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LEGAL PROFESSIONAL PRIVILEGE: FUNDAMENTAL PRINCIPLES

A. Introduction: The Nature of the Privilege

1.01 Every developed legal system provides special protection to communications between lawyers and their clients.[1] Such protection is generally not available to communications with other classes of professional adviser.[2] In English law this special protection is known as legal professional privilege, which extends to cover a broader range of communications and documents generated in the context of litigation. If categorization is sought, legal professional privilege can perhaps best be described as a species of confidence. For at its root lies the obligation of confidence which a legal adviser owes his client in relation to confidential communications passing between them[3] or the confidentiality attaching to documents which 'form part of the brief' in the preparation of a party for the purposes of

[1] *McE v Prison Service of Northern Ireland* [2009] 1 AC 908, para 108 (HL) (*per* Lord Neuberger).
[2] Other than by statutory intervention, as the Court of Appeal has confirmed in *R (Prudential PLC) v Special Commissioner of Income Tax* [2011] 2 WLR 50.
[3] *Paragon Finance plc v Freshfields* [1999] 1 WLR 1183, 1188 (CA) (*per* Lord Bingham CJ).

adversarial litigation.[4] It has been described by the Supreme Court of the United States as 'the oldest of the privileges for confidential information known to the common law'.[5]

1.02 However, legal professional privilege operates unlike any other type of confidence. For there is no general rule of law permitting the withholding of evidence, whether oral or documentary, on the grounds of confidentiality.[6] It has been said that 'no obligation of honour, no duties of non-disclosure arising from the nature of a pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box'.[7] Legal professional privilege is an exception to this general principle, developed for reasons of fundamental public policy but which is nonetheless anomalous.[8] As a Victorian Vice-Chancellor put it in defending the rationale of legal professional privilege, even truth 'like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much'.[9] Legal professional privilege entitles a party not to disclose information even if, for example, it is highly relevant to issues to be determined in a court or administrative tribunal. In essence, privileged communications are immune from compulsory disclosure.[10]

1.03 The privilege therefore involves an interaction, or more accurately a clash, between competing public interests. Lord Nicholls identified the two interests in *R v Derby Magistrates Court, ex p B*:[11]

> The public interest in the efficient working of the legal system requires that people should be able to obtain professional legal advice on their rights and liabilities and obligations. This is desirable for the orderly conduct of everyday affairs. Similarly, people should be able to seek legal advice and assistance in connection with the proper conduct of court proceedings. To this end communications between clients and lawyers must be uninhibited . . .
>
> The other aspect of the public interest is that all relevant material should be available to courts when deciding cases. Courts should not have to reach decisions in ignorance of the contents of documents or other material which, if disclosed, might well affect the outcome.

[4] *Sumitomo Corporation v Credit Lyonnais Rouse Ltd* [2002] 1 WLR 479, para 46 (CA) (*per* Jonathan Parker LJ).
[5] *Upjohn Company v United States* 449 US 383, 389 (1981). See Wigmore, 542.
[6] *Science Research Council v Nassé* [1980] AC 1028, 1065 (HL).
[7] *McGuinness v A-G* (1940) 63 CLR 73, 102–3 (*per* Dixon J).
[8] See Wigmore, 554.
[9] See para 1.19 below.
[10] The privilege cannot be overridden by an order of the court: *Comfort Hotels v Wembley Stadium* [1988] 1 WLR 872, 876 (*per* Hoffmann J); *R (Kelly) v Warley Magistrates Court* [2008] 1 WLR 2001, paras 25–35 (CA).
[11] [1996] 1 AC 487, 510 (HL).

The common law has had to strike a balance between these two competing interests. Lord Carswell described the considerations involved in the following terms in *Three Rivers 6*:[12]

