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A Consolidated Update of Legal Professional Privilege

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INTRODUCTION

1. This talk[1] sets out to provide a brief review of the law surrounding legal professional privilege. This talk is subdivided into nine (9) parts:

    1. Advice Privilege
    2. Litigation Privilege
    3. Miscellaneous
    4. Public Policy
    5. Other Professionals
    6. Human Rights
    7. Losing Privilege
    8. CPR
    9. Summary

2. In English law legal professional privilege is a substantive common law and human right that confers a form of protection over certain confidential communications made between a professional legal adviser and his client and/or third party.

3. The protection afforded to communications within the scope of legal professional privilege is divided into two categories:

    a. Advice Privilege

    b. Litigation Privilege

PART 1: ADVICE PRIVILEGE

4. Advice Privilege protects a confidential communication made between a client and his professional legal adviser that is made for the purpose of seeking or giving legal advice or related legal assistance. It is not necessary under this head for there to be pending or anticipated legal or quasi proceedings.

5. Advice privilege protects all qualifying communications made between client and lawyer irrespective of their subject matter providing always it is in a relevant legal context.

The Test for LAP

6. The starting point for what must be established for advice privilege is that the claim is made in respect of communications, whether written or oral, that is made:

[1] Largely adopted from Mr Colin Passmore's latest book on Legal Professional Privilege 2013

a. Between a client and his lawyer, where the lawyer is acting in the course of their professional relationship and within the scope of his professional duties

b. Under conditions of confidentially

c. For the purpose of enabling the client to seek, or the lawyer to give, legal advice or assistance in a relevant context.

Identifying LAP and Assistance

7. In the case of ***Three Rivers (No.6) [2004] UKHL 48*** the House of Lords approved Taylor L.J's reference in ***Balabel v Air India (1988) Ch 317 at 330*** to advice being sought in a relevant legal context linking the availability of the privilege with the performance of the functions ordinarily undertaken by a lawyer with the benefit of his specific legal skills. Baroness Hale stated in the ***Three Rivers (No.6)***:

> *"I understand that we all endorse the approach of the Court of Appeal in **Balabel v Air India** and in particular the observations of Taylor L.J that "legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context."*

8. Lord Carswell said this:

> *"all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, notwithstanding that they do not contain advice on matter of law of construction, provided that they are directly related to the performance by the solicitor or his professional duty as legal adviser."*

9. Accordingly LAP is wide in scope.

10. The 'dominant purpose' test has no obvious role to play in determining claims for advice privilege under English law. The test is 'relevant legal context' in which legal advice is given.

11. Majority of the work undertaken by a solicitor is likely to have a relevant legal context. The courts have discouraged any narrow nit-picking approach.

Third Party Communications

12. Communications with third parties are only protected by privilege when it is made in respect of litigation.

13. By way of illustration in the court of appeal in ***Wheeler v Le Marchant (1881) 17 Ch D 675*** Sir George Jessel M.R rejected the defendants' claim for privilege, since it would have resulted in an extension of the protection afforded by the rule, where he stated:

> *"The solicitor, being consulted in a manner as to which no dispute has arisen, thinks he would like to know some further facts before giving his advice, and applies to a surveyor to tell him what the state of a given property is because it is desired or required by the solicitor in order to enable him the better to give legal advice. It appears to me that to give such protection would not only extend the rule beyond what has been previously laid down, but beyond what necessity warrants."*

14. Accordingly if a client asks his solicitor to engage an expert to advise him the expert's report will not be privileged and will be disclosable in any subsequent litigation where relevant.

15. This distinction is worth bearing in mind where, for example banking or corporate finance solicitors engage external accountants to assist with on-going non-contentious transactions, since all too frequently it is not appreciated that the accountants' work is not privileged.

Documents protected by LAP

16. LAP extends to protect certain types of documents such as lawyers' internal research notes.

17. LAP will protect communications held on CDs, computers, tape and any other means of recording communications like fax, emails etc.

18. A copy of an existing document which predates the need to instruct a lawyer will not be protected by LAP.

19. A document that contains material or information prepared for submission to a legal adviser perhaps such as a map or a drawing may form the basis of the advice that will be protected by LAP on the basis that such documents were brought into existence for the purpose of confidential relationship between client and lawyer.

20. Accordingly the test is whether the documents were brought into existence for the purpose of a confidential relationship.

Fruits of the Advice

21. Fruit of the advice is not protected by LAP. There is a distinction between a communication by a lawyer which is protected and the result which is not. Documents merely evidences a transaction such as:

    a. A contract
    b. A trust
    c. Settlement Agreement
    d. Income tax returns
    e. Company registration forms

    will not be privileged for these are brought into existence otherwise than as a communication between client and lawyer seeking or giving legal advice.

PART 2: LITIGATION PRIVILEGE

22. Litigation privilege protects confidential communications made between the client or his legal adviser and a third party such as an expert or factual witness where such communications comes into existence for the 'dominant purpose' for use in connection with existing, pending or anticipated litigation such as court proceedings, arbitration and/or employment tribunals and the like.

23. This head of privilege also protects communications between the client and his non-legal representatives such as an accountant or engineer.

24. The leading case is ***Waugh v British Railways Board [1980] AC 521*** whereby it was held:

    " … to keep clear the distinction between:

    (a) communications between client and legal adviser, and

    (b) communications between the client and third parties …

    in cases falling within (a), privilege from disclosure attaches to communications for the purpose of obtaining legal advice and it is immaterial whether or not the possibility of litigation were even contemplated … but in cases falling within (b), the position is quite otherwise. Litigation is its actual hallmark."

The Dominant Purpose Test

25. The test of litigation privilege is that the client must establish the communication is:

a. Between either (i) himself or (ii) his lawyer and a third party

b. In either case under the conditions of confidentiality

c. For the dominant purpose of use in litigation that at a time the communication is:

    i. Either proceeding or pending, or reasonably anticipated or in contemplation and

    ii. Litigation in which the client is or reasonably anticipates becoming a party

d. For the purpose of either:

    i. Enabling legal advice to be sought or given, and/or

    ii. Seeking or obtaining evidence or information to be used in or in connection with the litigation concerned

PART 3: MISCELLANEOUS

The Client

26. The client is not always easy to identify. Where the client is an individual identifying the client is not difficult. However, when it is a large company the client can be difficult to define. In a large company the client may be a legal department or a pre-selected number of personnel charged with communicating with the legal adviser.

