Hilary Term
[2013] UKSC 1
On appeal from: [2010] EWCA Civ 1094

JUDGMENT

R (on the application of Prudential plc and another) (Appellants) *v* Special Commissioner of Income Tax and another (Respondents)

before

Lord Neuberger, President
Lord Hope, Deputy President
Lord Walker
Lord Mance
Lord Clarke
Lord Sumption
Lord Reed

JUDGMENT GIVEN ON

23 January 2013

Heard on 5, 6 and 7 November 2012

Appellants
Lord Pannick QC
Conrad McDonnell
(Instructed by PricewaterhouseCoopers Legal LLP)

Respondents
James Eadie QC
Patrick Goodall
(Instructed by Solicitor to Her Majesty's Revenue and Customs)

Intervener (The Law Society of England and Wales)
Sir Sydney Kentridge QC
Tom Adam QC
Tim Johnston

(Instructed by Herbert Smith Freehills LLP)

Intervener (The General Council of the Bar of England and Wales)
Bankim Thanki QC
Ben Valentin
Henry King
Rebecca Loveridge
(Instructed by Field Fisher Waterhouse LLP)

Intervener (The Institute of Chartered Accountants in England and Wales)
Patricia Robertson QC

(Instructed by Simmons & Simmons LLP)

Intervener (AIPPI UK Group)

Michael Edenborough QC
QC
James Tumbridge
(Instructed by Gowlings (UK) LLP)

Intervener (Legal Services Board)
Philip Havers QC

(Instructed by Legal Services Board)

LORD NEUBERGER (with whom Lord Walker agrees)

Introductory

1. The specific issue raised by this appeal is whether, following receipt of a statutory notice from an inspector of taxes to produce documents in connection with its tax affairs, a company is entitled to refuse to comply on the ground that the documents are covered by legal advice privilege (LAP), in a case where the legal advice was given by accountants in relation to a tax avoidance scheme. The more general question raised by this issue is whether LAP 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 LAP thereby extends, or should be extended.

The statutory provisions applicable in this case

2. The statutory provisions in force at the time during which the events giving rise to the present proceedings took place were in the Taxes Management Act 1970 ("TMA"). All references in this judgment to sections are to sections of that Act, unless the contrary is stated.

3. Section 20(1)(a) provided that an inspector of taxes

> "may by notice in writing require a person … to deliver to him such documents … as (in the inspector's reasonable opinion) contain, or may contain, information relevant to … (i) any tax liability to which that person is or may be subject, or (ii) the amount of any such liability".

Section 20(3) extended this power to require "any other person" to "deliver … or … make available" such documents to an inspector. By virtue of section 20(7), an inspector needed the consent of the special or general commissioners before serving a notice under either subsection.

4. It was established by *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 ("*Morgan Grenfell*") that the provisions of section 20 could not be invoked to force anyone to

produce documents to which LAP attached. Lord Hoffmann at paras 7 and 9 said that a statute could only remove such "a fundamental human right" if it "expressly stated" that it was doing so, or if the intention "appear[ed] by necessary implication", and, as Lord Hobhouse emphasised at para 45, "[a] necessary implication is a matter of express language and logic not interpretation".

5. Section 20A, inserted by the Finance Act 1976 ("the 1976 Act"), empowered an inspector to call for documents to be produced by a person who had "stood in relation to others as a tax accountant" and who had been convicted of an offence relating to tax or had had a penalty imposed on him under section 99. Section 20D(2), also inserted by the 1976 Act, explained that "a person stands in relation to another as tax accountant" when "he assists the other in the preparation of returns or accounts to be made or delivered by the other for any purpose of tax …".

6. Section 20B was also inserted by the 1976 Act (and was amended in 1988, 1989 and 1990). Section 20B(1) required an inspector, before serving a notice under section 20(1) or (3) on any person, to give that person "a reasonable opportunity to deliver (or … make available) the documents in question …".

7. Section 20B also included the following subsections:

> "(8) A notice under section 20(3) … or section 20A(1) does not oblige a barrister, advocate or a solicitor to deliver or make available, without his client's consent, any document with respect to which a claim to professional privilege could be maintained.
>
> (9) Subject to subsection … (11) … below, a notice under section 20(3) … -
>
> > (a) does not oblige a person who has been appointed as an auditor for the purposes of any enactment to deliver or make available documents which are his property and were created by him or on his behalf for or in connection with the performance of his functions under that enactment, and
> >
> > (b) does not oblige a tax adviser to deliver or make available documents which are his property and consist of relevant communications.
>
> (10) In subsection (9) above 'relevant communications' means communications between the tax adviser and –

(a) a person in relation to whose tax affairs he has been appointed, or

(b) any other tax adviser of such a person,

the purpose of which is the giving or obtaining of advice about any of those tax affairs; and in subsection (9) above and this subsection 'tax adviser' means a person appointed to give advice about the tax affairs of another person (whether appointed directly by that other person or by another tax adviser of his).

(11) … subsection (9) above shall not have effect in relation to any document which contains information explaining any information, return, accounts or other document which the person to whom the notice is given has, as tax accountant, assisted any client of his in preparing for, or delivering to, the inspector or the Board."

8. Section 20BA was inserted by the Finance Act 2000 ("the 2000 Act"), and it extended the power granted by section 20 to make an order for the delivery of documents by any person who appears to have such documents in his possession or power. Paragraph 5(1) of Schedule 1AA, also inserted by the 2000 Act, exempted from the ambit of section 20BA "items subject to legal privilege", which were defined in para 5(2) as:

"(a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;

(b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and

(c) items enclosed with or referred to in such communications and made —

(i) in connection with the giving of legal advice ...."

9. These various provisions of TMA have now been replaced by provisions contained in section 113 of, and Schedule 36 to, the Finance Act 2008 ("the 2008

Act"). While there are differences between the regime in TMA and that in the 2008 Act, they are of no significance for present purposes. Paragraph 23 of Schedule 36 to the 2008 Act, which effectively replaces section 20B(8), provides that:

> "(1) An information notice does not require a person—
>
> (a) to provide privileged information, or
>
> (b) to produce any part of a document that is privileged.
>
> (2) For the purpose of this Schedule, information or a document is privileged if it is information or a document in respect of which a claim to legal professional privilege, or (in Scotland) to confidentiality of communications as between client and professional legal adviser, could be maintained in legal proceedings."

And paragraphs 24 to 26 of Schedule 36 to the 2008 Act contain provisions relating to communications with "auditors" and with "tax advisers", which are similar to those in subsections (9) to (11) of section 20B.

The factual and procedural background to this appeal

10. In 2004, the international firm of chartered accountants, PricewaterhouseCoopers ("PwC"), devised a marketed tax avoidance scheme ("the scheme"). In accordance with the requirements of Part 7 of the Finance Act 2004, PwC disclosed the scheme to the Commissioners for Inland Revenue, or Her Majesty's Revenue and Customs ("HMRC") as they became a year later and as I will refer to them. At about that time the Prudential group of companies instructed PwC to advise them in connection with certain overseas holdings, and PwC identified that the scheme could be adapted for their benefit. Thereafter the Prudential group implemented the scheme, which involved a series of transactions ("the Transactions").

11. The details of the scheme and the Transactions do not matter for present purposes. It is enough to say that the aim of the scheme was to give rise to a substantial tax deduction in Prudential (Gibraltar) Ltd, a subsidiary company of Prudential plc, which could then be set off against the profits of that company, which profits were ordinarily chargeable to corporation tax in this country.

12. Mr Pandolfo, the inspector of taxes responsible for this aspect of the Prudential group's tax liabilities, considered it necessary to look into the details of the Transactions (for reasons which are not challenged). To that end, he served notices under section 20B(1) on Prudential (Gibraltar) Ltd and Prudential plc (together "Prudential") giving them the opportunity to make available specified classes of documents in relation to the Transactions prior to his serving notices under section 20(1) and (3). Prudential disclosed many of the documents requested by Mr Pandolfo, but refused to disclose certain documents ("the disputed documents") on the ground that Prudential was entitled to claim legal advice privilege in respect of them.

13. Mr Pandolfo considered that questions were raised by the documents which were disclosed, and he sought authorisation from the Special Commissioners under section 20(7) to require Prudential to disclose the disputed documents. Such authorisation was given, and, on 16 November 2007, Mr Pandolfo served notices under section 20(1) and (3) on Prudential (Gibraltar) Ltd and Prudential plc respectively, requiring disclosure of the disputed documents.

14. Prudential then issued the present application for judicial review challenging the validity of those notices on the ground that they sought disclosure of documents which related to the seeking (by Prudential) and the giving (by PwC) of legal advice in connection with the Transactions, which were therefore said to be excluded from the disclosure requirements of section 20 by virtue of LAP, in accordance with the decision of the House of Lords in *Morgan Grenfell*.

15. That application came before Charles J, who rejected it on the ground that, although the disputed documents would have attracted LAP (and would have been thereby excluded from the disclosure requirements of section 20) if the advice in question had been sought from, and provided by, a member of the legal profession, no such privilege extended to advice, even if identical in nature, provided by a professional person who was not a qualified lawyer. His decision, [2009] EWHC 2494 (Admin), was upheld, substantially for the same reasons, by the Court of Appeal (Mummery, Lloyd and Stanley Burnton LJJ), [2010] EWCA Civ 1094. (Both decisions are now reported at [2011] QB 669.)

16. Prudential now appeal to this court.

Legal advice privilege

17. Where legal professional privilege ("LPP") attaches to a communication between a legal adviser and a client, the client is entitled to object to any third

party seeing the communication for any purpose, unless (i) the client has agreed or waived its right, (ii) a statute provides that the privilege can be overridden, (iii) the document concerned was prepared for, or in connection with, a nefarious purpose, or (iv) one of a few miscellaneous exceptions applies (eg in a probate case where the validity of a will is contested).

18. As Lord Carswell explained in *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 ("*Three Rivers*"), para 105, LPP "is a single integral privilege, whose sub-heads are legal advice privilege and litigation privilege". This case is concerned with the first of those subheads, legal advice privilege ("LAP").

19. In summary terms, as is common ground on this appeal, LAP applies to all communications passing between a client and its lawyers, acting in their professional capacity, in connection with the provision of legal advice, i.e. advice which "relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law" – *Three Rivers (No 6)*, [2005] 1 AC 610, para 38, per Lord Scott.

20. The development and rationale of LAP are explained in terms which I could not begin to improve on by Lord Sumption in paras 115 to 121 below. In modern times, LPP, and more particularly LAP, have been fully considered and refined in a number of authoritative decisions, which speak for themselves. Particularly as they throw no direct light on the issue thrown up by this appeal, it is only necessary to identify three points which emerge from them before turning to the issue itself.

21. First, LAP exists to ensure that there is what Justice Rehnquist referred to in the Supreme Court of the United States as "full and frank communication between attorneys and their clients", which "promote[s] broader public interests in the observance of law and administration of justice" – *Upjohn Co v United States* (1981) 449 US 383, 389, quoted by Lord Scott in *Three Rivers (No 6)* at para 31. As Lord Scott went on to explain at para 34, the principle "that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills …, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else" is founded upon "the rule of law".

22. Secondly, LAP exists solely for the benefit of the client. As Bingham LJ said in *Ventouris v Mountain* [1991] 1 WLR 607, 611, the expression "legal professional privilege" is "unhappy" in so far as it suggests that the privilege is that of the legal profession, when it is "the client who enjoys the privilege". Thus,

as Lord Hoffmann pointed out in *Morgan Grenfell* at para 37, "[i]f the client chooses to divulge the information, there is nothing the lawyer can do about it".

23. Thirdly, LAP is a common law principle, which was developed by the judges in cases going back at least to the 16th century - see *Berd v Lovelace* (1577) Cary 62, which, together with subsequent cases, is discussed in the opinion of Lord Taylor of Gosforth CJ in *R v Derby Magistrates' Court, Ex p B* [1996] AC 487, 504-505. As Lloyd LJ said in the Court of Appeal at [2011] QB 669, 709, para 30, LAP and its rationale was probably first coherently characterised in a judgment by Lord Brougham LC in *Greenough v Gaskell* (1833) 1 My & K 98, 102-103. (Litigation privilege seems to have developed rather later – see per Lord Carswell in *Three Rivers (No 6)*, para 96.)

The issue on this appeal

24. This appeal is concerned with the breadth of LAP, in the sense of the types of advisers with whom communications can attract LAP. The particular issue on this appeal is whether LAP should attach to communications passing between chartered accountants and their client in connection with expert tax advice given by the accountants to their client, in circumstances where there is no doubt that LAP would attach to those communications if the same advice was being given to the same client by a member of the legal profession.