> Determining the bounds of privilege involves finding the proper point of balance between two opposing imperatives, making the maximum relevant material available to the court of trial and avoiding unfairness to individuals by revealing confidential communications between their lawyers and themselves. The practice which has developed is a reconciliation between these principles . . . . There is a considerable public interest in each of these. The importance of keeping to a minimum the withholding of relevant material from the court . . . is self-evident. It was stressed by Wigmore (*Evidence*, vol 8, para 2291 McNaughton rev. 1961), who expressed the opinion that the privilege should be strictly confined within the narrowest possible limits consistent with the logic of its principle, an approach echoed in the speech of Lord Edmund-Davies in *Waugh v British Railways Board* [1980] AC 521 at 543. The competing principle of legal professional privilege is also rooted in public policy: cf *B v Auckland District Law Society* [2003] 2 AC 736, paras 46–7. It is not based upon the maintenance of confidentiality, although in earlier case-law that was given as its foundation. If that were the only reason behind the principle the same privilege would be extended to such confidants as priests and doctors, whereas it has been settled in a line of authority stemming from the *Duchess of Kingston's Case* (1776) 1 East PC 469 that it is confined to legal advisers.

A rule of immunity Since the privilege can be waived or lost,[13] it is fundamentally a rule relating to immunity rather than admissibility.[14] Even improperly obtained privileged material may be admissible in evidence[15] (although the party to whom the privilege belongs might, of course, apply for an injunction to restrain its use[16]).[17] This distinction between immunity and admissibility is reflected in the Civil Procedure Rules, which require even privileged documents to be listed in a party's list of disclosed documents. Privilege operates, however, so as to remove any obligation to allow inspection of such documents.[18] **1.04**

The rule of law rationale The generally accepted rationale for the protection afforded by legal professional privilege is in promoting the rule of law and **1.05**

[12] *Three Rivers 6*, para 86.
[13] See Chapter 5 below.
[14] *McE v Prison Service of Northern Ireland* [2009] 1 AC 908, para 5 (HL) (*per* Lord Phillips).
[15] *Calcraft v Guest* [1898] 1 QB 759 (CA); *R v Tompkins* (1977) 67 Cr App R 181.
[16] *Ashburton v Pape* [1913] 2 Ch 469 (CA); *Goddard v Nationwide Building Society* [1987] QB 670 (CA). See para 5.106 ff below.
[17] It would appear that, for example, secret surveillance of privileged discussions would not be prohibited per se but that legal professional privilege would operate to prohibit any *use* being made of material obtained in this way without the privilege holder's consent: *McE v Prison Service* of *Northern Ireland* [2009] 1 AC 908, para 83 (HL) (*per* Lord Carswell). However Lord Carswell did not find it necessary to reach a decision on this point. Cf the speech of Lord Phillips, paras 9–10, 45.
[18] See para 4.91 ff below.

facilitating access to justice.[19] As Lord Hoffmann has pointed out, legal professional privilege:

> . . . is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice.[20]

However, when the sub-heads of legal professional privilege are analysed, it will be seen that the rationale justifying lawyer–client communications is markedly different to the rationale justifying the protection of other privileged communications. These rationales are discussed in section D below.

1.06 **A substantive right, not lightly overridden** Although legal professional privilege used to be regarded as no more than a rule of evidence,[21] it is now also regarded as a substantive right of considerable importance in English law.[22] In a sense, the jurisdictions of the common law world have since the 1980s 'reinvented' legal professional privilege as a substantive and fundamental right to limit the power of the state to compel disclosure of privileged documents.[23] If it were simply a rule of evidence, a client could only prevent disclosure in legal proceedings. There would be no guarantee that the same material could be kept from the police or some other agency, such as financial regulators, with the power to compel the production of documents or information. Hence, legal professional privilege can now generally be asserted in answer to any demand for documents by a public or other authority; it is not limited to a right which may be asserted only in the context of civil or

[19] A Zuckerman, *Civil Procedure* (2nd edn, 2006), paras 15.8–15.12, refers to 'the rule of law rationale' for legal professional privilege (adopted by Lord Scott in *Three Rivers 6*, para 34).

[20] *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, para 7 (HL).

[21] *Parry-Jones v Law Society* [1969] 1 Ch 1, 9 (CA); Law Reform Committee, Sixteenth Report, *Privilege in Civil Proceedings*, Cmnd 3472, para 1. Cf *R v Secretary of State for the Home Department, ex p Leech (No 2)* [1994] QB 198. The reasoning (although not the result) in the *Parry-Jones* case is now regarded as flawed: see the speech of Lord Carswell in *Three Rivers 6*, para 104 and the discussion in C Hollander, *Documentary Evidence* (10th edn, 2009), paras 11.11–11.13. So far as the result is concerned, the Divisional Court has recently held that *Parry-Jones* was correctly decided: see *Simms v The Law Society* [2005] EWHC (Admin) 408, paras 48–51, following the reasoning of Lord Hoffmann in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, para 32.