27. Ordinarily a client's employees' communication with the lawyer will not be privileged.

28. ***Three Rivers (No.5) [2003] EWCA Civ 474*** related to the collapse of the BCCI banking group in 1991. The bank appointed a lawyer to advise on all aspects of its submission to the inquiry lead by Bingham L.J. The bank also constituted an internal committee of three senior employees which was known as the Bank Inquiry Unit (BIU) to deal with all communications between the Bank and the Inquiry. The BIU was the client for the purposes of communications between the lawyer.

29. BIU engaged a number of the Bank's employees to carry out certain activities including pooling information. It was successfully argued that the communications between BIU and the Bank's employees were not protected by LAP as such communications were in effect third party communications.

30. Such third party communications were not protected by litigation privilege because it was not for the 'dominant purposes' of actual or pending litigation.

31. In the case of corporate clients 'LAP does not attach to communications to the legal adviser by either employees who were not part of the directing mind and will of "the client" or by others who were not "the client".

32. The Court of Appeal justified its restriction on LAP on the premise that it was not clear whether there was less of a temptation for the client not to offer a clean breast to his legal adviser where advice is sought in a non-contentious matter.

33. As a result practitioners and their corporate clients will have to have continuing regard to the issue of who is the client and who within its camp can communicate with the lawyers under the cloak of LAP in non-adversarial situations.

Legal Adviser

34. The legal adviser was established as early as 1792 in a case known as ***Wilson v Rastall (1792) 4 Dum & 753*** insofar as this case limited privilege to:

    a. Counsel
    b. Solicitor
    c. Attorney

35. Today this includes lawyers and their employees, such as legal executives, paralegals, trainees or licenced conveyancers.

Lawyers who have no Practicing Certificates

36. In the case of ***Dadourian Group International Inc & Ors v Simms & Ors [2008] EWHC 1784 (Ch)*** Patten J had to consider whether a solicitor (Mr Simms) who had been struck off the Roll could qualify under either head of privilege.

37. After considering the cases of ***Calley v Richards*** Patten J said this:

> *"Given that the general rule is that legal professional privilege does not attach to communications between a lawyer and his client unless the former is qualified to practice, it seems to me that the burden is on the defendants to show that they continued to believe that Mr Simms held a practicing certificate as a solicitor at the time when the documents came into existence and that in the absence of such evidence the claim to legal professional privilege in the documents cannot be maintained except for any documents sent by the clients themselves (or their agents) to third parties for the (or their agents) to*

third parties for the purpose of gathering information relevant to the proceedings."

38. Further, professional failings such as failing to register his practicing address with the law society, to issue an engagement letter would not have a prospect of success since a client cannot be prejudiced by the professional failings of his solicitor.

Whose Privilege is it

39. Privilege belongs to the client and not the legal adviser, however, the legal adviser is capable of waiving such privilege as agent of the client having ostensible authority to act on its behalf.

40. Subject to various statutory abrogations a client may refuse to disclose the contents of its confidential legal communications to any third party. However, absent of Parliament's clear and compelling words in primary legislation a court will find that privilege remains substantive law.

41. An example of Parliament abrogation is found in the Regulation of Investigatory Powers Act 2000 and the Police Act 1977 in relation to surveillance powers.

Spent Privilege

42. There is a school of thought that privilege may be spent insofar as the client may have no interest to protect by maintaining privilege. However, in ***Nationwide Building Society v Various Solicitors [1999] PNLR 52 at 69***, Blackburn J held that whether the client has any interest in continuing to assert privilege is absolute and the lawyer's mouth is shut forever.

Automatic Reports

43. The test of dominance will be difficult to satisfy when enquiries are instituted or reports produced automatically whenever a mishap occurs, whatever its nature, its gravity of even its triviality.

44. A subordinates' report sent to a superior sent in consequence of a general order to report, or in the ordinary course of his duty, will not normally be privileged since the dominant purpose behind its creation will not be used in the litigation. For example a complaints procedure which is triggered prior to the commencement of litigation.

Abrogation of Privilege by Statue

45. The House of Lords has emphasised that it is likely to be difficult to persuade a court that legislation whether primary or secondary can be construed so as to override or curtail the right to privilege.

46. Lord Hoffmann accepted in Simms ***R v Secretary of State for the Home Department Ex p Simms [1999] UKHL 33*** that Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental human rights but that would have a political cost. Such legislation would have to have a legitimate aim such as ***Regulation of Investigatory Powers Act 2000 section 27(1)*** and Police Act 1977 for surveillance powers which include listening into client / lawyer communications.

47. Other than this Parliament has so far left privilege 'untouched' insofar as there is no English statute which contains an express statutory abrogation of privilege other than what can be said as 'technical abrogations' such as ***RIPA, Police Act and Solicitors Act 1974***.

Law Society Powers & Privilege

48. The Solicitors Act 1974 and now schedule 36 of the Finance Act 2008 may be cause to compel disclosure by solicitors of information relating to his client's affairs even though it may be privileged. The information so obtained can only be used respectively for the purpose of the Law Society investigation into the solicitor's affairs and the determination of the solicitor's personal tax liabilities. Otherwise such information must be kept confidential.

Adverse Inference

49. As long ago as ***Wentworth v Lloyds (1864) 10 HL*** Lord Chelmsford stated this about adverse inference against a person withholding privileged information:

> *"The exclusion of such evidence is for the general interests of the community, and therefore to say that when a party refuses to permit professional confidence to be broken, everything must be taken most strongly against him, what is it but to deny him the protection which, but for public purposes, the law affords him, and utterly to take away a privilege which can thus only be asserted to his prejudice."*

Sharing Privileged Information

50. An employer may have the need to share privileged information with employees in order for them to take business decisions in light of such legal advice providing

always it is done in a manner which does not cause the underlying confidentiality to be lost.