25. The case advanced by Lord Pannick QC for Prudential, supported by Ms Patricia Robertson QC for the Institute of Chartered Accountants for England and Wales, was that this court should hold that LAP does attach to such communications. This case is based on the proposition that LAP is a common law right created by the judges, which should be applied, and if necessary extended, so as to accord with the principles which underlie and justify the right.

26. More particularly, it is said that, given that LAP is justified by the rule of law, and that it exists for the benefit of a client who seeks and receives legal advice, for instance on its tax affairs, there is no principled basis upon which it can be restricted to cases where the adviser happens to be a member of the legal professions, as opposed to a qualified accountant. This point was said to be reinforced by reference to relatively modern developments, in particular the fact that the great majority of legal advice on taxation matters is now given by accountants rather than by lawyers. In addition reliance was placed on (i) section 330 of the Proceeds of Crime Act 2002 ("POCA"), (ii) the Human Rights Act 1998 ("the HRA"), and (iii) the Legal Services Act 2007 ("the 2007 Act").

27. The contrary case was advanced by Mr James Eadie QC for HMRC, supported by Sir Sydney Kentridge QC for the Law Society, Mr Bankim Thanki QC for the Bar Council, and Mr Michael Edenborough QC for AIPPI UK. Their case was that it has been universally assumed that LAP is restricted to advice given by lawyers, and the court should not extend it to accountants in connection with tax advice for a number of reasons.

28. Those reasons, in summary form, were that (i) the effect of extending LAP would involve a potentially nuanced policy decision, with unpredictable and potentially wide-ranging public and forensic consequences, which is therefore best left to Parliament, and (ii) Parliament has legislated on the assumption that LAP is restricted to advice given by lawyers, and has further considered and rejected a proposal to extend LAP to tax advisers. It was also argued that there is a good principled reason in the modern world to restrict LAP to advice given by lawyers.

The ambit of LAP as it is generally understood

29. There is room for argument whether, by allowing Prudential's appeal, we would be extending the breadth of LAP or would simply be identifying the breadth of LAP. On the former view we would be changing the common law; on the latter view, we would be declaring what the common law always has been. I do not think it necessary to address this issue, as the important point for present purposes is that it is universally believed that LAP only applies to communications in connection with advice given by members of the legal profession, which, in modern English and Welsh terms, includes members of the Bar, the Law Society, and the Chartered Institute of Legal Executives (CILEX) (and, by extension, foreign lawyers). That is plain from a number of sources, which speak with a consistent voice.

30. First, there are clear judicial statements of high authority to that effect over the past century and more. Sir George Jessel MR referred to LAP as being "confined to communications between a client and his legal adviser, that is, between solicitor and client or barrister and client" in *Slade v Tucker* (1880) 14 Ch D 824, 828, a view he repeated in *Wheeler v Le Marchant* (1881) 17 Ch D 675, 681-682. In *Minter v Priest* [1930] AC 558, 581, Lord Atkin said that a "[professional] communication pass[ing] for the purpose of getting legal advice … must be deemed confidential", and added that it should be "understood that the profession is the legal profession". More recently, the view that LAP is confined to advice from lawyers was repeated by Lord Denning MR in *Attorney General v Mulholland* [1963] 2 QB 477, 489-490, in a passage approved by Lord Edmund-Davies in *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, 243-244.

31. Secondly, in three more recent cases, on the basis that LAP is confined to advice given by lawyers, the courts have refused to extend LAP to legal advice given by a trade mark agent, a patent agent, or a personnel consultant – see, respectively, *Dormeuil Trade Mark* [1983] RPC 131 (Nourse J), *Wilden Pump Engineering Co v Fusfeld* [1985] FSR 159 (CA, Waller and Dillon LJJ), and *New Victoria Hospital v Ryan* [1993] ICR 201 (EAT, Tucker J).

32. Thirdly, and unsurprisingly, the current editions of textbooks on privilege and evidence state that LAP is limited to communications in connection with obtaining legal advice from qualified lawyers – see the summary given by Charles J at first instance in this case at [2011] QB 669, 683, para 45(5).

33. Fourthly, more than one significant official report has expressed the view, and proceeded on the basis, that LAP is restricted to legal advice given by a professional lawyer. Thus, *The 16th Report of the Law Reform Committee (Privilege in Civil Proceedings)* (1967) (Cmnd 3472) stated at para 24, in relation to LAP that "[t]he category of professional legal advisers is confined to barristers and solicitors"; the committee included Lord Pearson, Diplock LJ, Winn LJ, Megarry J and Roger Parker QC (later Parker LJ). To the same effect, Chapter 26 of the 1983 *Report of the Committee on Enforcement Powers of the Revenue Departments*, Cmnd 8822 ("the Keith Report"), prepared by a committee presided over by Lord Keith of Kinkel, proceeds on the clear basis that LAP was limited to communications with a client's lawyers and did not extend to communications with their tax accountants, even where these communications involve the seeking and giving of legal advice.

34. Fifthly, in 2003, the Government (by which I mean the executive as opposed to Parliament) rejected a proposal, which had been made in 2001, by the Director General of Fair Trading that legal advice given by accountants should be subject to the same privilege as that conferred upon advice given by professional lawyers. This shows that both the Director General and the Government clearly proceeded in the belief that legal advice was not protected by LAP unless given by a member of the legal profession.

35. Sixthly, and more importantly, Parliament has legislated in a way which plainly implies that it assumes that LAP is limited to advice given by lawyers. Thus, there are the statutory extensions of LAP to patent attorneys, to trade mark agents and to licensed conveyancers – see respectively section 280 of the Copyright, Designs and Patents Act 1988, section 87 of the Trade Mark Act 1994 (as amended by the Legal Services Act 2007), and section 33 of the Administration of Justice Act 1985. Then there are the provisions of section 20B of TMA itself: the terms in which subsection (8) is expressed, particularly when one looks at subsections (3) and (9), plainly show that Parliament believed that there was a

difference in the tax advice given by "a barrister, advocate or a solicitor", as opposed to the more generic "tax adviser".

36. Seventhly, the substantial re-enactment of the relevant provisions of TMA in paragraphs 23 to 26 of Part 4 of Schedule 36 to the Finance Act 2008 were considered in the usual way by the House of Commons Public Bill Committee. In their deliberations on 10 June 2008, the Committee actually discussed extending LAP to tax advice given by accountants through the medium of an amendment to what is now paragraph 23 of Schedule 36 to the 2008 Act – see the Hansard report of this discussion, (HC Debates), cols 606-608. No details were given to us as to what happened following those discussions, but what is clear is that Parliament none the less decided in Schedule 36 to the 2008 Act to maintain the difference between (i) a person with whom communications attracted "legal professional privilege" (in England and Wales, and a "professional legal adviser" in Scotland) in paragraph 23, and (ii) a "tax adviser" in paragraph 25. Although it could be said to beg the question which we have to decide, a combination of the general understanding as to the breadth of LPP and the absence of any suggestion of a Parliamentary intention to depart from TMA in this connection, leads to the clear conclusion, in my view, that paragraph 23 was intended to be limited to professional lawyers.

The implications of allowing this appeal

37. If we were to allow this appeal, we would therefore be extending LAP beyond what are currently, and have for a long time been understood to be, its limits. 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.

38. In that connection, Sir Sydney pointed out in argument that there have been some variations in the way in which Prudential has formulated its case as to the precise breadth of LAP. In my view, the most powerful formulation is that favoured by Lord Sumption, namely that LAP is confined to cases where legal advice is given by a professional person "whose profession ordinarily includes the giving of legal advice". It is the most powerful formulation because it is the simplest and the most consistent with the basis on which LAP has been justified by the courts.

The case for allowing this appeal

39. There is no doubt that the argument for allowing this appeal is a strong one, at least in terms of principle, as anyone reading Lord Sumption's judgment can appreciate. LAP is based on the need to ensure that a person can seek and obtain legal advice with candour and full disclosure, secure in the knowledge that the communications involved can never be used against that person. And LAP is conferred for the benefit of the client, and may only be waived by the client; it does not serve to protect the legal profession. In light of this, it is hard to see why, as a matter of pure logic, that privilege should be restricted to communications with legal advisers who happen to be qualified lawyers, as opposed to communications with other professional people with a qualification or experience which enables them to give expert legal advice in a particular field.

40. This is especially true at the present time when, as Lord Pannick pointed out, almost all qualified lawyers specialise in limited fields, and when the provision of legal advice is no longer a service limited to professional lawyers, as (in terms of practice) is demonstrated by the specific example of tax advice, and as (in terms of law) is illustrated by the fact that the provision of legal advice is not a "reserved legal activity" under the 2007 Act.

41. As Charles J said at [2011] QB 669, 691, paras 64-65:

> "[there is] 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. ... So, in my view, [it has been] shown that accountants do what lawyers are described as doing in the cases that establish [LAP]. 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."

The principled arguments for restricting LAP to lawyers' advice

42. The principled arguments for restricting LAP to communications with professional lawyers which have been put forward appear to me to be weak, but not wholly devoid of force. They are based on (i) the close connection between members of the legal profession and the court, (ii) historical observations and

relics (albeit important relics), such as the involvement of the court in disciplinary procedures of solicitors and barristers, (iii) the duties to the court owed by members of their profession, and (iv) 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.

43. At any rate, to modern eyes, it is hard to see why the connection between lawyers and the courts, and in particular the reliance which judges place upon lawyers to act properly, is a good reason in principle for limiting LAP to the legal profession. One can see why the argument might have carried real weight 150 years ago, but for the point to convince today would require something more than such a general statement. Judicial and other observations from the 19th century are of little use, as we are now in a world where a great deal of legal advice is tendered by professional people other than members of the legal profession, as is recognised by the fact, mentioned above, that giving legal advice is not a reserved legal activity under the 2007 Act.

44. The appeal functions of the judges in the disciplinary procedures of the legal profession do not seem to me, at least in general, to be much greater than their judicial review functions in relation to the disciplinary procedures of other professions. It is also true that solicitors and barristers owe a formal duty to the court, but (i) that duty only would be relevant in connection with litigation, whereas LAP goes much wider, and (ii) every professional person involved in litigation can fairly be said to have a duty to the court.

45. Such principled justification as there is for the restriction of LAP to lawyers seems to me to be further undermined by the extension of LAP which the court has approved to all foreign lawyers, without (it would seem) regard to their particular national standards, regulations or rules with regard to privilege. That extension appears to originate from *Lawrence v Campbell* (1859) 4 Drew 485 (Sir Richard Kindersley V-C), and was approved and applied in *Macfarlan v Rolt* (1872) LR 14 Eq 580 (Sir John Wickens V-C), *In re Duncan, decd* [1968] P 306 (Ormrod J), and *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529, 536 (Templeman LJ). (I do not consider, however, that Prudential's argument is assisted by the fact that advice from employed lawyers attracts LAP: that seems entirely consistent with the notion that LAP applies where legal advice is being sought from or given by members of the legal profession).

46. In the light of these points, particularly as it is entirely a creation of the common law for the benefit of individuals or companies seeking and obtaining legal advice, I accept that there is a strong case in terms of logic for allowing this appeal.

Conclusion: introductory

47. While I accept that it would accord with its underlying logic to extend LAP as Prudential contend, "[t]he life of the [common] law has not been logic", as Oliver Wendell Holmes, Jr observed on the first page of *The Common Law* (1881). As he went on to say, the life of the common law "has been experience". The common law has been created and developed by judges over more than eight centuries, and, as Holmes also observed, "[i]n order to know what it is, we must know what it has been …".

48. It is therefore inevitable that the common law will include some rules which, while entirely valid today, have limitations or other aspects which are only explicable by reference to historical practices or beliefs. LAP, as it is currently understood, is such a rule. There is no doubt that the justification for LAP is as valid in the modern world as it was when it was first developed by the courts. However, its restriction to advice from members of the legal profession, while it can fairly be said to be illogical in the modern world, is explicable by reference to history. In particular, until the last century, (i) it was very rare for any professional person other than a lawyer to give legal advice, and (ii) the connection between the legal profession and the courts was thought to be of greater significance than it is now.

49. Where a common law rule is valid in the modern world, but it has an aspect or limitation which appears to be outmoded, it is by no means always right for the courts to modify the aspect or remove the limitation. In any such case, the court must consider whether the implications of the proposed modification or removal are such that it would be more appropriate to leave the matter to Parliament. The court must also consider whether the aspect or limitation in question has led to problems, and whether it has been assumed, approved or disapproved impliedly or expressly by Parliament. And if Parliament has unequivocally endorsed the aspect or limitation then the courts should not, of course, alter it.

50. Subject to that last qualification, the question whether to remove or modify the aspect of the rule in question must inevitably be considered on a case by case basis. Where the court decides that it is inappropriate to remove or modify, it is, in my view, wrong to characterise the result as unprincipled: in a common law system, no well-understood rule or aspect of a rule can sensibly be so described.

