



# Recent Developments in the Law Relating to Legal and Professional Privilege

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# Legal and Professional Privilege



- A long established common law principle
- *Berd v Lovelace* [1577] Caryl 62

*"Thomas Hawtry, gentleman, was served with a subpoena to testify his knowledge touching the cause in variance; and made oath that he hath been, and yet is a solicitor in this suit, and has received several fees of the defendant; which being informed to the Master of Rolls, it is ordered that the said Thomas Hawtry shall not be compelled to be deposed touching the same; and that he shall be in no danger of any contempt, touching the not executing of the same process".*

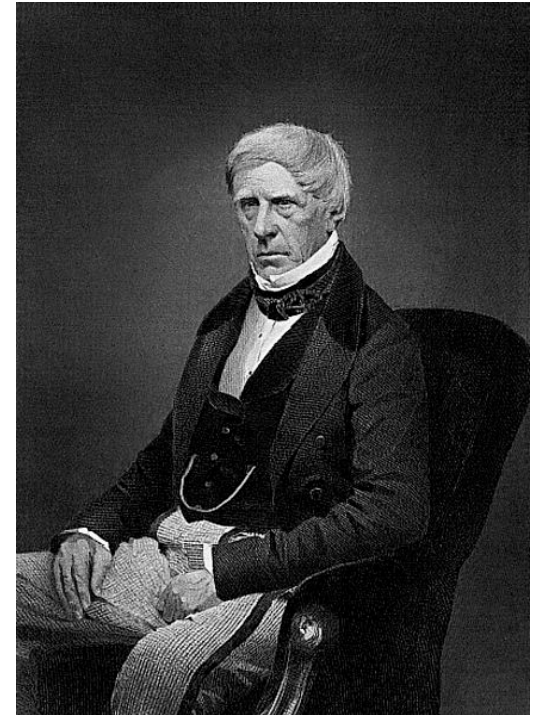


# Lord Brougham - Greenough v Gaskell 1833

*"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 to them protection...*

*...but it is out of regard to the interests of justice, which cannot be up holden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts and in those matters affecting rights and obligations which form the subject of all judicial proceedings.*

*If the privilege did not exist at all, everyone would be thrown upon his own legal resources, deprived of professional assistance, a man would not venture to consult any skilful person, or would only dare tell his counsellor half his case."*



[1833], 1 M&K 98



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# Common Law or Mixed Systems

- Scotland
- “Confidentiality of Communications”



Nordern Services Ltd v Inverness Retail and Business Park Ltd  
& ors [2008]

*“The notion of LPP is enshrined in the common law of Scotland. There is (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...which were prepared in the contemplation of litigation”*



# McCowan v Wright [1852]



*"LPP was substantially decided [in Scotland] in the case of Lady Bath's Executors in 1811 [The Law of Scotland] therefore required no authority from the law of England to support that proposition"*



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# LPP in England & Wales

- Civil procedure rules 1998 (CPR) Rule 31.15

## Legal Advice Privilege (LAP)

- Three Rivers District Council & ors v The Bank of England [2005]

## Litigation Privilege

- Communications post litem motam



# The Position in Common Law & Mixed Jurisdictions



- Australia

- Client legal privilege

*“...a substantive general principle which plays an important role in the effective and efficient administration of justice by the courts”* Goldberg v Ng [1995]



- United States of America

- Attorney-client privilege
- Some differences between states
- Not all attorney communications are privileged



- Hong Kong

- Basic law article 30
- Basic law article 35



# Current Rationale

- Lord Scott in 3 Rivers:



*"...it is necessary in our society, a society in which the restraining and controlling framework is built on a belief in the rule of law, that communications between clients and lawyers, whereby 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 busy bodies or anyone else..."*

- LPP is NOT subject to any public interest test

- Lord Rodgers in 3 Rivers:



*"...from time to time, a tribunal will be deprived of potentially useful evidence but the public interest in people being properly advised on matters of law is held to outweigh the competing public interest in making that evidence available".*





# Who Can Claim?

- Belongs to the party for whose benefit the privilege exists

Whose advice is privileged?

- R (Prudential PLC & anor) v Special Commissioner of Income Tax & anor [2013]



**PRUDENTIAL**

- Supreme Court rejected Pru's challenge by a 5-2 majority confirming that legal advice will only be privileged if it comes from the legal profession.
- Lord Neuberger said LAP restricted to lawyers as an argument that is *"weak but not wholly devoid of force."*
- Lords Sumpton and Clarke (dissenting) proposed a wider test of whether legal advice had been provided *"in the course of a professional relationship with a person whose profession ordinarily includes the giving of legal advice"* – regardless of the profession



# Why does LAP only cover legal advice obtained from Lawyers?

- Lord Hope

*"the inestimable advantages of clarity and consistency"*



- Any decision on extending privilege to other professions should be taken by parliament.



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# Current Issues and the Position of In-House Lawyers

1. Common Law/Mixed Systems
2. Civil Law/EU Proceedings
3. AKZO Nobel Chemicals and Akros Chemicals v Comm [2010]

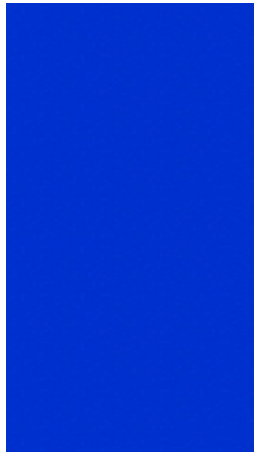


# LPP in Other Jurisdictions

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- Articles 101 and 102 Treaty on the Functioning of the European Union (TFEU)
  - Competition Law proceedings 'dawn raids'
  - Regulation 17/63 new Regulation 2003
    - AM&S [1982]
    - AKZO Nobel



# France - Rules of Evidence



- No process equivalent to documentary discovery or disclosure
- No obligation for a party to list or produce documents under its control which are relevant to the dispute
- Civil procedure - only produce documents to support respective case.

# Lawyers Duty of Confidentiality

- Differences between civil law duty of confidentiality and common law privilege
  1. Confidentiality covers not only communications but in general all information that becomes known to the lawyer in the course of his or her professional activity.
  2. The duty of confidentiality is typically sanctioned by the disciplinary bodies of bar associations – however in some countries (Finland and Belgium) infringing the duty of confidentiality can also give rise to criminal sanctions
  3. Duty of confidentiality is based on the ethical rules of the legal profession and not the rules of evidence. It has an effect on all situations not only in court. It is the right and obligation of the lawyer not the client. It is the lawyer who has the right to refuse to testify or answer questions on the basis of confidentiality.





# Impact

- LPP is central to disclosure obligations in common law systems which seek to:
  - determine the truth
  - encourage settlement
  - narrow claims
  - avoid surprises
- Compensates the common law judges lack of inquisitorial powers
- Contrast with limited importance of disclosure in France and Civil Law countries.

# Waiver

- England and US privilege can be waived by the client
- France/Civil Law – duty of confidentiality is the right and obligation of the lawyer and not the client – and the client does not have the right to relieve the lawyer from this duty

Article 2.1 French Regulatory Decision No. 1999-001

# Conclusion

- No transnational rules of privilege
- Importance of understanding the rules in the jurisdiction where business is conducted
- Jurisdictional issues:
  - Lex fori determines whether an exchange is privileged
- *RMBSA Corporate Services and Another v Secretary of State for Justice* [2009]
- 2010 IBA Rules on the Taking of Evidence in International Arbitration art.9.3 – *“...the need to maintain fairness and equality as between the parties, particularly if they are subject to different legal or ethical rules”*

**Thank you for your attention**  
**Any Questions?**



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