51. As Gatehouse J held in ***Re British & Commonwealth Holdings Plc (1990)*** unreported:

> *"If, as is accepted the original lawyer/client communications was plainly privileged, why should that privilege be lost because the advice is recorded in a document, the very purpose of which was to make use of that advice in reaching a commercial decision …. It would frustrate the principle of legal professional privilege in virtually every commercial sense if the argument were to be accepted."*

PART 3: PUBLIC POLICY

52. The public interest point is furthered by allowing a client to confide in his lawyer safe in the knowledge that what he tells him will remain secret, for such confidence helped to ensure that hopeless and exaggerated claims and unfounded and spurious defences are discouraged.

53. In ***Waugh*** Lord Wilberforce stated that:

> "*Everything should be done in order to encourage anyone who knows the facts to state them fully and candidly. This he may not do unless he knows that this communication is privileged."*

54. Lord Rodger of Earlsferry in ***Three Rivers (No.6)*** stated:

> *"Litigation privilege …. is based upon the idea that legal proceedings take the form of a contest in which each of the opposing parties assembles his own body of evidence and uses it to try and defeat the other side with the judge or jury determining the winner. In such a system each party should be free to prepare his case as fully as possible without the risk of his opponent will be able to recover the material generated by his preparations. In the words of Justice Jackson in Hickman v Taylor (1947) 329 US 495, 516, 'Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary."*

55. Aikens J in the case of ***Winterthur Insurance Company and The National Insurance & Guarantee Corporation Ltd v AG (Manchester) Limited (in Liquidation) & Ors [2006] EWHC 839*** stated:

> *"The rationale for ….. 'litigation privilege' rests, in modern terms, on the principles of access to justice, the proper administration of justice, a fair trial*

and quality of arms. Those who engage in litigation or are contemplating doing so may well require professional legal advice to advance their case in litigation effectively. To obtain the legal advice and to pursue adversarial litigation efficiently, the communications between a lawyer and his client and a lawyer and a third party and any communications brought into existence for the dominant purpose of being used in litigation must be kept confidential, without fear that what is said or written might be disclosed. Therefore those classes of communications are covered by litigation privilege."

The Rationale

56. Lord Brougham LC in the celebrated passage in the case of ***Greenough v Gaskell (1833) 1 My & K 98*** taken as the foundation of modern law stated:

> *"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 interest 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, everyone 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 successfully, or at all proceedings superfluous."*

57. Further, Sir George Jessel's M.R famous statement in the case of ***Anderson v Bank of British Columbria (1876) 2 Ch D 644 at 649*** which has been adopted by many a fine judge thereafter sums up the rationale why legal professional privilege exists:

> *"…by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of a professional lawyer, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase,* ***that he should be able to make a clean breast of it to the gentleman whom he consults with*** *a view to the prosecution of his claim, or the substantiating of his defence against the claim; that he should be able to place unrestricted and unbounded confidence in the professional agent, and*

that the communications he so makes to him should be kept secret unless with his consent (for it is his privilege, and not the privilege of the confidential agent) that he should be enabled properly to conduct his litigation."

58. Furthermore, in ***AM & S Europe Ltd v Commission of the European Communities [1983] QB 878*** Sir Gordon Slynn, Advocate General, observed:

> *"Whether it is described as the right of the client or the duty of the lawyer, this principle has nothing to do with the protection or privilege of the lawyer. It springs essentially from the basic need of a man in a 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."*

59. Still further, Bingham L.J stated in ***Ventouris v Mountain [1991] 1 WLR 607 at 611*** that the benefit to the administration of justice which arose from allowing a client to confide in his lawyer was in the public interest ensuring that hopeless and exaggerated claims and unfounded and spurious defences are discouraged. Bingham LJ stated that to achieve this:

> *"….it is necessary that actual and potential litigant, be they claimants of respondents, should be free to unburden themselves without reserve to their legal advisers be free to give honest and candid advice on a sound tactual basis, without fear that these communications may be relied on by an opposing party if the dispute comes before the court for decision. It is the protection of confidential communications between client and legal adviser which lies at the heart of legal professional privilege."*

60. ***R v Derby Magistrate's Court Ex p [1996] 1 AC 487*** confirmed that legal professional privilege is an absolute right.

61. The case of ***R v Secretary for the Home Office Department Ex p Daly [2001] UKHL 26*** first recognised privilege in a non-judicial context insofar as the serving prisoner complained about the examination of his legal correspondence during a cell search. ***Daly*** contended that a blanket policy requiring the prisoner's absence during an examination infringed an impermissible extent both at common law and human rights.

62. Lord Bingham stated *inter alia* that a prisoner had a right to communicate confidentiality with a legal adviser and the seal of legal privilege. These rights can only be curtailed by Parliament with clear and expressed words in statute.

63. The case of ***R (Morgan Grenfell & Co Ltd) v Special Commissioners [2002] UKHL 21*** concerned the Inland Revenue's statutory powers of document production pursuant to s.20(1) Taxes Management Act 1970 (TMA) and whether these entitled it in a non-judicial context to demand privileged materials relating to his tax liability.

64. MG's objections were that the documents were privileged. The question before the HoL was whether the TMA notice could override privilege in documents held by MG. Lord Hoffmann stated that there was no clear or expressed words which enabled a TMA notice to override the common law right.

65. Further in ***Three Rivers (No.6) [2004] UKHL 48*** Lord Scott provided that:

> *"But the dicta to which I have referred all have in common the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients) affairs should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else ….*
>
> *I, for my part, subscribe to this idea. It justifies, in my opinion, the relation of legal advice privilege in our law, notwithstanding as a result cases may sometimes have to be decided in ignorance of relevant probative material."*

66. Baroness Hale took up the same theme at para 61:

> *"It may thus impede the proper administration of justice in the individual case. This makes the communication covered by different from most other types of confidential communication, where the need to encourage candour may be just as great. But the privilege is too well established in the common law for its existence to be doubted now. And there is a clear policy justification for singling out communications between lawyers and their clients from other professional communications. The privilege belongs to the client, but it attaches both to what the client tells his lawyer and to what the lawyer advises his client to do. It is in the interest of the whole community that lawyers give their clients sound advice, accurate as to the law and sensible as to their conduct."*

67. According to Lord Sumption in ***Prudential*** the Supreme Court of United States has the same underlying rationale.

68. These cases including ***Derby***, ***Daly***, ***Morgan Grenfell*** and ***Three Rivers (No.6)*** immutably establish that legal professional privilege is a fundamental right

recognised both at common law and under the European Convention of Human Rights and LAP is restricted to lawyers save where Parliament has legislated otherwise.