51. Turning to this case, then, despite the powerful arguments advanced to the contrary, and in agreement with the clear and careful judgments below, I consider that we should not extend LAP to communications in connection with advice given

by professional people other than lawyers, even where that advice is legal advice which that professional person is qualified to give.

52. I reach this conclusion for three connected reasons, which together persuade me that what we are being asked to do by Prudential is a matter for Parliament rather than for the judiciary. First, the consequences of allowing Prudential's appeal are 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. Secondly, the question whether LAP should be extended to cases where legal advice is given from professional people who are not qualified lawyers raises questions of policy which should be left to Parliament. Thirdly, Parliament has enacted legislation relating to LAP, which, at the very least, suggests that it would be inappropriate for the court to extend the law on LAP as proposed by Prudential.

Conclusion: uncertainties and unknown consequences

53. At the moment, although there are inevitably still arguments about whether a party can rely on LAP on particular facts, these arguments are very much at the margins (as Lord Scott recognised in *Three Rivers (No 6)* at para 43). That is because the presently accepted state of the law on LAP is clear to any professional advisers who need to understand it, and relatively easy to explain to their clients who are meant to benefit from it. The implications for society, for the courts, and for the executive, of LAP only applying where it is members of the legal profession who are giving the advice, have been generally understood, accepted and allowed for by the rules and practice of the courts and in legislation.

54. The suggested reformulation proffered by Lord Sumption is, as I have said, clear and principled in conceptual terms. However, closer examination of the suggestion that LAP should apply in any case where legal advice is given by a person who is a member of a "profession [which] ordinarily includes the giving of legal advice" suggests to me that this is an inappropriate formulation for us to adopt, as it would carry with it an unacceptable risk of uncertainty and loss of clarity in a sensitive area of law.

55. For example, it is unclear to me whether occupations such as town planners, engineers, or pension advisers would be members of a "profession" for this purpose. They require training and qualifications, and they have associations, with rules and disciplinary procedures. Further, like, for instance, actuaries, auditors, architects and surveyors (undoubtedly professionals), they often, as a result of education and/or experience, have considerable specialist legal expertise, on which

clients draw and expect to be able to draw. And that may well become more in point now that legal advice is not a reserved legal activity under the 2007 Act.

56. As I see it, it could be necessary for a court to delve into the qualifications or standing, and maybe into the rules and disciplinary procedures, of a particular group of people to decide whether the group constitutes a profession for the purpose of LAP. So there would be room for uncertainty, expenditure and inconsistency, if the court had to decide such an issue.

57. Further, I am not clear quite how a court is to decide whether a profession is one which "ordinarily includes the giving of legal advice". Many chartered surveyors, architects and accountants, for instance, may not ordinarily give legal advice, but there are many who do. Should the issue be judged by reference to the profession generally, a particular branch of the profession (which could lead to definitional issues), or the practice of the particular member of the profession in the case, and, if this last possibility is correct, would the issue be determined on that member's say-so? In addition, I suspect that much of the advice given by most members of those professions could not infrequently be characterised as "legal" in nature by some people but not by others.

58. Consider cases such as (i) a town planner instructed to try and obtain planning permission for a development or to advise whether it was needed or what had to be done to get it, (ii) a pension consultant asked to advise on whether a payment could be made, or a contribution should be demanded, by trustees of a pension scheme, (iii) a valuation surveyor asked to advise on rental value under a rent review clause or for rating purposes, or (iv) an auditor asked as to the appropriate treatment of a receipt or debt. In each such case, the issue on which advice is sought may well involve a point of law on which the professional concerned is well qualified to advise. In each case, it could very well be open to argument whether LAP attached to such advice.

59. So long as LAP is limited to advice from members of the legal profession, the strong, and justified, presumption will be that LAP does apply in connection with any communications in that context, because lawyers normally only give legal advice. However, where members of other professions give legal advice, it will often not represent the totality of the advice, and there may well be difficult questions to resolve, as to whether, and, if so, in respect of which documents, LAP could be claimed. For instance, it is unclear whether LAP would apply where the legal advice is only subsidiary, and, if so, how one determines subsidiarity; and, in a case where LAP could be claimed, there may be difficulties in deciding how to deal with documents (which may frequently be the majority of documents concerned with the giving of advice in the case) which contain legal and non-legal advice.

60. The specific issue in *Three Rivers (No 6)* provides the basis for an example of my concerns. In that case, it was held that advice to a client as to how to present its case at an inquiry was privileged if it was given by the client's lawyers, who were also giving general legal advice, which was undoubtedly subject to LAP. I am unclear whether, on Prudential's case, it would follow that a letter from town planning experts advising their client how to present its case at a planning inquiry would attract LAP; the answer might, for instance, depend on whether the advisers were also giving legal advice, but that would seem inconsistent with the requirement for consistency across the professions inherent in Prudential's case. And if LAP would apply in such a case, there might be obvious difficulties in disentangling letters seeking or giving both legal and technical advice.

A policy issue best left to Parliament

61. Apart from these concerns, it seems to me that this appeal gives rise to an issue, possibly a series of issues, of policy, which constitutes an area into which the courts should generally be reluctant to tread. Rather than extending LAP beyond its present accepted boundaries, we should leave it to Parliament to decide what, if anything, it wishes to do about LAP.

62. Much of what is said in the preceding section of this judgment demonstrates that quite wide questions of public policy may be thrown up by Prudential's argument. The general implications of extending the generally understood limits of LAP as suggested by that argument could clearly have significant implications, which, at least in my view, would be very difficult to identify, let alone to assess. To put it at its lowest, they may well have significant consequences which should be considered through the legislative process, with its wide powers of inquiry and consultation and its democratic accountability.

63. There are no doubt many pieces of legislation giving the executive the power to call for documents, in respect of which LAP could be invoked to avoid delivering up such documents. One of the most vital functions of the courts is to protect citizens against abuses by the executive, but that role must be exercised with discrimination. However, it would, I think, require exceptional circumstances before that function was invoked to create a new right, or to extend an existing right substantially beyond what is currently understood by everyone, including Parliament when enacting such legislation, to be its existing limits.

64. In addition, there is the fast changing landscape of the legal terrain following the passing and implementation of the Legal Services Act 2007. That Act is also another indication that Parliament is ready to change common law practices which involve special rules for lawyers when it wishes to do so.

65. Another reason why the present issue should be left to Parliament is that the extension of LAP to professions other than lawyers may only be appropriate on a conditional or limited basis. That is an aspect which can be properly considered and implemented by Parliament, and cannot appropriately be assessed, let alone imposed, by the courts. This point is well illustrated by reference to the very type of case with which this appeal is concerned. In 1983, when the Keith Committee recommended that LAP should be extended to communications in connection with tax advice given by expert accountants, it included two qualifications. The first was that the privilege should be overridden where it "would ... unreasonably impede the ascertainment of facts necessary to the proper determination of the taxpayer's tax liabilities, being facts not otherwise capable of ascertainment" (para 26.6.5). The second was that LAP should not extend to advice given by in-house professional advisers (para 26.6.13). It would be open to Parliament to impose such types of restriction or condition: it would not realistically be open to the courts.

66. Further, as demonstrated by the facts set out in paras 33-34 above, the sort of extension to the currently understood law of LAP sought by the appellants has been (i) reported on by two committees, (ii) discussed in a parliamentary committee, and (iii) proposed to the executive. Despite thinking it appropriate to extend LAP to certain other professions, as explained in para 35 above, Parliament has apparently chosen not to extend LAP to accountants giving tax advice.

67. Of course, in another case, points such as these could be overcome if the court was satisfied that there was a pressing need, in terms of the rule of law, injustice or even practicality, for the common law to move from its generally understood position in a particular area. However, although there is evidence of some concern about the presently understood limits of LAP, there is no evidence that even gets near establishing a pressing need to change those limits.

Parliament has relevantly legislated and declined to legislate

68. Parliament has on a number of occasions legislated relevantly in this field. On three occasions it thought it appropriate to extend LAP, and did so on the basis that LAP was limited to advice given by members of the legal profession. I have in mind section 280 of the Copyright, Designs and Patents Act 1988, section 87 of the Trade Mark Act 1994, and section 33 of the Administration of Justice Act 1985, referred to in para 35 above. All these provisions would have been demonstrably unnecessary if the breadth of LAP was as Prudential submits.

69. Parliament also legislated in the very field with which this appeal is concerned on the assumption that LAP only applies to advice given by lawyers –

see section 20B of TMA and paragraphs 23 to 26 of Part 4 of Schedule 36 to the 2008 Act, referred to in paras 6 to 9 above.

70. Lord Pannick sought to meet this point by relying on the approach adopted by the House of Lords in *Morgan Grenfell*, where it was held that although the general words of sections 20 and 20B of the TMA might appear to imply the removal of LAP in some circumstances, they did not do so because, as already mentioned, "[a]n intention to override such [a fundamental human right] must be expressly stated or appear by *necessary* implication" (emphasis added) – to quote from Lord Hoffmann at [2003] 1 AC 563, para 8.

71. In my opinion, that principle does not apply here, although I accept that one must be careful about placing too much weight on the points I have identified in paras 63 and 64 above. The reason that it does not apply is that, in *Morgan Grenfell*, the Revenue was arguing that what undoubtedly was universally accepted as being LAP in common law had been impliedly cut down by legislation. Given that there was therefore no doubt that the LAP claimed by the appellant in that case existed at common law, it was to be expected that, if the 1970 Act had been intended to cut down LAP, "Parliament [would have] squarely confront[ed] what it [was] doing and accept[ed] the political cost" – per Lord Hoffmann in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131, cited by Lord Hobhouse in *Morgan Grenfell*, para 44.

72. But the position in this case is different from the position in that case, even though in both cases HMRC seek to rely on implication (rather than necessary implication) to defeat the taxpayer's argument based on LAP. The difference arises from the fact that in this case, as demonstrated from the discussion in paras 30-36 above, the generally accepted view is that the type of LAP invoked by Prudential does not exist. In other words, HMRC's contention is not that a statutory provision impliedly shows that Parliament intended to remove LAP which plainly would otherwise exist (as in *Morgan Grenfell*): rather it is that a number of recent statutory provisions clearly show that Parliament, along with the courts, the textbook writers, and the writers of relevant reports, considered the type of LAP contended for by Prudential does not exist.

Various other points

73. I referred in para 45 above to four cases where it was held that LAP applied where the advice was tendered by foreign lawyers. In none of those cases does it appear that there was any significant analysis as to why and to what extent LAP was to be accorded where it was a foreign lawyer who had given the advice. It is none the less understandable why LAP was so extended: the extension was, I

suspect, based on fairness, comity and convenience. While that extension does rather undermine much of the principled justification for LAP being confined to cases where the advice is given by professional lawyers, it is consistent with the argument that the court should restrict LAP to its currently understood bounds for reasons of practicality and certainty.

74. Nor do I consider that HRA or POCA take the case any further. The decision and reasoning of the Strasbourg court in *Van der Mussele v Belgium* (1983) 6 EHRR 163, *AM & S Europe Ltd v Commission of the European Communities* (Case 155/79) [1983] QB 878, and *Campbell v United Kingdom* (1992) 15 EHRR 137 effectively undermine any suggestion that it would somehow be contrary to article 14 of the Convention to hold that LAP applies to communications with professional lawyers and not with other professional people. Nor do I accept the argument that so to hold would infringe article 8 read together with article 14. As for section 330 of POCA, it is in a form which was intended to give effect to the Second Money Laundering Directive (2001/97/EC), and I do not see how it can be said to represent any sort of indication by Parliament as to its understanding of the extent of LAP.

75. I am also unimpressed by Prudential's reliance on the 2007 Act. At best, it merely acknowledges two realities which I have accepted anyway, namely that legal advice is now given by many professional people other than lawyers, and that lawyers can work in firms with other professionals, and vice versa: the only change affected by the 2007 Act is that lawyers can now go into partnership with people in other professions.

Disposition

76. For these reasons, I would dismiss this appeal.

LORD HOPE

77. For the reasons given by Lord Neuberger, Lord Mance and Lord Reed I too would dismiss this appeal. I should like to add just a few words of my own to explain why I am of that opinion.

78. A search for a principled answer might well lead one to the conclusion that there was no good reason at all for holding that the tax advice of chartered accountants should be treated differently from similar advice given by a barrister or a solicitor, as Lord Sumption's powerfully reasoned judgment so ably

demonstrates. He starts from the position that English law has always taken a functional approach to legal advice privilege, and that all one needs to do is to recognise as a matter of fact that much legal advice falling within the principles governing legal advice privilege is given today by people who are not lawyers: see paras 123 and 128, below.