[22] *R v Derby Magistrates Court, ex p B* [1996] 1 AC 487, 507–8 (HL); *General Mediterranean Holdings SA v Patel* [2000] 1 WLR 272; *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, para 7. See also *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

[23] This is the convincing analysis of Professor Pattenden: see R Pattenden, *The Law of Professional–Client Confidentiality* (2003), para 16.11. The landmark cases cited are *Baker v Campbell* (1983) 153 CLR 52, 117; *Goldberg v Ng* (1995) 185 CLR 83, 93–4; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121: *Descoteaux v Mierzwinski* [1982] 1 SCR 860, 875; *Smith v Jones* [1999] 1 SCR 455, 476–7; *Rosenburg v Jaine* [1983] NZLR 1.

criminal proceedings. Previously, the courts did not require a great deal of persuasion that Parliament had intended to override legal professional privilege.[24] That is no longer the case.[25] For example, statutory powers requiring the production of documents would generally be deemed to exclude the right to demand documents which are subject to legal professional privilege. Any exception to this rule would have to be explicitly supported by primary legislation.[26] Explicit support would require clear language or necessary implication. A necessary implication in this area is not an exercise in interpretation; it is a matter of express language and logic.[27] A necessary implication arises only where the legislative provision would be rendered inoperative or its object largely frustrated in its practical application if the privilege were to prevail.[28] Any curtailment of privilege could only be to the extent reasonably necessary to meet the ends which justify the curtailment.[29] If established, the privilege is absolute and cannot be overridden by the demands of any particular situation.[30] The courts will take seriously any violation of a client's legal professional privilege by the state, for example in stopping the prosecution of an offence even where no prejudice had in fact been caused to the defendant.[31]

1.07 A rare example of a case where the courts have held that a statute does by implication override legal professional privilege is *McE v Prison Service of Northern Ireland*.[32] With obvious reluctance the House of Lords ruled that the Regulation of Investigatory Powers Act 2000 permitted covert surveillance of communications between persons in custody and their legal advisers. This conclusion was based on the plain words of the statute, its functions, and its legislative history. Lord Hope

[24] See, for example, *R v Inland Revenue Commissioners, ex p Lorimer* [2000] STC 751.

[25] Although *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 (HL) is regarded as the landmark ruling in this area, *R v Secretary of State for the Home Department, ex p Daly* [2001] 2 AC 532, paras 5, 31 (HL) is of equal significance. These cases applied the more general principle that a statute is generally not intended to override fundamental rights: *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131 (HL); *McE v Prison Service of Northern Ireland* [2009] 1 AC 908, paras 96–97 (HL) (*per* Lord Carswell).

[26] *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, para 8; *General Mediterranean Holdings SA v Patel* [2000] 1 WLR 272; *R v Secretary of State for the Home Department, ex p Daly* [2001] 2 AC 532; Bowman v Fels [2005] 1 WLR 3083, paras 70–91 (CA). See also *Baker v Campbell* (1983) 153 CLR 52. On statutory exceptions, see para 4.78 ff below.

[27] *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, para 45 (per Lord Hobhouse).

[28] *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, para 43 (*per* McHugh J).

[29] *R v Secretary of State for the Home Department, ex p Daly* [2001] 2 AC 532, paras 5 (*per* Lord Bingham) and 31 (*per* Lord Cooke).

[30] See paras 1.28–1.32 below.

[31] *R v Grant* [2005] 2 Cr App R 28. Cf, decided prior to *R v Derby Magistrates Court, ex p B* [1996] 1 AC 487, *R v Heston-Francis* [1984] 1 All ER 785. However, of itself, even deliberate invasion of a client's legal professional privilege gives rise to no tortious remedy: *Watkins v Home Office* [2006] 2 AC 395.