69. These four cases have been ratified by the Supreme Court in ***R v Special Commissioner of Income Tax and another [2013] UKSC 1.***

70. In this case Lord Neuberger defined the question as follows:

> *"Whether [legal advice privilege] extends, or should be extended, so as to apply to legal advice given by someone other than a member of the legal profession, and if so, how far [legal advice privilege thereby extends, or should be extended."*

71. The Supreme Court by a 5:2 majority (Lords Sumption and Clarke dissenting) answered the question 'no' affirming what has long being understood or assumed – legal advice privilege only applies to legal advice given by lawyers.

5:2 Majority

72. Lord Neuberger stated that the court should not extend LAP to non-lawyers for three reasons:

    a. The consequences of allowing the appeal were hard to assess and would be likely to lead to what is currently a clear and well understood principle becoming an unclear principle involving uncertainty. For example, it was unclear what would count as a 'profession' if the appeal were allowed, and which acts of advice of the professional would amount to legal advice protected by the privilege and which would be other advice not so protected;

    b. The question of whether legal advice privilege should be extended to cover legal advice given by professional people who are not qualified lawyers raises questions of policy best left to Parliament; and

    c. Parliament had enacted legislation relating to legal advice privilege which, at the very least, suggested that it would be inappropriate for the court to extend the law of legal advice privilege as proposed by the appellant.

73. Lord Sumption at para 122 stated this;

> "*Once it is appreciated;*
>
> *(i) That legal advice privilege is the client's privilege,*

(ii) That it depends on the public interest in promoting his access to legal advice on the basis of absolute confidence, and

(iii) That it is not dependant on the status of the adviser

it must follow that there can be no principled reason for distinguishing between the advice of solicitors and barristers on the one hand and accountants on the other. The test is functional. The privilege is conferred in support of the client's right to consult the members of any particular professional body. The finding of Charles J, which are borne out by the evidence, show that today there are at least three professions whose practitioners have as part of their ordinary professional functions the giving of skilled legal advice on tax. Accountants are among them.

Any distinction for this purpose between some skilled professional advisers and others is not only irrational, but inconsistent with the legal basis of the privilege.

It would make it dependant not just on the nature of the advice or the circumstance in which it was given, which have always been relevant considerations, but to a substantial degree on the status of the adviser, which has not been a relevant consideration for 250 years."

Functional Approach

74. Lord Sumption places emphasis on the point that English law has adopted the "functional approach" changing with the pragmatic requirements of modern times based on cases concerning salaried and foreign lawyers being incorporated into the category of 'lawyer'.

75. The legal adviser was established as early as 1792 in a case known as ***Wilson v Rastall (1792) 4 Dum & 753*** insofar as this case limited privilege to:

    a. Counsel
    b. Solicitor
    c. Attorney

76. However, Sir Sydney Kentridge Q.C appearing for the Law Society, (in Prudential) described these cases as anomalous. I would agree insofar as they are variants of the same species of lawyer rather than opening the floodgates by deviating from the norm.

77. If LAP was to be resolved on a functional approach, then anybody who gives legal advice regardless of their profession (why should it stop at professionals what about

academics) could attract LAP. Accordingly such an approach would not be as narrow as Lord Sumption purports.

Floodgate Argument

78. As to the 'floodgate' argument Lord Sumption at para 127 stated that the floodgate argument cannot justify an arbitrary distinction between different professionals performing exactly the same function. It would only be a matter which would involve recognising that as a matter of fact much legal advice falling within those principles is nowadays given by legal advisers who are not barristers or solicitors but accountants insofar as tax is concerned. With respect, this line of tact does not take into account differing professional bodies' codes of conduct and/or ethics. In my view the legal profession is more accountable and under significantly more scrutiny than most other professionals. Although Lord Sumption does go on to say at paragraph 136 that abuse of LAP could be overcome by professional disciplinary sanctions against those involved. That with respect is easier said than done.

79. Notwithstanding this if the pure rationale is that LAP should apply to those professionals where the client has given full disclosure (giving a clean breast of things) then that must surely include persons who are not professionals such as from an academic or a person who has a law degree but who has decided for whatever reason not to hold a practicing certificate.

80. One could argue, how it is possible to stop at accountants? What about constructions professionals such as civil engineers, delay analysts, claims consultants, investment bankers, medics and the like.

81. Opening the floodgates in my view would jeopardise the entire rationale behind LAP insofar as potentially all communications between divers advisers and the client could become privileged leaving little or no audit trail to determine what has factually happened in a given set of circumstances. Alternatively there would have to be a distinction drawn as to what would be legal advice and non-legal advice. This would cause a significant amount of arguments in court on each case as to where does LAP start and end with certain professionals. Currently this is not a problem for lawyers as LAP is treated as being very broad i.e. 'relevant legal context'.

82. In my view opening the floodgates would be like opening Pandora's box. The client would become confused and be tempted not to give a clean breast of things to his lawyer in the fear of scrutiny by others?

Parliamentary Intervention

83. The majority of the house argued that any change to LAP should be determined by Parliament and not the Court, in my view that makes perfect sense not least because

any decision of the Court in relation to LAP may disturb the effect European Convention of Human Rights Articles 6 and 8.

84. Notwithstanding this, Parliament has frequently legislated abrogating privilege in certain circumstances see statute for patent and trade mark attorneys, licenced conveyors and Courts and Legal Services Act 1990. In the case of ***Wilden Pump Engineering Co v Fusfield [1985] FSR 159*** the Court of Appeal decided that legal advice did not attract privilege. Patent and trade mark attorneys were later regulated by statute to overcome the decision in ***Wilden***.

85. Lord Sumption at para 131 advocates that such Parliamentary intervention is restricted by common law and as such common law is a job for the Courts. In particular to define the extent of common law in particular privilege.

