

and of relevant documents open for inspection under the disclosure regime). Thirdly, the *ex parte* procedure governing judicial examination of claims to public interest immunity (“PII”) does not support adoption of a general closed procedure. A special feature of PII challenges is that the court is required, as a last resort, to scrutinise the relevant Minister’s claim to immunity against compulsory disclosure. At that stage, as the Court of Appeal noted, it is obvious that relevant information cannot be opened up for public examination in an ordinary hearing: for such openness would destroy the very claim that, even if it is relevant to the facts of the civil action, the information is so sensitive that it should not be publicly divulged during that civil process (see [48]). Fourthly, the Court of Appeal addressed the argument that closed proceedings might be justified if it were apparent that additional relevant evidence would become available in the civil process as a result of adopting that *in camera* style of proceeding. But this argument failed because such quantitative assessment can only be made once the PII inspection procedure has been conducted. In short, because the closed procedure would be an “add on” (see [54]), it would not achieve any saving in forensic time or expense. Finally, Lord Neuberger M.R. suggested that judgment following closed proceedings would not be perceived as fair and just. If the damages claims were upheld, it would be unsatisfactory that the open judgment would not contain all salient findings of fact (these being secreted in the closed judgment). Conversely, if the claimants lost, the Government’s defence would not have been convincingly vindicated, and there would be a legitimate suspicion that the court had failed to deal effectively with the relevant facts. As Lord Neuberger M.R. convincingly said, this would be “a pyrrhic victory for the defendants” (at [56]).

NEIL ANDREWS

ACCOUNTANTS ARE NOT LAWYERS: LEGAL PROFESSIONAL PRIVILEGE,
ACCOUNTANTS AND THE TAX MAN

IN *R. (on the application of Prudential plc) v. Special Commissioner of Income Tax* [2010] EWCA Civ 1094 Prudential challenged notices requiring the production of documents relating to tax advice given by PricewaterhouseCoopers. The thrust of Prudential’s argument was that, as accountants routinely give legal advice regarding fiscal matters, legal professional privilege (“LPP”) should apply. LPP is a common law rule which entitles an individual to refuse to disclose documents. The purpose of LPP is to ensure that an individual will not be inhibited in seeking legal advice. It has therefore been said that it is “more than

a rule of evidence ... it is a fundamental condition on which the administration of justice as whole rests” (Lord Taylor C.J. in *R v. Derby Magistrates Court, ex parte B* [1996] A.C. 487, 507). Given this purpose, Prudential’s argument (that LPP should apply when accountants give legal advice) is not without merit. However, this argument did not succeed either at first instance, or in the Court of Appeal.

At first instance, Charles J. acknowledged the strength of Prudential’s argument, but rejected the claim on the basis that existing precedent limited LPP to lawyers (see [2009] EWHC 2494, [2010] 3 W.L.R. 1042, at [73]). The Court of Appeal unanimously rejected Prudential’s appeal. Lloyd L.J. giving the only reasoned judgment held that LPP only applies to advice given by lawyers, that there is no scope for further judicial development, and that no assistance could be sought from the Human Rights Act 1998 (“HRA”).

Prudential’s first argument was that LPP is concerned with the *function* of giving legal advice, not the *status* of the adviser. Lloyd L.J. examined cases spanning four centuries, and concluded that none of these cases “assists much either way” (at [41]). Prudential’s best hope was a statement of the Employment Appeal Tribunal that “privilege should be strictly confined to legal advisers such as solicitors and counsel” (*New Victoria Hospital v. Ryan* [1993] I.C.R. 201 at [203], see discussion in *Prudential* at [43]). Prudential unsuccessfully sought to rely upon the inclusion of the words “such as” to argue that “the class of legal advisers is not necessarily limited to solicitors and barristers” (at [44]). Lloyd L.J. rejected this argument, and asserted that as *New Victoria Hospital* is a decision that LPP only applies to lawyers, the fact that the EAT stated that LPP should be a “strictly confined” must have played a role here. In any event, semantic arguments were of limited use as the decision of the EAT clearly could not bind the Court of Appeal (at [45]).

Prudential’s second argument was that as LPP is a common law rule the courts could extend it. Lloyd L.J. asserted that this depends upon whether Parliament has left that option open. He looked at a number of statutory provisions (at [46]–[49]), and proposals of reform bodies (at [50]) and concluded that “Parliament’s failure to change the law in this respect is not an accident” (at [51]).

Prudential’s last argument related to the Court of Appeal decision in *Wilden Pump Engineering Co v. Fusfeld* [1985] F.S.R. 159. At first instance in *Prudential*, Charles J. had concluded that, following *Wilden Pump* (where the court refused to extend LPP to patent agents), LPP only applies to advice given by lawyers. On appeal, Prudential argued that *Wilden Pump* did not decide this, and that even if it did, the decision needed to be re-examined in the light of the HRA (at [62]). Lloyd L.J. held that Charles J. had correctly interpreted *Wilden Pump*

(at [63]–[64]). Lloyd L.J. also rejected the HRA argument – on the basis that whilst Article 8 of the European Convention on Human Rights protects communications with lawyers, it does not protect communications with other professionals providing legal advice, and even if it did, the limits of LPP could be justified under Article 8(2) (at [68]–[69]). He also rejected the argument advanced under Article 8 coupled with Article 14 ECHR, concluding that if there is any discrimination it “is not on the basis of the status of the person enjoying the right, but of the person to whom he wishes to turn to get advice” (at [68]).

Finally, Lloyd L.J. noted that even if there were scope to extend LPP, the courts would run into difficulties in determining the limits to LPP. Prudential offered a number of solutions (at [74]). However, Lloyd L.J. held that the claimant’s arguments only served to illustrate the complexity of the matter, and that the extension of LPP must be a matter for Parliament (at [77]). Thus the court rejected the appeal.

One has sympathy with Prudential’s argument given that the purpose of LPP is not to protect lawyers, but to protect those seeking legal advice. However, the Court of Appeal advanced sound reasons for refusing the appeal, based on the coherency of LPP and deference to Parliament and this was sufficient for the courts to dispose of the issue. Nevertheless, further consideration needs to be given to the normative question of whether lawyers should be subject to special rules. A possible justification emerges from the first instance decision where Charles J. noted that “the duties of lawyers to the court ... is part of the background of LPP ... [which] provides a check or balance in the system” (at [32]).

If parity between professions is desired, then an alternative solution is to remove the right given to clients of lawyers. At first instance Charles J. favoured that approach (at [73]). However, lawyers will be relieved to hear that the Court of Appeal did not (at [86]). The court offered no reasons, but any reformist would need to consider the implications for Article 8 ECHR.

Finally, it is worth noting that the *status* approach is mitigated in large firms such as PricewaterhouseCoopers which have a separate legal division. Those firms can ensure that communications regarding legal advice take place within their legal division to avoid falling foul of the limits upon LPP. Legal certainty may therefore be sufficient to alleviate their concerns. Of course smaller accountancy firms do not have that option and will be hoping for a successful appeal or reform. The Court of Appeal refused leave and Prudential have now sought leave from the Supreme Court. However, success in the courts looks highly unlikely following this decision.

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