79. If the issue is approached on that basis, I agree that it is quite difficult to see how in principle according barristers and solicitors a special status on this matter can be justified. I would find it very hard to distinguish between the legal and factual basis for any claim of privilege in this respect as between chartered accountants on the one hand and lawyers on the other. The functions that they perform when giving tax advice are essentially the same in each case. And I would certainly not find it possible to draw any relevant distinction between these two professions as to their standards of training or discipline.

80. My starting point, however, is the same as that indicated by Lord Neuberger: see para 29. The reason why the issue is before us at all in this case is quite simple. It is to be found in what people generally understand the position to be. Legal advice privilege, as generally understood, applies only to advice that is given by lawyers. If we were to declare that the matter is to be determined not by the profession to which the adviser belongs but by the function that he is performing, we would be changing the ambit of the privilege. And it would be a significant change because the position as generally understood has clearly defined limits and, in consequence, the inestimable advantages of clarity and certainty. Can we be certain that that will be so if the privilege were to be extended to tax advice by chartered accountants, on the ground that they too are advisers whose profession has as an ordinary part of its function the giving of skilled legal advice? If the privilege were to be extended that far, what about tax advice given by other members of the accountancy profession? As Sir Sydney Kentridge QC put it, the change we are asked to make would need a very good reason – evidence that something was not working properly. I agree with Lord Neuberger that no such pressing need has been demonstrated, and that to adopt the functional test would give rise to a significant risk of uncertainty.

81. I also think that the courts are not best placed to assess how profound such a change would be, whether there are good reasons of policy for making it and what protections, if any, are needed to ensure that the ambit of the privilege is kept within limits that are acceptable. Principle is an uncertain guide in such matters, if all one has to go on is the function that is being performed by the adviser. We do not need to go down that road, and it seems to me that the wiser course is not to do so. If there are reasons of public policy for making the change, the matter should be left to Parliament.

LORD MANCE

82. I have had the great advantage of reading the judgments prepared by Lord Neuberger, with whom Lord Hope agrees, and Lord Sumption, with whom Lord Clarke agrees. I come down on the same side as Lord Neuberger, basically for all the reasons which he gives. I add only a few words, principally to address the suggested logic of recognising that clients of tax accountants enjoy legal advice privilege ("LAP") in respect of tax advice given them professionally by such accountants paralleling the LAP normally enjoyed by the clients of lawyers.

83. LAP has developed and been accepted on a general basis in respect of lawyers because they are lawyers and their business is normally dealing with legal matters. There has been no particular occasion to examine specific areas of legal advice or lawyers' activity, in order to consider whether it merits special treatment and, if so, how such areas of their activity would be defined.

84. Such questions do however arise in respect of Prudential's current claim that the courts should recognise the underlying logic of LAP and accept that it applies in respect of legal advice given professionally in any particular area where the professional who gives it is a member of a profession which has as an ordinary part of its function the giving of skilled legal advice in that particular area.

85. The relevant profession here is accountancy and the relevant area the giving of tax advice. But there are, as Lord Neuberger notes in paras 54 to 60, other professions which might be said to give legal advice in particular areas in the course of their ordinary professional activity.

86. In relation to tax or any other particular areas where legal advice is given professionally, specific considerations may exist which could on examination point away from a recognition of LAP, or away at least from its recognition on an unqualified basis. That was certainly the conclusion of the Keith Committee, when it recommended that LAP be recognised in respect of tax advice by accountants, but only on a significantly qualified basis: see Lord Neuberger's judgment, para 65.

87. Similarly, when the New Zealand Parliament legislated by the Taxation (Base Maintenance and Miscellaneous Provisions) Act 2005 in June 2005 to create a statutory privilege in relation to any confidential "tax advice document", it did so by inserting into the Tax Administration Act 1994 a complex of statutory provisions (sections 20B to 20G) requiring the relevant "tax advisor" to be a member of an "approved advisor group" approved by the Commissioner on Inland

Revenue and providing that disclosure must nonetheless be made, from any tax advice document, of "tax contextual information". This was defined to include, inter alia, (a) a fact or assumption relating to a transaction that has occurred or is postulated by the person creating the tax advice document; (b) a description of a step involved in the performance of a transaction that has occurred or is postulated by the person creating the tax advice document; (c) advice that does not concern the operation and effect on the person of tax laws; (d) advice that concerns the operation and effect on the person of tax laws relating to the collection by the Commissioner of debts payable to the Commissioner; (e) a fact or assumption relating to advice that is referred to in paragraph (c) or (d); and (f) a fact or assumption from, or relating to the preparation of (i) financial statements of the person, or (ii) a document containing information that the person is required to provide to the Commissioner under an Inland Revenue Act.

88. In Australia the Law Reform Commission, in *A Review of Legal Professional Privilege and Federal Investigatory Bodies* (report ALRC 107 dated December 2007) supported "the New Zealand model of creating a separate 'tax advice privilege', rather than simply extending client legal privilege to accountants giving tax advice"; and it did this specifically because it would allow Parliament greater control over the operation and scope of tax advice privilege (para 6.278). As to the nature of the control, it said (para 6.281):

> "The ALRC is also supportive of the provision in the New Zealand legislation which does not apply the privilege to contextual information provided for the purpose of providing tax advice. It should be very clear in the operation of this privilege that only the advice itself will be protected, and not any other information that may form part of the accountant's file or briefing. The legislation should state that no privilege should apply to 'tax contextual information' given for the purpose of providing tax advice. 'Tax contextual information' should be defined as information about:
>
> > • a fact or assumption that has occurred or is postulated by the person creating the tax advice document; a description of a step involved in the performance of a transaction that has occurred or is postulated by the person creating the tax advice document; or
> >
> > • advice that does not concern the operation and effect of tax laws."

89. The justification of LAP advanced in respect of lawyers includes candour – that is, that it enables clients to provide their lawyers with all the facts and matters that they might need to advise on the law: see eg the quotation from Lord Scott in *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610, quoted by Lord Sumption at para 118. But it is evident from paras 86 to 88 above that, when the present issue has been considered by law reform committees or legislators in the United Kingdom, New Zealand and Australia, this justification has not been felt to have the same force. Rather, a specific need has been felt to ensure, by appropriate legislative qualification of the scope of LAP, that the Revenue is put in possession of a full understanding of the facts and the nature of the relevant transactions, so as to be able then to advise itself as to the correct legal conclusions to be derived therefrom as a matter of tax law.

90. Another, not unrelated, feature of this case, to which I attach considerable importance, is that the United Kingdom Parliament has on a number of occasions not only treated lawyers as the only persons whose advice gives rise to LAP on the part of their clients (see Lord Neuberger's judgment, para 35 et seq), but has also specifically decided to maintain a distinction between lawyers and tax advisers when it was suggested that the latter's advice ought to give rise to a general LAP paralleling that existing in respect of lawyers' advice (Lord Neuberger, para 36).

91. If LAP extended to professions other than lawyers, it is accepted that it would not be on a general basis, but that a careful distinction, in practice normally irrelevant in the case of lawyers, would have to be drawn between privileged and non-privileged activities. Although such a distinction can sometimes be relevant with lawyers (eg where a lawyer acts as a "man of business" or purely administratively, rather than as a lawyer), it is not normally so. But in the case of other professions, the distinction would become highly relevant and would not necessarily be easy to draw.

92. For all these and the other reasons given by Lord Neuberger, any recognition in respect of tax accountants of a privilege which has traditionally been and is still regarded as relevant only to legal advice given by lawyers in the course of their profession, or of any parallel privilege, should in my opinion take place, if at all, in Parliament, not in the courts.

LORD REED

93. I agree that this appeal should be dismissed, for the reasons given by Lord Neuberger, Lord Hope and Lord Mance.

94. The argument that existing legal principle already recognises the privilege claimed by the appellants, although powerfully put by Lord Clarke and Lord Sumption, is not one that I find persuasive.

95. The process of reasoning by which a legal principle is derived from a body of authority was explained by Lord Diplock in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1058-1059. Speaking of the law of negligence, his Lordship explained that the process involved two stages, the first of which was inductive, and involved an analysis of the characteristics of the conduct and relationship involved in each of the decided cases:

> "This analysis leads to a proposition which can be stated in the form:
>
> > 'In all the decisions that have been analysed a duty of care has been held to exist wherever the conduct and the relationship possessed each of the characteristics A, B, C, D, etc, and has not so far been found to exist when any of these characteristics were absent.'
>
> For the second stage, which is deductive and analytical, that proposition is converted to: 'In all cases where the conduct and relationship possess each of the characteristics A, B, C, D, etc, a duty of care arises.' The conduct and relationship involved in the case for decision is then analysed to ascertain whether they possess each of these characteristics. If they do the conclusion follows that a duty of care does arise in the case for decision" (p 1059).

96. Applying that approach in the context of legal advice privilege, in each of the decided cases in which the privilege was held to exist, the relationship of the persons between whom the communication passed was that of client (or prospective client) and professional lawyer acting as such; and the privilege has not so far been held to exist when any of the characteristics of that relationship were absent. One can therefore deduce from the authorities a principle which applies when that relationship exists. That relationship does not however exist in the present case.

97. As Lord Diplock explained (*ibid*), again in the context of the law of negligence, where the conduct or relationship which is involved in the case at hand lacks at least one of the characteristics which have been identified, the court has a choice whether or not to extend the kinds of conduct or relationships which give rise to a duty of care:

> "And the choice is exercised by making a policy decision as to whether or not a duty of care ought to exist if the characteristic which is lacking were absent or redefined in terms broad enough to include the case under consideration. … The choice to extend is given effect to by redefining the characteristics in more general terms so as to exclude the necessity to conform to limitations imposed by the former definition which are considered to be inessential."

98. Applying that approach in the present context, since the case at hand lacks one of the characteristics which has been present in all previous cases in which legal advice privilege has been held to exist, the court has a choice whether or not to extend legal advice privilege to situations where legal advice was sought from a professional person other than a lawyer. That choice is exercised by making a policy decision of the kind which Lord Diplock explained. It is open to the court to redefine the characteristics of legal advice privilege in more general terms, for example by holding that legal advice, given in the exercise of a professional activity which involves the giving of such advice, is subject to legal advice privilege. It is also open to the court to adhere to the narrower principle which can be derived from the existing body of case law. A judgment has to be made as to the most appropriate course of action.

99. That judgment, in this case, requires a number of considerations to be taken into account, as Lord Neuberger has explained. There are considerations which weigh in favour of an extension of the principle. In particular, it can be argued that the underlying rationale of the privilege favours its application whenever legal advice is sought from a person who is suitably qualified to give such advice, whether that person is a member of the legal profession or of some other profession whose activities include the giving of legal advice.

100. There are on the other hand countervailing considerations. One which seems to me to be particularly significant is that the privilege must be capable of being relied upon if it is to serve its purpose of enabling clients and their legal advisers to communicate with each other with complete candour. It is therefore highly desirable that the privilege should, as far as possible, be based upon a principle which is clear, certain and readily understood. The existing common law principle meets those requirements. The variety of possible formulations of an extended common law principle, and the consequent scope for debate as to whether particular professional persons, in particular situations, would or would not fall within its scope, would detract from the certainty and clarity which presently exist.

101. More fundamentally, it is necessary to give consideration to the respective roles, in relation to the development of this area of the law, of the courts, the executive and the legislature. In doing so, it is necessary to have regard to the measures taken (or not taken) in this area by the executive and the legislature, after consultation and consideration of a wider character than can be carried out by courts determining disputes between particular parties. In my judgment, having regard particularly to the latter consideration, the court should decide the case as Lord Neuberger proposes.

102. No question arises in this appeal as to the scope of the privilege in Scots law. It may nevertheless be helpful to add some observations about the case from a Scottish perspective, given the likely interest in the case in Scotland as well as in England and Wales. My observations are not however intended to pre-empt a full discussion of the matter should the issue arise in Scottish proceedings.

103. The law in this area developed separately in Scotland from in England. The two systems have however developed in the same direction. There are a number of differences in the case law in relation to particular aspects of the law, but the general principle, its fundamental importance, and the considerations of public policy which underlie it, are common to both systems.

104. By the late seventeenth century it was established in Scotland that an advocate was not bound to disclose "any private advice or secret of his calling or employment": *Creditors of Wamphray v Lady Wamphray* (1675) Mor 347; *Earl of Northesk v Cheyn* (1680) Mor 353; Stair, *Institutions of the Law of Scotland*, IV.xliii.8. The rationale was explained by Sir George Mackenzie as being the public interest in persons being able to obtain legal advice based upon complete knowledge of the relevant circumstances:

> "An Advocate is by the Nature of his Imployment tied to the same Faithfulness that any Depositor is: For his Client has depositate in his Breast his greatest Secrets; and it is the Interest of the Common-wealth, to have that Freedom allowed and secured without which Men cannot manage their Affairs and private Business: And who would use that Freedom if they might be ensnared by it? This were to beget a Diffidence betwixt such who should, of all others, have the greatest mutual Confidence with one another; and this will make Men so jealous of their Advocates that they will lose their private Business, or succumb in their just Defence, rather than Hazard the opening of their Secrets to those who can give them no Advice when the case is Half concealed, or may be forced to discover them when revealed."