[32] [2009] 1 AC 908.

observed that the whole point of the regime governed by the Act was to regulate the state's interference with fundamental rights and there was therefore no reason to interpret its powers other than literally.[33] While Baroness Hale found the conclusion unpalatable,[34] it is to be borne in mind that where the power to compel production is statutory the role of the courts is not to determine where the balance between conflicting imperatives ought to be struck but how wide Parliament intended the power to be.[35] However, as Lord Hoffmann has emphasized, the law's requirement of explicit support from primary legislation for any encroachment on fundamental rights means that Parliament must squarely confront what it is doing and accept the political cost if it does—exceptionally—decide to override such rights.[36]

1.08 It is perhaps not surprising that other common law jurisdictions, which share the same common law origins as England, have similar, although not identical, approaches to legal professional privilege.[37] But legal professional privilege is also recognized by the jurisprudence of both the European Court of Justice and the European Court of Human Rights, which have very different intellectual and procedural roots to English law.[38]

B. Classification

1.09 **A single privilege** It can now authoritatively be stated that legal professional privilege is a single integral privilege whose sub-heads are legal advice privilege and litigation privilege.[39]

1.10 **Two sub-heads** The proper classification of claims to legal professional privilege is therefore under the two sub-heads of legal advice privilege and litigation privilege. Like most shorthand terms these expressions are apt to mislead. The distinction is not between communications relating to litigation on the one hand and communications for the purposes of other types of legal advice on the other.

[33] Para 61. See also paras 62–66, 67–70, 98–105, 109–117. However the surveillance was unlawful in that the Code of Practice issued by the Home Secretary failed to provide sufficient safeguards under Article 8(2) of the Convention.

[34] Para 67, See also the speech of Lord Neuberger, para 108.

[35] *B v Auckland District Law Society* [2003] 2 AC 736, para 56 (PC) (*per* Lord Millett).

[36] *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131.

[37] See para 1.59 ff below.

[38] *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, para 7. See paras 1.70–1.73 below.

[39] *Three Rivers 6*, para 105 (*per* Lord Carswell). All the other members of the Appellate Committee agreed with Lord Carswell's speech (see paras 45, 49, 61, and 119).

As is clear from the decisions of the House of Lords in *Waugh v British Railways Board*,[40] *Re L*,[41] and *Three Rivers 6*,[42] the relevant distinction is between:

- Legal advice privilege—communications between *lawyer and client* for the purpose of giving or receiving legal advice, in both the litigation and the non-litigation context.
- Litigation privilege—communications between a client or his lawyer and *third parties* for the purposes of litigation.[43]

1.11 The former are broadly privileged in all circumstances, whether or not litigation is contemplated or in progress:[44] such communications are the subject matter of 'legal advice privilege' properly called and include, but are not confined to, communications between lawyer and client during the course of litigation. The latter are privileged *only* if litigation is in progress or in contemplation: such communications with third parties are the subject matter of 'litigation privilege' properly called.[45] Despite the common misperception that litigation privilege covers all communications once litigation is in contemplation,[46] litigation privilege has no application to communications between lawyer and client: these will always fall within the realm of legal advice privilege.

1.12 It should be stressed that although the word 'communications' is also commonly used as convenient shorthand in formulations of the rules governing legal professional privilege, neither sub-head is in fact literally confined to actual communications passing between lawyers, clients, and third parties. The position is more nuanced.[47]

[40] [1980] AC 521, 541–2 (HL) (*per* Lord Edmund-Davies). The distinction set out in Lord Edmund-Davies' speech was applied by the Court of Appeal in *Re Highgrade Traders Ltd* [1984] BCLC 151, 164–5 (*per* Oliver LJ).

[41] *In re L (a Minor) (Police Investigation: Privilege)* [1997] AC 16, 24–5 (HL) (per Lord Jauncey).

[42] Para 65 (*per* Lord Carswell) and paras 50–51 (*per* Lord Rodger). The suggestion by Lord Scott, at para 27, that when legal advice is sought in connection with litigation it falls within both categories of legal professional privilege is inconsistent with the correct classification adopted by Lord Carswell and Lord Rodger.

[43] See also Burrows (ed), *English Private Law* (2nd edn, 2007), para 22.69.

[44] Wigmore, 558–80.

[45] Needless to say there are numerous examples where the courts have not used these labels consistently. Often the term 'legal professional privilege' is used to describe legal advice privilege: eg *R (Kelly) v Warley Magistrates Court* [2008] 1 WLR 2001; *Ventouris v Mountain* [1991] 1 WLR 607, 618 (CA); *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, para 7 (HL) (pointed out by N Andrews, *English Civil Procedure* (2003), para 27.13).