86. However, it is peculiar that whilst Parliament has seen fit to legislate for the patent and trade mark attorneys it has not done so for tax advisers despite the fact that Parliament has considered the possibility of extending the privilege to accountants on a number of occasions between 1967 and 2008, as purported by Lord Sumption at para 130(3).

PART 4: OTHER PROFESSIONALS

87. The case of ***R v Special Commissioners of Income Tax and another*** (the Prudential) confirms that there is no prospect in the foreseeable future of any other professional than a lawyer who will be capable of giving legal advice which remains protected by advice privilege. Although it is accepted that other professionals who provide litigation services are capable of having communications protected by litigation privilege providing always it satisfies the dominant purpose test.

88. The Supreme Court stated this:

> *"Indeed, we would be extending it considerably, as the issue cannot simply be treated as limited to the question whether tax advice given by expert accountants is covered by LAP. While that is the specific question between the parties, it is just a subset, no doubt an important subset, of a much larger set. To concentrate on tax advice given by accountants would be wrong, because it would ineluctably follow from our accepting Prudential's argument that legal advice given by some other professional people would also be covered."*

89. At common law the courts have consistently held both that:

    a. A professional adviser who is not a lawyer but who dispenses advice on the law, such as an accountant tax adviser, patent and trade mark attorney, loss

adjuster or member of the construction industry, cannot communicate with their clients under the cloak of privilege, unless they can get within the scope of litigation privilege.

b. There is no protection available akin to privilege in respect of a client's confidential communications with another profession who is not a professionally qualified lawyer.

90. All attempts to extend the range of available privileges have failed.

91. In the case of ***Walter Lilly & Company Limited v Giles Patrick Cyril Mackay, DMW Developments Limited [2012] EWHC 649 (TCC)*** LPP did not extend to construction claims consultants. Akenhead J stated at para 16:

> *"I am satisfied that the defendants have not established that either Mr Rainsberry or Mr Tomlinson were practicing barristers (or solicitors).*
>
> *The reality is that the Defendants retained Knowles not as barristers but as an organisation to provide them with claims and project handling advice. In this respect, their position is no different from the claimants in the Prudential case who employed accountants.*
>
> *The Claimant's application for disclosure succeeds. I should point out that this decision relates to legal professional or legal advice privilege. It does not deal with litigation privilege and there remains an outstanding possible issue as to whether or not advice and other communications given by claims consultants in connection with adjudication proceedings are privileged. There is little authority on this latter issue and consideration might have to be given to issues of policy if and when this argument arises on another case."*

92. Arguments against expanding LAP to professionals other than lawyers put by the Law Society and the Bar Counsel are:

a. Currently clear and well understood principle

b. Extending advice privilege would lead to uncertainty insofar as to how does one define 'profession'

c. Extending advice privilege to other professionals is a matter for Parliament not the court

d. The close connection between members of the legal professional and the court

e. Historical observations such as the involvement of the court in disciplinary procedures of solicitors and barristers

f. The duties to the court owed by members of their professions

g. Risk of uncertainty as to who can give LAP

h. Loss of clarity in a sensitive area of the law

i. The view that solicitors and barristers are in a special position in that they are held by the courts to higher standards than members of other professions

93. Although the minority view is based on the argument that as a question of logic or principle there is no distinction between legal advice given by a lawyer and legal advice given by another skilled professional. However, it seems to me that the logic of the minority's analysis in fact goes further than that.

94. The minority state that in their view legal advice privilege applies to any skilled professional who gives legal advice as part and parcel of his normal professional functions, on the grounds that the rationale for the rule is equally applicable where the adviser is a lawyer or other skilled professional.

95. But if, as the minority seem to suggest, the sole rationale of legal advice privilege is that the client is able to give full disclosure and obtain skilled legal advice then legal advice should also apply even where the client seeks advice on the law from a skilled person who is not a professional – for example-

a. Where a client seeks legal advice from an academic, or a person with a law degree but who is not and has never been qualified;

b. Where a client seeks legal advice from someone who has picked up a lot about the law from his or her job but who is not in fact a lawyer or a professional of any sort.

96. If one moves to the functional approach suggested by the minority (namely a consideration of whether the adviser is skilled in the law and has as part of his ordinary function the giving of legal advice) to be determined by the rationale for the rule (client being able to give full disclosure and obtain skilled legal advice) it is not clear the test is as narrow as the one they propose.

97. Parliament has permitted some importance but restricted relations of the common law rules. For example:

a. Patent attorneys and trade mark attorneys can pursuant to s.280 ***Copyright, Designs and Patents Act 1998*** and s87 ***Trade Marks Act 1994*** engaged in privileged communications with their clients when advising in relation to passing off matters; and

b. Licenced conveyancers pursuant to s.33 Administration of Justice Act 1985

Part 35 Experts

98. A Part 35 expert's instructions will not be protected by privilege in civil proceedings.

99. CPR r35.10 provides:

> *"(3) the expert's report must state the substance of all material instructions, whether written or oral on the basis of which the report was written*
>
> *(4) the instructions referred to in paragraph (3) shall not be privileged against disclosure but the court will not, in relation to those instructions-*
>
> *(a) order disclosure of any specific document; or*
>
> *(b) permit any questioning in court, other than by the third party who instructed the expert unless the court is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete."*

100. CPR does not define 'instructions' or 'material instructions'. As a consequence uncertainty surrounds privileged information which may have been given to the expert as part of his instructions.

101. The Academy of Experts' Code of Guidance for Experts and those instructing them warned at para 12.3 (2004 version), that:

> *"An expert should not be given any information that is legally privileged unless it has been decided that privilege should be waived. An expert should therefore assume that his instructions do not contain any information for which privilege would b claimed."*

102. CPR r31.14(2) allows a party to apply for an order for inspection of any document mentioned in an expert's report which has not already been disclosed in the proceedings subject to r35.10(3).