(*Observations upon the 18th Act of the 23rd Parliament of King James the Sixth against Dispositions made in Defraud of Creditors etc* (1675), in *Sir George Mackenzie's Works*, vol 2 (1755), p 1).

105. It became clear during the eighteenth century, if not earlier, that this approach also applied to other types of lawyer engaged in legal proceedings (*McLeod v McLeod* (1744) Mor 16754), and that the concept of a "secret" extended to anything of which a lawyer had been informed by his client (*Leslie v Grant* (1760) 5 Brown's Supp 874). A crucial step in the further development of the principle was taken in *Executors of Lady Bath v Sir John Johnston,* 12 November 1811, FC, which has been interpreted (notably in *McCowan v Wright* (1852) 15 D 229) as having decided that the privilege was not confined to communications made in connection with legal proceedings which were then pending or in contemplation. It was also understood by the early nineteenth century, if not earlier, that the privilege was that of the client, not the lawyer: see eg Bell, *Principles of the Law of Scotland*, 4th ed (1839), para 2254. The general principle, as it was understood by the mid-nineteenth century, was summarised by Lord Wood in *McCowan v Wright* at p 237:

> "The rule by which the communications between clients and their legal advisers are protected from discovery, is one of great value and importance, and, within its legitimate limits, ought to be strictly observed. According to the law of Scotland, such communications are privileged although they may not relate to any suit depending or contemplated, or apprehended."

106. Comparing the Scottish authorities down to that date with the review of the English case law by Lord Brougham in *Greenough v Gaskell* (1833) 1 My & K 98, it could be said that the general principles governing the privilege of communications between lawyer and client in the two jurisdictions were in alignment; and that is reflected in the citation of numerous authorities from England as well as Scotland in Bell's account of the subject. More recent development of these general principles, notably in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, where the privilege was characterised as a fundamental human right, has not depended on matters peculiar to either jurisdiction.

107. In Scotland, as in England and Wales, all the cases in which the privilege has been upheld appear to have concerned lawyers acting in a professional capacity, clerks or assistants acting on their behalf, or other intermediaries to whom a communication had been made for transmission to or from such a person. It has been held that the privilege did not attach to communications made to an accountant (*Wright v Arthur* (1831) 10 S 139); but the case was not one in which it

was suggested that the accountant had given legal advice, and it long pre-dated the era in which the giving of tax advice, in particular, became one of the principal areas of practice of many accountants. It is not apparent that the courts have hitherto been required to make a judgment as to whether the privilege ought to be confined to legal advice given by lawyers acting as such, as opposed to legal advice given by members of other professions.

108. As far as I have ascertained, therefore, the authorities do not foreclose the possible application of the privilege to advice given by accountants. Nevertheless, as in England and Wales, the general understanding is that the privilege applies only to members of the legal professions. In *Narden Services Ltd v Inverness Retail and Business Park Ltd* 2008 SC 335, 338 for example, the court described the notion of legal professional privilege (an expression which was adopted in that case, and has been used in subsequent cases, in preference to the older term "confidentiality", which could lead to confusion between the privilege and the different sense in which "confidentiality" is employed in other contexts), as enshrined in the common law of Scotland, as "(in broad terms) a right of absolute privilege in respect of communications emanating between a solicitor and a client relating to advice and also in respect of any documents, including those coming from accountants, which were prepared in the contemplation of litigation". The apparent implication is that documents prepared by accountants may come within the scope of litigation privilege (in the older terminology, *post litem motam* confidentiality) if they were prepared in contemplation of litigation, but that legal advice privilege is confined, in broad terms, to communications between a solicitor and his client. The court was not however addressing the question whether the scope of the privilege might be extended where legal advice was given by accountants.

109. Textbooks proceed on a similar basis, assuming that the privilege applies only where advice is given by lawyers, but not specifically addressing the question whether it might also apply where legal advice was given by members of other professions. The title on Evidence in the *Stair Memorial Encyclopaedia of the Laws of Scotland*, (*Reissue*), for example, states that "the privilege is restricted to communications made to professionally qualified and instructed lawyers" (para 205), and that any attempt to plead privilege by "bankers, accountants and other professional business and personal advisers" will fail (para 209). Ross and Chalmers, *Walker and Walker, The Law of Evidence in Scotland*, 3rd ed (2009), similarly proceed on the basis that the privilege is confined to professional lawyers (para 10.2.7).

110. As in England and Wales, bodies concerned with law reform have also proceeded on the basis of such an understanding. The Keith Report, discussed by Lord Neuberger, concerned the United Kingdom as a whole, and was prepared by a committee presided over by a Scottish member of the Appellate Committee of

the House of Lords. It discussed the relevant rules of Scots law, which it described as not differing materially from the English rules, although some differences in matters of detail were noted (para 26.1.5). This area of the law was also considered by the Scottish Law Commission in its Memorandum No 46, *Law of Evidence* (1980), where it expressed the view that "solicitor/client privilege is reasonably well-defined and works satisfactorily in practice": para S 21. The Commission did not suggest that the privilege applied, or ought to apply, in situations where legal advice was sought from members of other professions; nor was that issue touched upon in the reports which followed upon the consultative memorandum.

111. As in relation to England and Wales, Parliament has legislated in relation to Scotland in ways which assumed that legal advice privilege was confined to advice given by lawyers. Section 20B of the Taxes Management Act 1970 and the replacement provisions in Schedule 36 to the Finance Act 2008, discussed by Lord Neuberger, apply to Scotland. So also do section 280 of the Copyright, Designs and Patents Act 1988 and section 87 of the Trade Marks Act 1994, which extend the privilege under Scots law to patent attorneys and trade mark agents respectively. Section 22 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 made provision for communications made to or by a licensed conveyancer or registered executry practitioner to be protected from disclosure "in like manner as if the practitioner had at all material times been a solicitor acting for the client".

112. Finally, just as Parliament legislated in the Legal Services Act 2007 to create a framework for the future of the provision of legal services, and for the regulation of such provision, in England and Wales, a comparable framework was created by the Scottish Parliament in the Legal Services (Scotland) Act 2010. The provision of legal advice is a legal service falling within the scope of the legislation: section 3. The professions whose members can own or control a licensed provider of legal services under the Act include chartered accountants and chartered certified accountants: Licensed Legal Services (Specification of Regulated Professions) (Scotland) Regulations, SSI 2012/213. The Act makes express provision in section 75, headed "professional privilege", that communications made to or by a licensed provider (or a designated person within the licensed provider) in the course of its acting as such in its provision of legal services, are "in any legal proceedings, privileged from disclosure as if the licensed provider or (as the case may be) the person had at all material times been a solicitor acting for the client". Since that provision applies only to licensed providers and designated persons within such providers, it therefore applies only where a licence has been granted; and such grants are dependent upon the existence of appropriate regulatory schemes and licensing rules.

113. Against that background, if the question were to arise in Scotland whether the common law privilege should be extended to legal advice given by

accountants, the courts would have to make a policy decision, as I have explained. That decision would have to be made in the context which I have discussed, including the enactment of legislation, following consultation and consideration in the Scottish Parliament, providing the privilege where other professions are involved in the provision of legal services, on a conditional and limited basis.

LORD SUMPTION (dissenting)

114. In my opinion the law is that legal professional privilege attaches to any communication between a client and his legal adviser which is made (i) for the purpose of enabling the adviser to give or the client to receive legal advice, (ii) in the course of a professional relationship, and (iii) in the exercise by the adviser of a profession which has as an ordinary part of its function the giving of skilled legal advice on the subject in question. The privilege is a substantive right of the client, whose availability depends on the character of the advice which he is seeking and the circumstances in which it is given. It does not depend on the adviser's status, provided that the advice is given in a professional context. It follows, on the uncontested evidence before us, that advice on tax law from a chartered accountant will attract the privilege in circumstances where it would have done so had it been given by a barrister or a solicitor. They are performing the same function, to which the same legal incidents attach.

115. The starting point for any analysis of these matters is the rationale of the privilege attaching to the process of obtaining legal advice. It has been described by the Supreme Court of the United States as "the oldest of the privileges for confidential communications known to the common law": *Upjohn Company v United States* 449 US 383, 389 (1981). In some respects its development has been peculiar to the English common law and those legal systems which have adopted it. In most civil law countries, the protection of professional confidences is founded on the status of the adviser. In French law, which can stand as the paradigm case, information given to an adviser in the course of a confidential professional relationship is subject to the rules governing the "secret professionnel". The source of the confidence is the professional obligations of the adviser, and the provisions of the Penal Code which reinforce them with criminal sanctions. Consistently with this approach, French law like most European civil law systems accords the same protection to other confidential professional relationships, for example with doctors or priests, and indeed has in recent times extended it to some non-professional ones: see Code Pénal, article 226-13. English law originally protected professional confidences on a similar basis. The origins of the privilege have been traced in the speech of Lord Taylor of Gosforth CJ in *R v Derby Magistrates' Court, Ex p B* [1996] AC 487, 504-507 and in *Holdsworth, History of English Law*, 3rd ed, ix (1944), 201-202. It originated in the practice of the Court of Chancery in the years after the statute of 1562 which first made

witnesses compellable: see *Berd v Lovelace* (1577) Cary 62; *Dennis v Codrington* (1579) *ib*, 100. By the early eighteenth century most writers were agreed that it was based on the protection of the honour of the adviser, who would be discredited by being required to disclose his client's confidences. It followed that the adviser was permitted but not compellable to give evidence of them. This theory was disposed of by Lord Mansfield in the *Duchess of Kingston's Case* (1776) 20 St Tr 355, 574. The famous surgeon Sir Caesar Hawkins declined to give evidence against the Duchess on her trial for bigamy, saying: "I do not know how far any thing that has come before me in a confidential trust in my profession should be disclosed consistent with my professional honour." Lord Mansfield ruled that he must testify, because if the sole ground of refusal was the protection of his honour, it was a sufficient answer to those who might subsequently impugn it that he was compellable. In the half-century following this decision, the juridical basis of the privilege was redefined by the courts. It became a right of the client, which was justified as serving a specific public interest in his freedom of action in dealings with his legal advisers. In *Wilson v Rastall* (1792) 4 TR 753, it was established (i) that the privilege was a right of the client, not of the lawyer, (ii) that the lawyer was therefore precluded from giving evidence of privileged matters even if he was willing to, and (iii) that the privilege was not confined to the litigation in which disclosure was sought nor to litigation in which the client was a party, but extended to any litigation in which it was sought to compel the production of documents or the appearance of a witness.

116. In *Greenough v Gaskell* (1833) 1 My & K 98, Lord Brougham LC reviewed the case law going back to the late eighteenth century. In a judgment which is generally regarded as the foundation of the modern law, he held that the privilege was unaffected by the question whether proceedings were pending or contemplated, "for a person oftentimes requires the aid of professional advice upon the subject of his rights and his liabilities, with no reference 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" (p 102). In a celebrated passage, Lord Brougham said (p 103):

> "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."

The only exception to the principle thus stated which Lord Brougham was prepared to recognise was the case where the communication for which privilege was claimed was made to a professional legal adviser but not in the course of a professional relationship with him: see pp 104-115. This was not an indirect way of recognising the special status of professional lawyers. It is clear from the context that the point which Lord Brougham was making was that the privilege attaches only to legal advice taken in a professional context, i.e. not in a social one.

117. Not every one has applauded the principle as it was developed in the late eighteenth and early nineteenth centuries. But it is fair to say that many of its critics have been animated by broader misgivings about the whole process of forensic inquiry and the role of the legal profession in it. Jeremy Bentham, who regarded lawyers as obstacles to the administration of justice, famously characterised legal professional privilege as a doctrine which turned the lawyer into the accomplice of his client. His views were the subject of a ferocious refutation in the pages of the *Edinburgh Review* by Thomas Denman, a barrister, member of Parliament, and lifelong friend of Lord Brougham, later to become Lord Chief Justice, who restated the classic view of the privilege as fundamental to the rights of the citizen. History has gone Denman's way and not Bentham's. Lord Brougham's judgment in *Greenough v Gaskell* remains to this day the classic statement of the rationale for legal advice privilege. In *AM & S Europe Ltd v Commission of the European Communities* (Case 155/79) [1983] QB 878, 913, Sir Gordon Slynn, Advocate General, after reviewing the law relating to the protection of confidences imparted to lawyers across the member states of the European Community 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."

More recently, in *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610, 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 communications covered 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 interests of the whole community that lawyers give their clients sound advice, accurate as to the law and sensible as to their conduct."