[46] This misperception is unfortunately persisted in by courts, despite the clear classification provided by the House of Lords in *Waugh, Re L*, and *Three Rivers 6* (see para 1.10 above). An example is to be found in *Kuwait Airways Corporation v Iraqi Airways Company* [2005] 1 WLR 2734, para 31, where Longmore LJ incorrectly treats communications between lawyer and client as being subject to litigation privilege once litigation is in contemplation.

[47] This is discussed in paras 2.50–2.75 and 3.24–3.31 below.

C. Historical Origins of the Two Sub-heads of Privilege

1.13 Legal professional privilege has existed in one form or another since at least the sixteenth century,[48] and is possibly older than that.[49] It was originally thought that the rationale for the privilege was that a lawyer ought not, in honour, to be required to disclose what he had been told in confidence.[50] This so-called 'honour theory' was rejected in the *Duchess of Kingston's Case*[51] in the second half of the eighteenth century. Before the end of that century it was plain that the privilege was properly to be regarded as that of the client, which he alone could waive. In the absence of such waiver the lawyer would not be permitted to disclose what had passed between him and his clients, past or present.[52]

1.14 Since the early nineteenth century, it has been well established that what is now known as legal advice privilege is not confined to cases of existing or contemplated litigation, but extends to communications between lawyer and client made in other circumstances for the purpose of obtaining legal advice. As Lord Brougham LC observed in his famous speech in *Greenough v Gaskell*[53] which first firmly established that privilege protected legal advice given before as well as after litigation was contemplated, 'all human affairs . . . may by possibility become the subject of judicial enquiry' even where litigation is not contemplated at the time of the advice.[54] Lord Brougham's conclusion was followed in a number of subsequent nineteenth century cases of formidable authority.[55] However, the matter remained the subject of controversy for much of the nineteenth century and there are a number of contrary statements in the case law.[56] In particular, Lord Langdale MR resisted any extension of the privilege in a number of reported cases.[57] This has accurately been

[48] *R v Derby Magistrates Court, ex p B* [1996] 1 AC 487, 504 (HL). Wigmore, at 542, suggests that the privilege was well established by the reign of Elizabeth I.

[49] See J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 2–3.

[50] *R v Derby Magistrates Court, ex p B* [1996] 1 AC 487, 504 (HL). Wigmore, 543 ff.

[51] (1776) 20 St Tr 355.

[52] *Wilson v Rastall* (1792) 4 Durn & E 753. See *R v Derby Magistrates Court, ex p B* [1996] 1 AC 487, 504–5 (HL).

[53] (1833) 1 M & K 98, 103.

[54] Lord Brougham is thought to have firmly established the rationale of legal professional privilege as being the interests of and the administration of justice in this and in the subsequent case of *Bolton v Liverpool Corporation* (1833) 1 M & K 88. See *R v Derby Magistrates Court, ex p B* [1996] 1 AC 487, 504–6 (HL).

[55] *Bolton v Liverpool Corporation* (1833) 1 M & K 88 at 94–5 (*per* Lord Brougham LC); *Holmes v Baddeley* (1844) 1 Ph 476, 480–1 (*per* Lord Lyndhurst LC); *Herring v Clobery* (1842) 1 Ph 91, 94–5 (*per* Lord Lyndhurst LC); *Carpmael v Powis* (1846) 1 Ph 687, 692 (*per* Lord Lyndhurst LC); *Pearse v Pearse* (1846) 1 De G & Sm 12 (*per* Knight Bruce V-C), *Lawrence v Campbell* (1859) 4 Drew 485, 490 (*per* Kindersley V-C).

[56] *Three Rivers 6*, para 92 (*per* Lord Carswell). Examples include *Original Hartlepool Collieries v Moon* (1874) 30 LT 585.