103. In summary the case of ***Lucas v Barking, Havering & Redbridge Hospitals NHS Trust [2003] EWCA Civ 1102*** decided that:

a. All information and documentation provided to the Part 35 expert by the lawyer or client instructing him is to be regarded, irrespective of its materiality, as part of his instructions;

b. Any privilege over such documents and information is removed, so that common law arguments about waiver arising from the deployment of privileged material via the expert's report are no longer relevant;

c. Since the expert need only set out the substance of his "material instructions", there is no requirement for him to set out all the information or material supplied to him for the purposes of his instructions in the statement required by CPR r35.10(3)

d. Interlocutory debates as to the adequacy of the statement of material instructions are to be discouraged; and

e. Where the expert's report does contain an accurate and complete statement of his material instructions, the receiving party will not be entitled to probe the expert's instructions.

104. Waller L.J in ***Lucas*** said that not only is CPR r35.10(4) 'Designed so far as possible to prevent lengthy arguments as to whether there has been a waiver of privilege whether prior to the trial or indeed at trial leading to an entitlement for further disclosure" but:

> *"The very purpose as it seems to me of CPR r35.10(4) is to prevent compliance with CPR r35.10(3) rendering such statement disclosable unless there are grounds for believing that the statement of instructions given in the expert report is 'inaccurate or incomplete'.*

105. It would appear from ***Lucas*** that the effect of CPR r35.10(4) is that privilege over such documents is lost and they are at risk of disclosure if (and only if) CPR r35.10(3) is not complied with.

106. ***Lucas*** makes it clear that an accurate and complete statement of his material instructions removes the risk of formerly undisclosed privileged material being compulsorily disclosed.

Expert Shopping

107. There are occasions when a party wishes for whatever reason to change its expert. In the case of ***Beck v The ministry of Defence [2003] EWCA Civ 1043*** the court of appeal held that it was a condition of instructing a fresh medical expert the

undisclosed report of the defendant's expert would have to be had to be disclosed forthwith.

108. In the case of ***Edwards – Tubb v JD Wetherspoon Plc [2011] EWCA Civ 136*** Hughes L.J recognised that the order sought would have the effect of curtailing the operation of privilege by making waiver the price of the claimant being able to continue in reliance on a second expert. He noted the justification for doing this is the need to prevent expert shopping and where this is to take place there would be a need to put before the Court the whole of the available evidence on the question at issue and not only in part.

PART 6: HUMAN RIGHTS

109. The English courts have stressed that in the majority of cases orthordox applications of the common law principles of privilege secures the same result as reliance on Convention of Human Rights.

110. The Court of Appeal in ***Bowman v Fels [2005] EWCA Civ 226 at 82*** provided:

> *"In relation to both access of justice through legal proceedings on the one hand and legal professional privilege on the other, the driving principles behind European Community law, ECHR law and UK domestic law are therefore seen to be virtually identical."*

111. **Article 6** Right to fair Trial provides:

> "(1) In determining his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ….
>
> (3) Everyone charged with a criminal offence has the following minimum rights:
>
> > (c) to defend himself in person or through legal assistance of his own choosing

112. **Article 8** provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a

democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime for the protection of health or morals, or for the protection of the rights and freedoms of others.

113. Lloyd L.J in Prudential rejected the argument that non-lawyer communications is protected by Article 8:

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

114. Lloyd L.J stated that a requirement of human rights law is that the relevant legal position should be appropriately certain. It seems that the rule should be certain so its application can be readily understood. It clear at the moment that the rule stands up to the test of certainty in practical terms.

115. If it were to be extended without the help of Parliament or statutory definition then its seems to me that the scope of the rule would be lamentably uncertain and which would fail to satisfy the human rights test of being in accordance with the law.

PART 7: LOSING PRIVILEGE

116. The rights conferred by privilege can be lost.

117. This usually occurs when the privilege is waived by the beneficiary or those representing him.

118. English law may hold that a waiver of privilege has occurred by the beneficiary if he has engaged in conduct which is inconsistent with the underlying confidentiality that is the hall mark of all privileged communications. There are two main types of factual situations where privilege is lost:

    a. Loss of Confidentiality

b. Implied Waiver

Loss of Confidentiality

119. It is a prerequisite to a claim of privilege that the document is confidential in the sense that it is not in the public domain.

120. Privilege will be lost if the communications cease to be confidential, whether against the party seeking disclosure or as against the world. Generally under this head the beneficiary intends to waive confidentiality.

121. So a statement made by a suspect to his lawyer in front of the police inspector was held not to be confidential.

122. However, the law may allow disclosure for a limited purpose without there being any wider loss of privilege.

Implied Waiver

123. In this circumstance the beneficiary may not have intended to waive privilege but the law may say that his conduct is inconsistent with the maintenance of confidentiality and as such fairness will dictate that the privilege will deemed to have been lost.

124. For example where the beneficiary has tried to use part of the privileged communication or where the communication has been inadvertently disclosed by the legal advisers in the proceedings.

125. Where the disclosure is more substantial the consequences can be that the Court has to order full or further disclosure so as to ensure the disclosing party is not using the privileged information in such an incomplete way so as to potentially mislead the Court.

Fairness

126. Fairness generally comes into play in almost all implied waiver cases. What the Court does here is to assess whether it is fair to the privileged holder's opponent in litigation to enable the privilege to survive the use to which the holder has put it, whether deliberately or otherwise.

127. In the case of ***Brennan and others v Sunderland City Council and others [2009] ICR 479*** Elias J held that:

> *"…the English authorities are … clear on the point. In our view the fundamental question is whether, in the light of what has been disclosed and*

the context in which disclosure has occurred, it would be unfair to allow the party making disclosure not to reveal the whole of the relevant information because it would risk the court and the other party only having a partial and potentially misleading understanding of the material. The court must not allow cherry picking. But the question is; when has a cherry been relevantly placed before the court."

128. In addressing waiver applications, questions of whether the litigant has merely referred to a privileged document or gone further and revealed some or all of its contents, and whether there has been a deployment of these materials, continue to loom large in the court's approach.

129. Where a privileged document is referred to in some way in the litigation process, a successful waiver application will usually need to address whether:

    a. There is a mere reference to such document as opposed to use of its contents or the gist of its contents

    b. The extent to which the reference to the document is being used or relied upon in the proceedings

    c. Whether it is fair to the user's opponent to allow the use of the document without more, and therefore whether there should be more extensive disclosure of the user's privilege material to ensure there is no 'cherry picking'.