I do not propose to multiply citations, but it is right to point out that precisely the same underlying rationale has been given for the privilege in modern times by the Supreme Court of the United States: *Upjohn Company v United States* 449 US 383, 389 (1981); *Swidler & Berlin v United States* 524 US 399, 403 (1998). By the High Court of Australia: *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49, at para 35; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at para 44 (McHugh J). And by the Supreme Court of Canada: *R v McClure* [2001] SCC 14, [2001] 1 SCR 445, at paras 36-39.

118. Doubts have sometimes been expressed about how important the assurance of absolute confidentiality really is to clients who consult legal advisers, particularly when they do so in civil or non-contentious matters. How often these doubts are justified is impossible to say. We can assume that they sometimes, perhaps often are. As Lord Scott pointed out in *Three Rivers (No 6)* at para 34, it is "obviously true that in very many cases clients would have no inhibitions in providing their lawyers with all the facts and information the lawyers might need whether or not there were the absolute assurance of non-disclosure that the present law of privilege provides." It does not matter for two reasons. The first is that the law is that the confidence must be protected if proper legal advice is to be obtained. It has been established in this sense for many years and no one is asking us to depart from it. The second, which is perhaps more satisfying, is that it would be wrong to depart from it in any event. The underlying principle is that those clients who do wish to consult a lawyer on the basis of absolute confidence should be entitled to do so, notwithstanding that absolute confidence may be less important to others.

119. Consistently with the underlying principle, the modern case law has developed the law of privilege in three principal respects which are relevant to the issues on this appeal. First, the courts have held that the privilege is absolute, subject only to a narrowly defined exception for cases where the client is seeking legal advice in order to enable himself the better to commit a fraud or crime. In *R v Derby Magistrates' Court, Ex p B* [1996] AC 487 the House of Lords, after reviewing the case law on the juridical basis of the privilege from its origins in the sixteenth century, held that it did not depend on balancing the public interest in sustaining the confidence against any competing public interest. In the circumstances of that case, it could not be overridden even if the information withheld was likely to be material evidence to exonerate a man charged with murder. Second, although litigation (civil or criminal) will generally be the occasion for seeking disclosure of information said to be privileged, the modern case law has reaffirmed the principle first stated by Lord Brougham that the privilege does not just exist in aid of forensic litigation. It attaches to confidences given in circumstances where no proceedings were contemplated or where the proceedings contemplated were not litigation but, for example, a domestic or public inquiry: *Three Rivers District Council v Bank of England (No 6)* [2005] 1 AC 610. Third, in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, Lord Hoffmann, with whom the rest of the House of Lords agreed, recognised at para 7 what was implicit in these propositions, namely that the privilege was not a mere procedural incident of the forensic process, but a "fundamental human right long established in the common law", which was "a necessary corollary of the right of any person to obtain skilled advice about the law."

120. Legal advice privilege is sometimes described as essential to the effective administration of justice, and Lord Brougham himself put it that way. By this, they did not mean the effective conduct of legal proceedings. On the contrary, as Baroness Hale pointed out in her speech in *Three Rivers* (quoted above), privilege may obstruct the forensic process by making relevant evidence unavailable. Lord Scott pointed out in the same case, para 34, that the relevant public interest was in reality the rule of law, which depends upon the citizen being able without inhibition to find out what his legal position is. The complexity of the modern law and its progressive invasion of the interstices of daily life, have made this a public interest of greater importance than ever before. It is perhaps particularly significant in the area of tax law, where the citizen is brought up against the power of the state and the law is often technically complex.

121. From the origins of the privilege in the late eighteenth century to the present day, the case law refers to it as attaching to the advice of lawyers, i.e. barristers, solicitors and attorneys and, in the very early days of the doctrine, the scriveners who drew up wills, charters and other legal instruments. In most of the early cases lawyers were identified in contradistinction not to other sources of professional

legal advice, but to professionals whose advice was not legal at all, such as priests or doctors. Once this distinction became too well understood to require repetition, the references in the cases to the advice of lawyers persisted but simply reflected the assumption that lawyers were the only source of skilled professional legal advice. Until modern times, this assumption was correct. The routine resort to accountants for legal advice on tax does not seem to have become common until the 1960s. The only English case before this one to address directly the difference between legal advice received from barristers and solicitors on the one hand and other legal advisers on the other was *Wilden Pump Engineering Co v Fusfeld* [1985] FSR 159, in which it was held that patent agents were not lawyers and that privilege did not attach to their advice. I shall say something more about this case below.

122. 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 dependent 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 a skilled professional legal adviser, and not in support of his right to consult the members of any particular professional body. The findings 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 dependent not just on the nature of the advice or the circumstances 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.

123. It is consistent with the view that I have expressed that the courts have in recent times expanded the categories of lawyer whose advice may attract privilege, in particular to cover salaried legal advisers and foreign lawyers. This development has been the natural consequence of the functional character of the test combined with the law's pragmatic willingness to recognise the changing patterns of professional life. The privilege attaching to the advice of salaried legal advisers was first recognised judicially by the Court of Appeal in *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1972] 2 QB 102. Lord Denning MR, at p 129, justified the result primarily on the ground that, although the communications of a corporation with an in-house legal adviser were internal to the corporation, nevertheless the adviser was performing the same function as the lawyer in independent practice. Relevant communications with foreign lawyers have for many years attracted the same privilege for the same

reason. In *Lawrence v Campbell* (1859) 4 Drew 485 privilege was claimed in English litigation for communications between a Scottish client and a Scottish solicitor practising in London. Sir Richard Kindersley V-C held (at p 491) that "the same principle that would justify an Englishman consulting his English solicitor would justify a Scotchman consulting a Scotch solicitor." Subsequently, communications with foreign lawyers were treated as being entitled as a matter of course to the same privilege as communications with English lawyers in like circumstances: see *Macfarlan v Rolt* (1872) LR 14 Eq 580; *In re Duncan, decd* [1968] P 306; *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529, 535-536. Sir Sydney Kentridge QC, appearing for the Law Society, described these cases as "anomalous". But he did not suggest that they were wrong. I think that they were clearly right, and I do not regard them as anomalous. They reflect the functional approach which English law has always taken to legal advice privilege.

124. The only sustained arguments addressed to us for treating barristers and solicitors as having a special status justifying their unique treatment by the law of privilege were (i) that other professionals did not have the same stringent legal obligations of non-disclosure as lawyers; and (ii) that barristers and solicitors have a unique relationship with the courts.

125. The first of these points can be shortly dealt with. If privilege attaches to the tax advice of accountants in the same circumstances as it would attach to similar advice from a barrister or solicitor, then its legal incidents are exactly the same in either case. It does not matter that the professional rules of at least some accountants permit them to disclose confidential client information in some circumstances in which it could not lawfully be disclosed by a solicitor. These rules do not prevent accountants from assuming more stringent and less qualified obligations, and they would be treated as doing so by giving advice in privileged circumstances. This is because the juridical source of the accountant's duty in relation to privileged material is the right of the client under the law of privilege, not the accountant's professional rules.

126. The second reason for attributing a unique status to the advice of barristers and solicitors was that the existence of the privilege has always depended on the close relationship of the courts with the legal professions. The authority of the judges, it is said, has always been the ultimate source of standards of admission and of the disciplinary powers exercisable over legal practitioners. But they have never been concerned with the professional standards or organisation of the accountancy profession. Sir Sydney Kentridge, who was mainly responsible for developing this argument, did not of course suggest that accountants were unworthy of being treated on a par with solicitors and barristers, nor was any such suggestion advanced by any one else on this appeal. His point was that judicial recognition and supervision of the legal profession was historically part of the

basis on which privilege attached to their advice. This, he submitted, was not something that could be ignored simply because others have come to perform the same functions. This approach was to some extent invited by the concession of the appellants that the privilege would attach only to communications with members of "recognised" professions. But in my view the argument, like the concession which provoked it, is mistaken. In the first place, the main judicial safeguard against abuse lies, as Lord Denning pointed out in the *Alfred Crompton* case (p 129), in the right of the court to examine the legal and factual basis for any claim of privilege at the time when it is made. The court is in as good a position to do this when accountants are involved as it is when the advice was sought from lawyers. Secondly, none of the statements of principle in the case law have identified the relationship of lawyers with the court or the arrangements for the admission or discipline of lawyers as a relevant factor. If it had been, then the English courts would not have recognised a privilege for legal advice which was wholly independent of any forensic proceedings, actual or prospective. Nor would they have recognised the privilege attaching to the advice of foreign lawyers. There is no suggestion in any of the cases about foreign legal advice of any interest on the part of the English court in the standards of their training or discipline, and they are certainly not amenable to the supervision of English judges. Nor could Sir John Romilly have recognised the privilege attaching to the advice of a person whom the client believed to be a solicitor and professionally consulted on that basis, but who in fact was not: see *Calley v Richards* (1854) 19 Beav 401. Third, the legal basis of the privilege was worked out by the courts at a time when most claims for legal advice privilege concerned communications with solicitors and attorneys, whose professional standards were then notoriously low. Many of them were not enrolled and the court's supervision of their professional practices was nominal or non-existent. This was particularly true of attorneys, who practised in the common law courts and whom Sir Vicary Gibbs, Chief Justice of Common Pleas from 1813, once memorably described as "the growling jackals and predatory pilot fish of the law": see *The Oxford History of the Laws of England*, xi (2010), 1110 (the whole of this chapter repays reading). The high modern standing of solicitors (as all of them were called after 1873) was due very largely to the work of the Law Society, which was founded after 1825 to address this perception, and which together with its provincial affiliates gradually transformed the profession in the course of the nineteenth century.

127. Neither Charles J nor the Court of Appeal took issue with these points in principle. On the contrary, Charles J considered, at paras 64-65, that the appellants had put forward

> "a compelling, 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... So in my view, Prudential have shown that accountants do what lawyers are described as doing in the cases that establish LPP."

The courts below decided the question mainly on the ground that the wider implications of recognising a privilege attaching to the advice of accountants made it a matter for Parliament. Most of the argument addressed to us on behalf of the respondents and those interveners who supported them, was directed to this proposition. In reality, it comprises three distinct points. The first is a classic "floodgates" argument, namely that it would involve an extension of scope of the privilege which would considerably increase the number of persons whose advice qualified. The second argument is that recognising the privilege attaching to accountants' advice would directly conflict with statute. The third is that fixing the boundaries of the privilege for legal advice from non-lawyers and determining the conditions on which it was exercisable were inherently legislative processes.

128. The main difficulty about the first point is its premise. This is that by recognising the privilege attaching to the legal advice of accountants we would be extending the scope of the privilege at common law. In my view this premise is wrong. Acceptance of the appellants' basic submission would not involve any change to the principles governing the availability of legal advice privilege. It would only 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 and solicitors but accountants. It is the function of the courts, and in particular of this court, to ensure that changes in legal, commercial or social practice are properly reflected in the way that the law is applied. I do not doubt that as a result the number of claims to privilege will be increased. But that is because the growing complexity of tax law and the increasing number of people and organisations affected by it, have led to an exponential increase in the number of people seeking legal advice. A mere increase in the number of people who can take advantage of an existing rule of law cannot be a good reason for failing to apply general principles coherently. Nor can it justify an arbitrary distinction between different professions performing exactly the same function.

129. The second point (that the supposed extension of the privilege would be directly inconsistent with statute) was based on the provisions of sections 20 and 20B of the Taxes Management Act 1970, which were the legal basis of the Revenue's demand in this case. Section 20(1) confers on an Inspector of Taxes the power to call for documents in the possession or power of the taxpayer, and section 20(3) confers on him a corresponding power to call for documents from third parties such as advisers. By section 20(9), these provisions are subject to the restrictions in section 20B. Under section 20B(3), only the Commissioners of Inland Revenue (not an Inspector) may exercise the power under section 20(1) or (3) against a barrister, advocate or solicitor. And by section 20B(8), a barrister,

advocate or solicitor is not obliged to produce any document for which legal professional privilege could be maintained. Section 20B(9) and (11) make additional provision for dispensing auditors and "tax advisers" from having to produce relevant communications which are their property (i.e., in effect, their working papers) or which are merely explanatory. For this last purpose, a "tax adviser" means any person appointed to give advice about the tax affairs of another person. The argument is that these sections make special provision for the assertion of privilege in respect of communications with barristers and solicitors, thus implicitly excluding the assertion of privilege for communications with any one else. The point is said to be reinforced by the fact that Parliament has made distinct provision in section 20B(9) for documents in the possession of a broader category of "tax advisers". In my view this argument cannot be accepted in the light of the decision of the House of Lords in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, which concerned the same provisions of the Taxes Management Act. The relevant advice in that case had been given by solicitors and counsel, but the argument was similar. Section 20B(8) expressly preserved legal professional privilege in respect of documents requisitioned from third parties under section 20(3) but not in respect of documents requisitioned from the taxpayer himself under section 20(1). The point made for the Inland Revenue, as summarised by Lord Hoffmann at para 10, was that "Parliament has provided a number of specific safeguards and restrictions for the protection of the taxpayer, including an express preservation of LPP for documents in the possession of a barrister, advocate or legal adviser. It therefore necessarily follows that no wider qualification of the general words of section 20(1) was intended": see also para 21. The argument failed essentially because the provisions relating to privilege in this part of the Act could not be regarded as a complete code governing its availability. Section 20B(8) was held to be directed at a limited problem arising from dicta in *Parry-Jones v Law Society* [1969] 1 Ch 1, which appeared to suggest that documents in the hands of a lawyer were protected only by the law of confidence, not by privilege. As for section 20B(9), that was held to be irrelevant because it was not concerned with privilege at all: see paras 14 and 19. More generally, Lord Hoffmann, with whom the rest of the Appellate Committee agreed, held at para 8 that the fundamental character of the client's right to invoke privilege meant that it could be overridden by statute only if an intention to do so was "expressly stated or appear[s] by necessary implication." As Lord Hobhouse pointed out in his concurring judgment, at para 45,

> "A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have been included. A necessary implication is a matter of express language and logic not interpretation."