[57] eg *Storey v Lord Lennox* (1836) 1 Keen 341, 349–50; *Nias v Northern and Eastern Railway Co* (1838) 3 M & Cr 355. Lord Langdale MR has accordingly been described as 'the determined

described as 'an unsettled period in the English law of professional privilege'[58] and the cases and judicial dicta from this period should be approached with great caution.[59] The differences are now seen as having been authoritatively settled by the decision of the Court of Appeal in *Minet v Morgan*.[60] Thus, Edward Bray was able to write in 1885 that:[61]

> [i]t is not now necessary as it formerly was for the purpose of obtaining protection that the communications should be made either during or relating to an actual or even an expected litigation.[62]

1.15 The fact that legal advice privilege was originally confined to advice concerning litigation[63] has led to confusion. In *Three Rivers 6* the Court of Appeal fell into fundamental error by concluding that legal advice privilege was ultimately an outgrowth of and extension of litigation privilege.[64] In the House of Lords Lord Carswell conducted an extensive review of the historical development of legal professional privilege and concluded that, on the contrary, the branch of legal professional privilege which is classified under the name of litigation privilege had a later origin in dicta to be found in three cases[65] decided in the later part of the nineteenth century.[66] The Court of Appeal's error was based on a misreading of the effect of *Greenough v Gaskell.*[67] That case in fact decided that legal advice privilege, as it is now understood, was not confined to obtaining advice from a lawyer in connection with litigation.

1.16 Litigation privilege, properly analysed, therefore entailed an extension of legal professional privilege to communications and documents falling outside the confidential relationship of lawyer and client. This was held to be justified on the ground that the disclosure of such documents would have enabled a party to adversarial litigation to see part of his adversary's brief.[68]

opponent of the privilege, see Wigmore, 562. Another determined opponent was Wigram V-C: see *R v Uljee* [1982] 1 NZLR 561, 566.

[58] *R v Uljee* [1982] 1 NZLR 561, 566 (*per* Cooke J).

[59] The limitation to advice in the context of litigation was founded upon a misperception of the effect of the decision of the House of Lords in *Radcliffe v Fursman* (1730) 2 Bro PC 514: see E Bray, *Principles and Practice of Discovery* (1885), 370.

[60] (1873) LR 8 Ch App 361, 366. See also *Bullivant v A-G for Victoria* [1901] AC 196, 200–1 (HL); *Three Rivers 6*, para 92. Although there can be no doubt which view has prevailed, the case of *Original Hartlepool Collieries v Moon* (1874) 30 LT 585 is hard to reconcile with *Minet v Morgan* (1873) LR 8 Ch App 361 despite the fact that it was decided over a year after *Minet*'s case.

[61] E Bray, *Principles and Practice of Discovery* (1885), 368.

[62] Borrowing the words of Kindersley V-C in *Lawrence v Campbell* (1859) 4 Drew 485, 490.

[63] *Balabel v Air India* [1988] 1 Ch 317, 330 (CA).

[64] See the speech of Lord Carswell, *Three Rivers 6*, paras 88–105.

[65] These cases are *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, *Southwark and Vauxhall Water Co v Quick* (1878) 3 QBD 315, and *Wheeler v Le Marchant* (1881) 17 Ch D 675.

[66] *Three Rivers 6*, para 96.

[67] (1833) 1 M & K 98, 103.

[68] See *Three Rivers 6*, paras 96–99.

D. Rationale

(1) Legal advice privilege

1.17 So far as legal advice privilege is concerned, the rationale is the same, whether litigation is contemplated or not.[69] There are two aspects to this: (i) the public interest in enabling persons to obtain appropriate legal advice and assistance; and (ii) the recognition by the courts that effective legal advice requires absolute candour between a client and his lawyer.[70] The requisite candour is much less likely to exist if their exchanges are liable to be disclosed.[71]

1.18 The underlying public interest was cogently expressed by Sir Gordon Slynn in *AM&S Europe Ltd v European Commission*,[72] in a passage cited with approval by Lord Scott and Lord Carswell in *Three Rivers 6*.[73] The Advocate-General stated that the privilege:

> . . . 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.

1.19 With regard to the need for candour, it is hard to find a better judicial statement of the principle than that of Sir James Knight Bruce V-C in the early Victorian case of *Pearse v Pearse*:[74]

> The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination . . . Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much. And surely the meanness and the mischief of prying into a man's confidential communications with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which

[69] For criticism of the rationale of legal advice privilege, see C Tapper (2005) 121 LQR 181.

[70] Or, as it is put in the early case law, the need to make a 'clean breast of it' to one's lawyer: *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, 649 (*per* Jessel MR).