Limited or Partial Disclosure

130. The English courts have grappled with a number of situations in which a legitimate claim to privilege is challenged because the privileged communication has been deliberately disclosed to or shared with a third party, whether pursuant to some sort of obligation or public duty, by agreement or in circumstances where the disclosing party has simply not considered the consequences of sharing his privileged material.

131. All such cases have in common the fact that there is usually no intention on the part of the disclosing party to waive privilege generally over the communication so disclosed, other than against the particular party to whom disclosure is made, and even then only for a particular purpose.

132. So the question to be addressed in such circumstances is whether the nature or extent of the disclosure in fact undermines the confidentiality in disclosed communication that it destroys the privilege in it as against all the world, or whether the ability to assert privilege is only lost as against the third party to whom it is disclosed.

133. In some cases privileged material is made available to the third party is sufficiently well expressed so as not to lose any privilege. Insofar as there may be well qualified and restricted as to the use of the privileged communication.

134. It is long understood that confidential disclosure of privileged information to a third party can take place without automatic loss of privilege. In ***Prudential Assurance Co Ltd v Fountain Page Ltd [1991] 1 WLR*** Hobhouse J pointed out:

> *"There is no conceptual difficulty about the reservation of rights of confidentiality or privilege notwithstanding that a document or piece of information has been communicated to another … in private law the concept of breach of confidence … has as its basis a situation where an owner of confidential information parts with it to another on the terms, or n circumstances, which impose a duty of confidence on that other restrict the use that that other may make of the information. So although that other has gained possession of that confidential information, the original owner has not lost his rights over that information and he can invoke legal and equitable remedies to enforce his rights."*

135. Parties often fail to give adequate consideration to the basis upon which their privileged materials are shared with another.

136. It is preferable for a party sharing privileged material with a third party is to spell out the basis on which such disclosure is made so as to minimise or even eliminate any risk of a wider loss of privilege.

137. The English courts have shown a rather generous willingness to treat the limited disclosure as a mere partial waiver, and to limit the circumstances in which the party sharing his privileged documents.

PART 8: CPR POSITION

138. CPR r31.20 provides:

> "Where a party inadvertently allows a privileged document to be inspected the party who has inspected the document may use it or its contents only with the permission of the court."

139. In the case of ***Breeze v John Stacy & Sons Ltd (1999) Ties July 8 1999*** the defendants' solicitor provided an affidavit with a lever arch file of documents. The affidavit contained no reference to the privileged documents and the exhibits were prepared by the solicitors' secretary.

140. The plaintiffs' solicitor used some of the privileged documents in his affidavit. The master granted the defendant an injunction to prevent the use of the privileged material.

141. The Court of Appeal overturned that decision. Peter Gibson L.J held that the sheer number of documents would have suggested that the contrary to the hypothetical reasonable solicitor namely that they had been deliberately disclosed. Clare L.J agreed, observing that the defendant's decision not to seek to persuade the Court to look at the privileged documents made it very difficult for the Court to decide whether an obvious mistake had been made.

142. Peter Gibson L.J stated:

> *"This point has already been catered for by the fact that in exercise of the equitable jurisdiction the court will intervene in cases of fraud and obvious mistake. I do not see that anything more is required to satisfy the dictates of equity. Nor … is the position affected by the new procedural rules."*

143. In the case of ***Al Fayed v Commissioner of Police of the Metropolis [2002] EWCA Civ 780*** Clarke L.J giving judgment set out some principles:

(i) *A party giving inspection of documents must decide before doing so what privileged documents he wishes to allow the other party to see and what he does not.*

(ii) *Although the privilege is that of the client and not the solicitors, a party clothes his solicitors with ostensible authority (if not implied or express authority) to waive privilege in respect of relevant documents.*

(iii) *A solicitor considering documents made available by the other party to litigation owes no duty of care to that party and is in general entitled to assume that any privilege which might otherwise have been claimed for such documents has been waived.*

(iv) *In these circumstances, where a party has given inspection of documents, including privileged documents which he has allowed the other party to inspect by mistake, it will generally be too late for him to claim privilege in order to attempt to correct the mistake by obtaining injunctive relief.*

(v) *However, the court has jurisdiction to intervene to prevent the use of documents made available for inspection by mistake where justice requires, as for example in the case of inspection procured by fraud.*

(vi) In the absence of fraud, all will depend upon the circumstances, but the court may grant an injunction if the documents have been made available for inspection as a result of an obvious mistake.

(vii) A mistake is likely to be held to be obvious and an injunction granted where the documents are received by a solicitor and:

a. The solicitor appreciates that a mistake has been made before making some use of the documents, or

b. It would be obvious to a reasonable solicitor in his position that a mistake has been made

and, in either case, there are no other circumstances which would make it unjust or inequitable to grant relief.

(viii) Where a solicitor gives detailed consideration to the question whether the documents have been made available for inspection by mistake and honestly concludes that they have not, that fact will be a relevant (and in many cases an important) pointer to the conclusion that it would not be obvious to the reasonable solicitor that a mistake had been made, but is not conclusive, the decision remains a matter for the court.

(ix) In both cases identified in (vii) (a) and (b) above there are many circumstances in which it may nevertheless beheld to be inequitable or unjust to grant relief, but all will depend upon the particular circumstance

(x) Since the court is exercising an equitable jurisdiction, there are no rigid rules

144. Clarke L.J then held that:

> *"…it seems to us that the same approach should be adopted to the exercise of the discretion conferred on the court by Rule 31.20 of the CPR. Whether the question to grant an injunction or to make an order under that rule, the court should do what is just and equitable in all the circumstances of the case."*

Consequences of the Obvious mistake

145. The lawyer who receives another's privileged material in the course of litigation runs the considerable risks if he wrongly forms the view that his opponent has deliberately disclosed that material, rather than as a result of an obvious mistake, and decides to look at it.

146. Not only may he become wrapped up in expensive satellite litigation, perhaps conducted partly at his own expense, but at the extreme he also runs the risk of being ordered to cease his involvement in the case. No doubt with these considerations in mind, CPR r31.20 places an onus on the receiving party to seek the court's permission to use another's privileged documents where disclosed to him through inadvertence.