The decision in *Morgan Grenfell* illustrates the difficulty of arguing that statutory provisions expressly reserving legal professional privilege in some circumstances impliedly override it in all others. The most that can be said about section 20B(8) in the present context is that, like some other statutes conferring power to requisition documents or information, it assumes that privilege is available only in cases where a barrister, advocate or solicitor is involved. That is understandable at a time when no court had pronounced on the application of privilege to tax advice given by any one else. But it is axiomatic that the assumptions of Parliament are not the same as its enactments. In my view it is impossible to spell out of these provisions a necessary implication that Parliament intended to confine the privilege to communications with lawyers even if the common law extended it to others. On the footing that privilege attaches to communications about tax advice from accountants on exactly the same basis as corresponding communications with lawyers, I can discern no rational reason why Parliament should have intended to distinguish between them. The truth is that Parliament was not intending to deal with the advice of non-lawyers at all.

130. I come therefore to the third of the arguments for leaving the present issue to Parliament, which is to my mind the strongest of them. It can fairly be summarised as follows:

> (1) Legal professional privilege has been extended by statute to patent and trade mark attorneys, licensed conveyancers, and persons who without being barristers or solicitors are authorised to provide certain legal services under the Courts and Legal Services Act 1990 or the Legal Services Act 2007. There has been no equivalent extension to accountants.
>
> (2) A substantial number of statutes confer on the police or regulatory and disciplinary bodies the powers to obtain documents or information, subject to reservations for legal professional privilege which refer to "professional legal advisers". Other provisions, such as section 2 of the Criminal Justice Act 1987 (which confers a corresponding power on the Serious Fraud Office), preserve legal professional privilege subject to exceptions which refer in terms to "lawyers".
>
> (3) The possibility of extending the privilege to accountants was considered on a number of occasions between 1967 and 2008, but on none of them was Parliament prompted to extend the privilege to the advice of accountants.
>
> (4) More generally, the question which professionals qualify would be left uncertain if the appellants' argument succeeded. They are

> seeking the recognition only of the privileged status of tax advice given by members of the Institute of Chartered Accountants and the Chartered Institute of Taxation, but the principle which is said to justify such recognition would be capable of affecting a wider and wholly uncertain category of legal adviser.

In my view, none of these considerations require this court to refrain from giving a principled answer to the question posed on this appeal.

131. The first point to be made is that we are not here concerned with social or economic issues or other issues of macro-policy which are classically the domain of Parliament. Nor are we concerned with legal principles derived from statute. Legal professional privilege is a creation of the common law, whose ordinary incidents are wholly defined by the common law. In principle, therefore, it is for the courts of common law to define the extent of the privilege. The characterisation of privilege as a fundamental human right at common law makes it particularly important that the courts should be able to perform this function. Fundamental rights should not be left to depend on capricious distinctions unrelated to the legal policy which makes them fundamental.

132. Statute has intervened frequently in the past half-century, but it is important to appreciate on what basis it has done so. In the great majority of cases, statute has intervened for the limited purpose of reserving privilege when creating new powers to obtain documents or information by compulsion. Sometimes, the privilege is reserved subject to some qualification, although the commonest qualification relates to the right to require a lawyer to disclose his client's name and address, something that would not necessarily be privileged anyway. Section 20 of the Taxes Management Act 1970 is one of the earliest interventions of this kind. They have become commoner as statutory regulation has become more pervasive and powers of compulsion have multiplied. Some of the enactments in question, like the Taxes Management Act itself, assume that the privilege applies only to communications involving barristers and solicitors. Some of them, particularly in more recent times, have assumed that it applies to communications involving "legal advisers" or "professional legal advisers", a term which would naturally include any person who gives legal advice in the course of his profession. Provisions of these kinds are not concerned to define the extent or incidents of the privilege at common law. They operate by reference to the common law as it is declared by the courts. They may proceed on assumptions about the categories of legal adviser to which the relevant common law applies, which may be expressed with greater or lesser precision. Either way, assumptions of this kind are entirely consistent with the courts continuing to perform their historic role of clarifying and developing the common law. Indeed, the regularity of statutory intervention makes it the more important for the courts to declare the common law so that Parliament can proceed on a correct assumption about what it is. The problem at the moment

is that Parliament is legislating against the background of assumptions about the common law which are contrary to principle, discriminatory and out of date. Only the courts can be expected to rectify that state of affairs. Certainly, the frequency of references to privilege in statutes providing for the compulsory provision of documents or information has not prevented the courts from recognising the privileged status of relevant dealings with foreign lawyers. A French notary or a German *Rechtsanwalt*, for example, could not properly be described as a "barrister" or "solicitor" for the purposes of section 20B(8) of the Taxes Management Act, but it would be surprising to hear it said that a client who consulted one of these professionals could not claim privilege for their communications in response to a requisition under section 20.

133. The other purpose for which statute has intervened in recent years is to recognise certain professional activities other than those of barristers and solicitors as attracting the privilege. I find it difficult to attach much significance to this. None of the enactments in question attempt a comprehensive scheme of recognition which could make the omission of accountants' tax advice significant. There has been piecemeal legislation applying the privilege to certain professional activities of patent and trade mark attorneys and licensed conveyancers. In the case of patent and trade mark attorneys, this was necessary in order to reverse the effect of *Wilden Pump Engineering Co v Fusfeld* [1985] FSR 159, which had held that their activities did not attract privilege. A more systematic attempt to address the issue was made by section 63 of the Courts and Legal Services Act 1990, which has now been superseded by section 190 of the Legal Services Act 2007. Section 190(2) of the 2007 Act provides that where advocacy, litigation, conveyancing or probate services are provided by individuals who are not barristers or solicitors, legal professional privilege is to attach "in like manner as if [the individual] had at all material times been acting as [his] client's solicitor." By section 190(4), it is also to attach where a body licensed by the Legal Services Board provides services through a person who is a "relevant lawyer" or acts under the supervision or direction of a "relevant lawyer". "Relevant lawyers" include solicitors, barristers, Scottish advocates, registered foreign lawyers, European lawyers and also an indeterminate category of persons authorised by the Board to carry on a "reserved legal activity". These provisions can contribute very little to the present debate for two reasons. First, legal advice is not as such covered by the statutory scheme. It is regulated only so far as it is incidental to one of the services specified for the purpose of subsection (2) or the "reserved legal activities" relevant to subsection (4). The latter are defined in section 12. Secondly, section 190(7) provides that the rest of the section is "without prejudice to any... rule of law by virtue of which a communication, a document, material or information is privileged from disclosure." So far as any policy can be discerned which is relevant to the present issue, it is to enable legal services to be supplied on a comparable basis as to privilege and other matters, irrespective of traditional demarcation lines between barristers, advocates and solicitors on the one hand and other persons providing the same services on the other.

134. There is a well-established difference between a case where Parliament has merely made assumptions about the common law in framing legislation, and cases where the legislation in question is workable only if that assumption is correct. It was pointed out by Lord Reid in *Birmingham Corporation v West Midlands Baptist (Trust) Association Inc* [1970] AC 874, 898F-G, and the courts have implicitly addressed it on many occasions. *Woolwich Equitable Building Society v Inland Revenue Comrs* [1993] AC 70 is one of them. The House of Lords extended the right to restitution of unlawfully demanded tax, notwithstanding that important policy considerations were engaged and notwithstanding extensive statutory intervention in the relevant area. Lord Slynn observed at p 200 C-E:

> "I do not consider that the fact that Parliament has legislated extensively in this area means that no principle of recovery at common law can or should at this stage of the development of the law be found to exist. If the principle does exist that tax paid on a demand from the Crown when the tax was the subject of an ultra vires demand can be recovered as money had and received then, in my view, it is for the courts to declare it. In so doing they do not usurp the legislative function. I regard the proper approach as the converse. If the legislature finds that limitations on the common law principle are needed for reasons of policy or good administration then they can be adopted by legislation..."

At the other extreme, in *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42 and *Johnson v Unisys* [2003] 1 AC 518 the suggested developments of the common law would have made apparently comprehensive schemes of statutory regulation unworkable in the manner which Parliament intended. In a case like this, where the suggested development conflicts with some of the assumptions of Parliament but not with its intentions, the courts should be extremely wary before acceding to invitations to leave those assumptions uncorrected when their practical application has become anomalous or incoherent in the light of modern developments.

135. Over the years, there have been some proposals to protect communications with accountants relating to tax advice by statute. Their rejection or abandonment is said by the respondents to suggest that Parliament has taken a position on the question. In 1967, the Law Reform Committee advised in its Sixteenth Report (Cmnd 3472) against creating a statutory privilege for confidential professional relationships generally. The privilege would have been an enhanced rule of confidentiality along the same lines as the "secret professionnel" in most European civil law jurisdictions. It would have applied to doctors, priests, bankers and accountants. It is, however, clear that the Committee was dealing with the possibility that such a privilege might be desirable by virtue of the confidential character of the relationship, rather than any public interest in enabling persons to take legal advice. This has nothing to do with legal professional privilege. The

Keith Committee came rather closer to the mark when they reported in 1983 on the enforcement powers of the revenue departments (Cmnd 8822). The Committee considered (para 26.6.13) that "there does not appear to be any reason to distinguish between a legally qualified tax agent and any other, at least in the tax field." They recommended by a majority that the privilege should extend to non-legally qualified tax agents in private practice who were members of an incorporated society of accountants or the Institute of Taxation. They considered that the privilege should be subject in all cases (including lawyers) to a right in the tribunal to override it where its exercise would unreasonably impede the ascertainment of the facts. For reasons which do not appear to be recorded, nothing came of this proposal. It would have involved an extension of the categories of relevant adviser but some significant restrictions of the scope of the privilege. This may have been why it got no further. In 2003, the Government rejected a recommendation of the Director General of Fair Trading that accountants' legal advice should be privileged on the same basis as that of lawyers, on the ground that the discrimination between them was anti-competitive. Its stated reason was that it was undesirable to increase the number of people who could decline on the ground of privilege to produce information about money-laundering transactions or tax avoidance schemes. Finally, there was a brief discussion in the committee stage of the Finance Bill 2008 of a proposed amendment to Schedule 36, which substantially re-enacted the various powers of the revenue departments to requisition documents or information. Schedule 36 as enacted does in fact allow "tax advisers" (generally accountants) to withhold material requisitioned by the Revenue if they constitute communications for the purpose of giving or obtaining advice about a client's tax affairs. The proposed amendment was directed to the fact that whereas the advice of lawyers was to be privileged in the hands of both the adviser and the client, the corresponding statutory protection for communications with "tax advisers" applied only to material in the hands of the adviser. The same material could be obtained by compulsion from the client himself. The Financial Secretary to the Treasury said that the Government was reluctant to extend the protection for privileged material too widely but would consider the position, and on that basis the amendment was withdrawn. The matter does not seem to have resurfaced. The differentiation between material in the hands of the adviser and in the hands of the client was criticised as irrational by Lord Hoffmann in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 at para 22, in the context of section 20B(8) of the Taxes Management Act, which made a similar distinction in a case where the advice was sought from a lawyer. The same criticism was made by Sir Gordon Slynn as Advocate General in *AM & S Europe Ltd v Commission of the European Communities* (Case 155/79) [1983] QB 878, 913-914. It is a poor advertisement for the coherence of English statute law in this area. In my view these proposals and their reception fall a very long way short of suggesting that Parliament has implicitly taken a position on the application of legal professional privilege to communications with accountants. The material shows that the Government is reluctant to increase the number of claims to privilege in tax investigations, which will surprise no one. I do not think that it shows any more than that. Only the Keith

Report and the Government response to the proposals of the Director General of Fair Trading directly address the question whether privilege or some statutory equivalent should attach to communications with accountants. The former appears to have been rather cursorily discussed in Parliament and the latter not at all. The proposal in 2008 to deal with the anomalous distinction between materials in the hands of a tax adviser and his client was discussed in Parliament, but was left inconclusively in Limbo.

