WORLD BAR CONFERENCE

THE CORROSION OF ATTORNEY/CLIENT PRIVILEGE:

IS THE THREAT REAL?

1. Attorney-client privilege or legal advice privilege ("LAP") attaches to certain communications between attorneys and clients. Fifteen years ago, it was described by the Law Lords as a "fundamental human right established in the common law"[1]. However, a number of decisions of courts in the UK since then have limited or even cut down that privilege. I think one can identify at least five areas.

2. First, a limitation on who is an "attorney".

3. Five years ago, in the *Prudential* case[2], by a majority of 5 to 2, the Supreme Court rejected the contention that LAP applied to legal advice sought from or given by accountants and other non-lawyers. This can be characterised more as a refusal to extend LAP, rather than a limitation on LAP. However, as Lord Sumption's powerful dissenting judgment demonstrated, it would in many ways have been more principled to extend the doctrine into new territory.

4. The second limitation is in relation to the identity of the "client".

[1] *R v Special Commissioner ex p Morgan Grenfell & Co Ltd* [2003] 1 AC 563, para 7
[2] *R (Prudential plc) v Special Commissioners* [2013] 2 AC 185

5. In its 2003 *Three Rivers (No 5)* decision[3], the English Court of Appeal held that LAP does "not apply to documents communicated to a client or his solicitor for advice to be taken on them, but only to communications passing between that client and his solicitor" and associated documents.[4] Accordingly, in that case, LAP did not attach to communications between a company's solicitor and employees or agents of that company, unless those employees or agents could be treated as the person actually being advised.

6. Two English High Court decisions (in 2016 and 2017), *The RBS Rights Issue Litigation*[5] and *Director of the SFO v ENRC*[6], followed and expanded the principle, by confirming that LAP would not automatically apply to communication made to a corporation's lawyers by an employee of the corporation - even an employee who was specifically authorised to make such communications. In both cases, it was said that the "client" for the purposes of LAP consists only of persons authorised to seek and receive legal advice from the lawyer and does not extend to those authorised only to provide information to or speak to the lawyer on the corporation's behalf.[7] In *RBS*, Hildyard J indicated that LAP could only apply where the employee was part of the corporation's directing mind and will, although in *ENRC* Andrews J thought the issue should be determined on a case-by-case basis[8].

7. The third limitation is on the documents or circumstances to which LAP applies.

[3] [2004] QB 916
[4] *Three Rivers (No 5)*, para 19
[5] [2016] EWHC 3161 (Ch)
[6] [2017] EWHC 1017
[7] *RBS*, para 78, *ENRC*, para 75
[8] *ENRC*, paras 91-92

8. In *RBS*, Hildyard J held that notes of an interview between solicitor and client were not privileged because they did not betray the tenor of advice given or sought. In *ENRC*, Andrews J held that LAP does not attach to the "fruits" of a fact-finding or evidence-gathering exercise carried out by a lawyer simply because the purpose of that exercise was to enable a lawyer to give legal advice[9].

9. Fourthly, there is a jagged edge developing between LAP and, its first cousin, litigation privilege, which has given rise to a further limitation on legal privilege.

10. In *ENRC*, Andrews J held that witness statements and forensic accountancy reports produced in the context of internal investigations carried out by a company would be subsequently disclosable to regulators or litigation adversaries. At the time the investigations were carried out there had been no existent or imminently threatened criminal or civil proceedings and the fact that an SFO investigation was imminent was held to be irrelevant. Sir Geoffrey Vos, Chancellor, in the *Bilta v RBS* case[10] reached a different conclusion on the ground that there was clear evidence that the purpose of the investigations was to prepare for potential civil litigation with the Revenue. Andrews J's view was followed by the Court of Appeal in the *Jukes* case last month[11].

11. Fifthly, Parliamentary invasion, which is reflected in *Re McE*[12], to which Mar Mulholland is speaking and I will say no more.

[9] *ENRC*, para 67
[10] *Bilta (UK) ltd v RBS* [2017] EWHC 3535(Ch)
[11] *R (Jukes) v Health and Safety Executive* [2018] EWCA Crim 176
[12] *Re McE (Northern Ireland)* [2009] UKHL 15, [2009] AC 908

12. These cases provide some support for the notion that legal privilege is being subjected to a degree of attack by attrition. Some of the distinctions may appear arbitrary, as in the restriction to legal advisers, and others may appear to be based on impractical distinctions, like the difference between *Bilta* and *ENRC*, and others might appear to suffer from both defects – like *Three Rivers (No 5)*. Indeed, in powerful judgments, the Federal Court of Australia in 2004, the Singapore Court of Appeal in 2007, and the Hong Kong Court of Appeal in 2015[13] refused to follow *Three Rivers (No 5)*. The Singapore Court described the decision as "almost universally criticised" and "too restrictive, impractical and unworkable"[14]. In their 2004 *Three Rivers (No 6)* decision[15], the House of Lords left open the question whether *Three Rivers (No 5)* had been rightly decided[16].

13. If there is a trend towards cutting down LAP, that may be attributable to doubts whether its historical justifications remain convincing. This, there is a perhaps a stronger feeling than before that as much material as possible should be put before a court. Openness is more in vogue than it was: advocates and judges come into court knowing what all the arguments and evidence will be: very different from when I started at the Bar forty-five years ago. As was mentioned in *Prudential*, non-lawyers appear willing to give legal advice despite the lack of protection of LAP, which could be said to suggest that there would be no "chilling effect" if LAP were to be abolished. Further, it could be said that today there is less of an obvious distinction between the lawyer-client relationship and other professional relationships with clients, all founded on mutual trust and confidence.[17]

[13] *Pratt Holdings v Commissioner of Taxation* (2004) 136 FCR 357, *Skandinaviska Enskilda Banken v Asia Pacific Breweries* [2007] 2 SLR 367 and *Citic Pacific Ltd v Secretary of State for Justice* [2015] HKCA 293, [2015] 4 HKLRD 20

[14] *Skandinaviska*, para 38

[15] [2004] UKHL 48, [2005] 1 AC 610,

[16] See at para 47

[17] *Anthony David Kerman v Tatiana Akhmedova* [2018] EWCA Civ 307, para 26

Over and above this, modern technology increases the likelihood of documents losing their confidentiality accidentally, inadvertently or intentionally.

14. I strongly doubt that these developments justify undermining the fundamental principle of legal privilege. I accept that LAP can sometimes lead to perceived injustice, but so can any rule, however uncontroversial and plainly right it is. Its fundamental justification remains unchanged, and it is rather arrogant to think that a principle which has been built up over many centuries should simply be junked. It can be dangerous to drop one principle in our legal system, particularly one which is of central importance and of very long standing. As with any complex system, removing one fundamental aspect will almost certainly give rise to unpredictable undesirable unintended consequences in other aspects. The same point applies to any severe cutting down of the principle. Having said that, it would be equally dangerous to extend LAP significantly, and it remains true that judges must adopt a critical attitude towards it.

15. In a nutshell, the normal common law approach should be applied when it comes to LAP: no radical change, but judicious and cautious adjustments to take account of new factual situations and of social, technological and moral changes in society.

16. Thank you very much.

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