disclosure. These e-mails also support the Revenue's view that documents contained in the bundle provided by Prudential do not necessarily contain all of the relevant facts.

(7) The Special Commissioner agreed with this view. The content of the e-mails includes the following:

“As the preference is not to mention the declaration and payment of the dividend by PCAHL the “outline proposal” element of the note is brief and just details the intention to issue the warrants to SNC...Just a presentational point, we mention that the reason for the issue of the warrants is to facilitate the winding up of PCAHL, but we do not explain how the issue helps to achieve that – perhaps a point to gloss over...

Please do NOT include reference to the dividend in the approvals note as that would give it an inevitability.

As you know, Robin has let us have a copy of the proposed steps to effect the payment of the charge by PGL. Myself and David have had discussions to try and “put a little flesh on the bones” and as a result have numerous questions for PwC e.g. duration and terms of the warrant, are the Australian directors aware of the proposals, nature of the investment in the partnership – capital or debt-, does the partnership need a general partner, how does PCAHL reconcile the issue of the warrants which will include a provision that no dividends will be paid during the term of the warrant with the fact that it will propose to pay a dividend to PGL on the same day, etc, etc... ”

(8) These extracts indicate that the contents of the final transactional documents may not include all the facts (the omission of reference to dividends in the approvals paper for example) and that the correspondence with the accountants (who are the scheme promoters) is not confined to advice on the taxation treatment. The accountants were closely involved in the arrangements for implementation of the scheme and sight of the documents sought is (or – in the words of the statutory test – may be) relevant to the tax liability or its amount.

(9) The Special Commissioner's decision on relevance was as follows:

“The Officer considers that the true purpose of the transactions has been at least glossed over and that a decision to declare the dividend may already have been made. In the light of these e-mails I cannot accept [Prudential's] contention that “HMRC has been provided with the key facts”. I consider that the Officer is entirely reasonable in his opinion that the documents sought contain or may contain information that shows the whole facts which are relevant to the tax liability of the Gibraltar Subsidiary”

(10) The issue before the Court on relevance is not whether the Officer and the Special Commissioner were correct in their views, but whether their views

were perverse. In order to establish this, Prudential would have to establish, with evidence, that the officer (and the Special Commissioner) could not reasonably hold the views they did.

- (11) The point was dealt with in the TC Coombs case where for example Lord Lowry said (at 301H to 302D):

“(1) The applicant [for judicial review] has to prove a negative. (2) What he has to prove is ... the absence of a reasonable opinion on the part of someone else, namely the inspector. (3) The inspector’s opinion has to have been reasonable but need not have been correct. (4) The resolution of the question will usually depend to a large measure on evidence which is not before the court. (5) By reason of the principle of confidentiality [of the hearing before the Commissioner] ... the general rule for taking account of a party’s silence does not fully apply and, for the same reason, the court cannot assess the extent to which in each case it does not apply. (6) Proceedings in which affidavit evidence is the general rule are not well suited to resolving factual questions.

I hope that these observations will also help to show how much better a position the commissioner is in to make a just appraisal under s 20(7) than a court conducting a judicial review.”

- (12) Particularly in the light of the content of the e-mails referred to above and the TC Coombs presumptions of regularity the proposition that these decisions are perverse is incorrect.

81. In my judgment not only does this line of argument (and in particular sub-paragraphs (6) to (9)) show that the decisions of the Special Commissioner and the Inspector were not perverse, it also demonstrates that what is being sought is not “pure legal advice” on the meaning and effect of relevant taxing provisions but information concerning the nature of the transactions and, in particular, what was and what was not pre-ordained.