136. Looking at these matters in the round, one point stands out. Most of the policy considerations urged upon us on this appeal ultimately rest on concerns that privilege may get out of hand if it may be claimed in respect of legal advice from non-lawyers. It is said that only Parliament can address this problem so far as it is one. I do not underestimate these concerns. But I do not think that they impinge on the issue in this appeal. This is because, although there are perfectly rational reasons why one might wish to see the scope of legal professional privilege limited or the occasions for claiming it curtailed, there are no rational reasons for addressing the issue by discriminating between different categories of legal adviser performing precisely the same function. If privilege is abused by professional legal advisers, and there is no evidence that it is, then the answer lies in (i) the scrutiny to which all claims to privilege are ultimately exposed in court, and (ii) in a sufficiently extreme case, professional disciplinary sanctions against those involved. None of this requires an arbitrary distinction to be made between different kinds of legal adviser which has no basis in principle. If on the other hand, the scope of privilege at common law is thought to be too broad, then the remedy is legislation to modify the common law principles as they apply to all professionals performing the relevant functions and not just some of them. As applied to tax advice this should be straightforward if there is enough Parliamentary support for it: there is a Finance Bill once a year. But none of this has anything to do with the present appeal. We are not here concerned with the breadth of the scope of privilege at common law, but only with identifying the categories of adviser to which the existing principles apply.

137. I turn, finally, to the argument that in recognising that privilege attaches to the advice of members of the Institute of Chartered Accountants or the Chartered Institute of Taxation, we would be acknowledging a principle which would let in an uncertain and potentially large category of other professionals. I would accept that so far as other professionals are found to be giving legal advice on substantially the same basis as barristers and solicitors do, the privilege will apply to them in the same way. Coherence and rationality demand nothing less. But fears of a flood of privilege claims arising from the activities of supernumerary legal advisers strike me as extravagant. The privilege is confined, as it always has been, to the taking of legal advice in the course of a professional relationship with a person whose profession ordinarily includes the giving of legal advice. There are other advisory professions whose practitioners although not lawyers require some

knowledge of law. A chartered surveyor advising on the structural integrity of a building may require a knowledge of the building regulations. An investment banker advising on a takeover may require a knowledge of the Takeover Code and associated regulatory codes. An auditor will require a basic knowledge of company and insolvency law. The activities of these professionals will no doubt be informed by their understanding of the relevant law. But it does not follow that their profession has as an ordinary part of its functions the giving of legal advice. The legal element involved in their advisory work is likely to be purely incidental to the exercise of a broader advisory function. The distinctive feature of accountants' advice on tax law is that advice on tax law is itself the service which clients routinely seek from them. I very much doubt whether many other professions will find themselves in the same position. It may be that patent agents did in 1984 when the Court of Appeal held in *Wilden Pump Engineering Co v Fusfeld* [1985] FSR 159 that their legal advice did not attract privilege. But so far as this decision is based on the proposition that communications for the purpose of giving or receiving legal advice are never capable of being privileged if given by non-lawyers, I think that it was wrong. As far as patent and trade mark attorneys are concerned, the point no longer matters. Their position has since been regulated by statute.

138. I would allow the appeal and remit the case to the High Court to decide whether the material requisitioned by the respondent would have been privileged if a solicitor or barrister had performed the functions that the accountants performed, and a direction to quash the notices if it would have been.

LORD CLARKE (dissenting)

139. I have read the judgments of Lord Neuberger, Lord Sumption and Lord Hope with great interest. I agree with Lord Sumption that the appeal should be allowed, essentially for the reasons he gives. I briefly summarise my reasons for reaching that conclusion because the true position at common law does seem to me to be a matter of some importance and I hope that the whole issue will be considered by Parliament as soon as reasonably practicable.

140. The striking feature of the judgments of Lord Neuberger and Lord Sumption, and indeed of Lord Hope, is to my mind that they agree what the common law is or should be if the issue is treated as one of principle. As I see it, that principle can readily be seen by taking a simple example. Suppose that two individuals, A and B, have the same problem, the solution to which depends upon an application of the legal principles of taxation law to the same, or substantially the same, facts. Suppose that A seeks advice from, say, Freshfields, and that B seeks advice from, say, PricewaterhouseCoopers. Each asks the same question and

gives an account of what are substantially the same facts to the person from whom the advice is sought. Each is receiving legal advice. The question for decision in this appeal is whether the information given and the advice received are privileged as legal advice. Are both A and B entitled to claim the privilege and refuse to disclose to HMRC the information and the advice?

141. In my opinion, the only principled answer to that question is yes. It is accepted on all sides that the privilege is that of the client, that is A and B, and not that of either the solicitors or the accountants. It is also accepted that, as recently confirmed in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563, the privilege is a "fundamental human right long established in the common law", which was "a necessary corollary of the right of any person to obtain skilled advice about the law": per Lord Hoffmann, with whom the other members of the House of Lords agreed, at para 7. As Lord Sumption says at para 122, the privilege depends upon the public interest in promoting A and B's access to legal advice on the basis of absolute confidence.

142. It seems to me to follow that, if the common law treats the information and advice as privileged in the case of A, principle requires that it must do the same in the case of B. The advice is the same legal advice in both cases and the expertise of the adviser in each case is broadly similar, if not the same. Indeed some accountants may be able to give more specialised legal advice than some solicitors. I agree with Lord Sumption, for the reasons he gives (at para 122), that the privilege is conferred in support of the client's right to consult a skilled professional adviser and not in support of a right to consult the members of any particular professional body. On the respondents' case, as Lord Sumption describes at para 123, the privilege extends to advice given by salaried legal advisers and to foreign lawyers. According to Lord Neuberger at para 29, it also extends to members of CILEX. The privilege also applied historically to scriveners. It is thus clear that it is not limited to advice given by solicitors and barristers. If it extends to foreign lawyers, it is to my mind impossible to see how it can properly be denied in the case of advice given by an accountant qualified to give advice on the law of tax.

143. It is important to note that the issue in this appeal relates only to legal advice privilege and not litigation privilege. It is thus not directly related to the administration of the courts by judges. Lord Scott put it clearly in *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 at para 34:

> "None of these judicial dicta tie the justification for legal advice privilege to the conduct of litigation. They recognise that in the complex world in which we live there are a multitude of reasons why

> individuals, whether humble or powerful, or corporations, whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognise that the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest; they recognise that in order for the advice to bring about that desirable result it is essential that the full and complete facts are placed before the lawyers who are to give it; and they recognise that unless the clients can be assured that what they tell their lawyers will not be disclosed by the lawyers without their (the clients') consent, there will be cases in which the requisite candour will be absent. It is obviously true that in very many cases clients would have no inhibitions in providing their lawyers with all the facts and information the lawyers might need whether or not there were the absolute assurance of non-disclosure that the present law of privilege provides. 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 (see also paras 15.8 to 15.10 of *Zuckerman's Civil Procedure* (2003) where the author refers to the rationale underlying legal advice privilege as "the rule of law rationale"). I, for my part, subscribe to this idea. It justifies, in my opinion, the retention of legal advice privilege in our law, notwithstanding that as a result cases may sometimes have to be decided in ignorance of relevant probative material."

144. That same analysis seems to me to lead to the conclusion that where advice on tax law is sought from and given by an accountant it should be subject to legal advice privilege in the same way and that there is no difference between the positions of A and B in my example. It was no doubt considerations of this kind that led Charles J to say in this case at first instance (at paras 64-65), in my opinion correctly, that there is a compelling, indeed unanswerable, case that in modern conditions accountants have the expertise to advise on tax law and that it is firms of accountants rather than firms of solicitors who give such advice and represent clients in disputes with the HMRC on many aspects of their tax affairs. He concluded that the respondents had shown that accountants do what lawyers are described as doing in the cases that establish legal advice privilege.

145. Lord Neuberger has demonstrated that the ambit of the privilege as widely understood is that it is limited to lawyers and does not extend to accountants. He has not, however, been able to point to any principled analysis of the reason why it is so limited. The decided cases do not provide such an analysis. For example, in a case entitled *Dormeuil Trade Mark* [1983] RPC 131, in which privilege was claimed in respect of the disclosure of correspondence between the plaintiffs and their trade mark agents, although Nourse J rejected the claim, he did not give any principled basis for doing so. He noted at page 136 that historically cases had been conducted only by solicitors and counsel and added this:

> "[Counsel for the defendants] says that in those days it was never necessary for anybody to consider whether the privilege should apply in a case where other professional men, far less non-professional men, were concerned in advising clients, or indeed in conducting litigation on their behalf. He says that in these days the rule should be different. Like the learned Master, I see great force in that submission. It does seem to me to be a little odd and possibly perverse, that if a trade mark agent is entitled to advise a client in relation to certain legal matters and to conduct certain legal proceedings on his behalf, the same privilege should not apply as would certainly apply in a case where the advice was being given and the proceedings were being conducted by a solicitor. Nevertheless I do not think it is open to me in this court to fly in the face of the established rule, as enunciated in *Wheeler v Le Marchant,* the statement of Chitty J in *Moseley v Victoria Rubber Company,* and the fact that in 1968 the legislature seemed to think it was necessary expressly to extend the privilege to the case of patent agents."

In the circumstances Nourse J made the order with some reluctance. He certainly did not identify the principle behind the rule. Nor did either of the cases he referred to. In *Wheeler v Le Marchant* (1881) 17 Ch D 675 the Court of Appeal made it clear that the privilege was limited to legal advice obtained from professional persons, by which was meant, as Nourse J put it at p 135, persons who have a full legal qualification here or abroad. In *Moseley v Victoria Rubber Company* (1886) 55 LT 482 Chitty J had said that it was quite clear that communication between a man and his patent agent were not privileged. He did not identify the rationale for such a rule. Nor to my mind did *Wilden Pump Engineering Co v Fusfeld* [1985] FSR 159. In any event, I agree with Lord Sumption (at para 137) that, to the extent that that decision was based on the proposition that communications for the purpose of giving or receiving legal advice are never capable of being privileged if given to non-lawyers, it was wrong.

146. Legal advice privilege is a creature of the common law. As such it should be capable of redefinition to cater for changed conditions. If principle requires that

it should apply to situations to which it was previously thought not to apply, I can see no reason why this court should not so state, unless prevented from doing so, either expressly or necessary implication, by statute. We have been referred to no such statute. Attention has been drawn to a number of areas in which Parliament may have assumed that the common law was different. However, in my opinion the principle identified by Lord Slynn in *Woolwich Equitable Building Society v Inland Revenue Comrs* [1993] AC 70, at p 200C-E (and quoted by Lord Sumption at para 134 above) applies equally to the issue for decision in this appeal. He put the point thus:

> "I do not consider that the fact that Parliament has legislated extensively in this area means that no principle of recovery at common law can or should at this stage of the development of the law be found to exist. If the principle does exist that tax paid on a demand from the Crown when the tax was the subject of an ultra vires demand can be recovered as money had and received then, in my view, it is for the courts to declare it. In so doing they do not usurp the legislative function. I regard the proper approach as the converse. If the legislature finds that limitations on the common law principle are needed for reasons of policy or good administration then they can be adopted by legislation..."

147. If principle requires the court to hold that legal advice privilege extends to advice given by accountants on a professional basis, the court should in my opinion so declare. As Lord Slynn put it, if the legislature finds that limitations on that principle are required for reasons of policy they can be adopted by legislation. It is of interest to note that when the Keith committee considered the position, it could not identify a rationale for the distinction advanced on behalf of the respondents and it did not recommend the continuation of the status quo. As Lord Sumption observes at para 135, it recommended that the privilege should extend to at least some tax advisers but that it should be subject to a limitation in all cases. As Lord Sumption says, the matter was only cursorily discussed in Parliament. In all the circumstances, I do not think that any of the pragmatic considerations identified by Lord Neuberger and Lord Hope are sufficient to confer the privilege on A in my example and to deny it to B. I agree with Lord Sumption's striking conclusion at the end of para 131 that fundamental rights should not be left to depend on capricious distinctions unrelated to the legal policy which makes them fundamental.

148. Lord Sumption expresses the view in para 114 that the privilege extends to advice given by members of a profession which has as an ordinary part of its function the giving of skilled legal advice. I would expect that criterion to be satisfied only where, and to the extent, that they are members of a properly regulated professional body.

149. For these reasons, which are essentially the same as those of Lord Sumption, I would allow the appeal and make the order which he proposes.