147. An early decision here, in which the more extreme consequences were meted out, is ***Ablitt v Mills and Reeves (1995) Times October 26 1995***. In this case the solicitors received in error privileged material emanating from counsel who was acting for the plaintiff in an action in which they represented the defendants. On instructions the solicitors read the counsel's papers after having warned them there was, as happened a real risk that they would face injunctive proceedings.

148. When these ensued, the plaintiff asked the court to restrain Mills and Reeve from acting altogether, notwithstanding the inconvenience and expense to their own clients.

149. Blackburn J agreed and granted this relief refusing to allow the construction of the Chinese wall so as to enable Mills Reeves to continue to act.

150. In other cases less draconian measures have been taken see ***English and American Insurance Company v Herbert Smith [1988] FSR 232***.

Challenging Privileged Material

151. Challenging a claim to privilege documents is difficult to sustain because the courts normally accept a claim to privilege on oath at face value and would rarely exercise its power to inspect the documents to check that claim; and would discourage an opposing party from challenging a claim to privilege by the use of a contentious affidavit of its own.

152. CPR proves a mechanism for a party to challenge a claim to privileged documents CPR r31.19(5). CPR r31.19(6) provides:

> "For the purpose of deciding an application under … paragraph (3) (Claim to withhold inspection) the court may
>
> (a) Require the person seeking to withhold disclosure or inspection of a document to produce that document to the court; and
>
> (b) Invite any person, whether or not a party, to make representations

153. CPR r31.19(7) then provides that an application under paragraph (5) must be supported by evidence.

154. In ***West London Pipeline and Storage Ltd & Anor v Total UK Ltd Ors [2008] EWHC 1729*** Beatson J categorised four possible responses when minded to go behind an affidavit/witness statement. These four options are as follows:

    a. The person claiming privilege has not discharged the burden that lies on him to do so and orders disclosure inspection

    b. It may order a further affidavit to be made to deal with matters the earlier affidavit did not address.

    c. The court may inspect the disputed document

    d. The court may order cross examination of the deponent

155. Beatson J summarised the position as follows:

    a. *The burden of proof is on the party claiming privilege to establish it… A claim for privilege is an unusual claim in the sense that the party claiming privilege and that party's legal advisers are, subject to the power of the court to inspect the documents, the judges in their or their own client's cause. Because of this, the court must be particularly careful to consider how the claim for privilege is made out and affidavits should be as specific as possible without making disclosure of the very matters that the claim for privilege is designed to protect: Bank Austria Akt v Price Waterhouse: Sumitomo Corp v Credit Lyonnais Rouse Ltd*

    b. *An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in an affidavit are not determinative and are evidence of a fact which may require to be independently proved; Re Highgate Traders Ltd; National Westminster Bank Plc v Rabobank Nederland*

    c. *It is, however, difficult to go behind an affidavit of documents at an interlocutory stage of proceedings. The affidavit is conclusive unless it is reasonably certain from:*

        i. *The statement of the party making it that he has erroneously represented or has misconceived the character of the documents in respect of which privilege is claimed: Frankenstein v Gavin' house to House Cycle Cleaning and Insurance Co*

ii. *The evidence of the person who or entity which directed the creation of the communications or documents over which privilege is claimed that the affidavit is incorrect; Neilson v Laugharne*

d. *The other evidence before the court that the affidavit is incorrect or incomplete on the material points*; Jones v Montevideo Gas Co.

156. One should note that more widely judges will tend to inspect documents where there are disputes as to whether the remainder of a partially disclosed document should also be made available to an opponent.

157. Once the documents are inspected the court will seek submissions.

PART 9: SUMMARY

158. In summary LPP has been for centuries a substantive procedural rule in the adversarial system of litigation both in England and the Commonwealth:

a. LAP is restricted to advice given by lawyers in relation to a relevant legal context in non-contentious matters

b. LLP is restricted to communications between a lawyer, client and a third party provided is it is given for the dominant purpose of actual, pending or anticipated litigation in adversarial proceedings

c. This is a public policy reason seen as being necessary in a democratic society:

i. To give a person an opportunity to give a clean breast of matters without the fear of scrutiny by others and

ii. In order for his legal adviser to give proper advice so as to eliminate exaggerated claims and/or spurious defences.

d. This public policy is supported by Article 6 and 8 of the Convention for Human Rights 1998.

e. Once communications are privileged the lawyers mouth is shut forever

f. For the last two centuries LPP has been restricted to lawyers.

g. It is argued that the professional best placed to be the custodians of LPP is lawyers because of their relationship with the court and their professional codes of conduct.

h. To extend LPP to other professionals would disturb the certainty which is required by law and currently in place

i. Extending LPP to other professionals is not necessary in a democratic society and nor does it breach Article 6 or 8 of the Convention for Human Rights

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WORKSHOP QUESTIONS

FACTS

1. An Employer (Fred) is in a meeting with you (his solicitor), engineer and surveyor friends; and he asks you as his solicitor whether the value of LADS should be incorporated into an amended FIDIC Contract or not. He explained to you that he had made a guess and included a chunk for profit, you give him your answer in the meeting.

2. The Employer comes back to you again 2 years later after inserting the LADS value into the Contract and asks you, based upon the facts he had given to you previously, "*what are the prospects of succeeding in adjudication for LADS of £2m".* You go out to a specialist FIDIC expert to obtain a supporting opinion and revert back to the Employer explaining the advice you have received from this consultant who thought it was a penalty and you (as before) concluded likewise in your written advice.

3. The Employer dissatisfied with your answer decides to go to Claims Consultants R for Us for advice and to pursue adjudication for LADS of £2m. The Employer gave the claims consultants your advice and the FIDIC expert's opinion. The claims consultants proceed to adjudication on the basis that the LADS were a genuine pre-estimate of the loss and win. Litigation ensues to recover the £2m from the Employer and the contractor seeks disclosure of the advice given by you previously along with the opinion of the FIDIC expert.

THE QUESTIONS

4. Under (1) is your advice protected by legal professional privilege

5. Under (2) is your advice and the expert's opinion protected by legal professional privilege

6. Under (3) is your advice and the expert's opinion protected by legal professional privilege