[71] *Balabel v Air India* [1988] 1 Ch 317, 330 (CA).

[72] [1983] QB 878, 913.

[73] Paras 33 and 95. Also cited with approval by Kirby J in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, para 87.

[74] (1846) 1 De G & Sm 12, 28–9 (cited with approval by Lord Carswell in *Three Rivers 6*, para 112). See also *Pearce v Foster* (1885) 15 QBD 114, 119–20 (*per* Sir Baliol Brett MR); *Hobbs v Hobbs and Cousens* [1960] P 112, 116–17 (*per* Stevenson J). For a more modern statement, see that of Lord Nicholls in *Re L* [1997] AC 16, 32 (also cited with approval in *Three Rivers 6*, para 112).

> must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself.

1.20 The general policy, applicable both to contentious and to non-contentious matters, was thus explained by Baroness Hale in *Three Rivers 6* in the following terms:[75]

> Legal advice privilege restricts the power of a court to compel the production of what would otherwise be relevant evidence. 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.[76] The client may not always act upon that advice . . . but there is always a chance that he will. And there is little or no chance of the client taking the right or sensible course if the lawyer's advice is inaccurate or unsound because the lawyer has been given an incomplete or inaccurate picture of the client's position.

1.21 Essentially the same justification has been given, irrespective of whether litigation was contemplated when the advice was sought, by the Supreme Courts of the United States and Canada and the High Court of Australia.[77]

1.22 The need for candour requires a high degree of certainty on the part of those involved in the relevant lawyer–client dialogue. As the US Supreme Court has put it, an uncertain privilege is little better than no privilege at all.[78] Confidence in non-disclosure is essential if the privilege is to achieve its raison d'être.[79] A lawyer must be able to give his client an absolute and unqualified assurance that whatever the

[75] Para 61. For similar observations in *Three Rivers 6* see paras 34 (*per* Lord Scott), 54 (*per* Lord Rodger), and 106 (*per* Lord Carswell). See also *D v NSPCC* [1978] AC 171, 231–2 (HL) (*per* Lord Simon); *R v Derby Magistrates' Court, ex p B* [1996] 1 AC 487, 507–8 (HL).

[76] The focus on society as a whole rather than the needs of the particular individual is long established: see *Marsh v Keith* (1860) 1 Drew & Sm 342, 347–8 (*per* Kindersley V-C).

[77] See the US Supreme Court's decisions in *Upjohn Company v United States* 449 US 383, 389, 397–402 (1981) and *Swidler & Berlin v United States* 524 US 399, 403 (1998) and the Canadian Supreme Court's decision in *R v McClure* [2001] SCC 14, paras 36–39. In Australia, the leading modern decisions are *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49, para 35; and *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, paras 44 (*per* McHugh J), 85–7 (*per* Kirby J). In the latter case, the High Court effectively rejected previous Australian case law suggesting that legal professional privilege was qualified, and accepted the view of the law stated by the House of Lords in *R v Derby Magistrates' Court, ex p B* [1996] 1 AC 487 and *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 to the effect that it was absolute.

[78] *Upjohn Company v United States* 449 US 383, 393 (1981).

[79] *R v Derby Magistrates' Court, ex p B* [1996] 1 AC 487, 512 (*per* Lord Nicholls)

client tells him in confidence will never be disclosed without his consent.[80] Actual or apprehended litigation is emphatically not the touchstone of the underlying rationale in this context. As Lord Simon said in *D v NSPCC*:

> . . . the adversary system, involving professional assistance, could hardly begin to work effectively unless the client could be sure that his confidences would be respected. And a legal representative with only partial knowledge of his case would be like a champion going into battle unconscious of a gap in his armour. But it is only the rare case which has to be fought out in court. Many potential disputes, civil especially, are obviated or settled on advice in the light of the likely outcome if they had to be fought out in court. This is very much in the interest of society, since a lawsuit, though a preferable way of settling a dispute to actual or threatened violence, is wasteful of human and material resources.[81] Thus similar considerations apply whenever a citizen seeks professional guidance from a legal adviser—whether with a view to undertaking or avoiding litigation, whether in arranging his affairs in or out of court. [82]

(2) Litigation privilege

1.23 The justification for litigation privilege, which developed as a coherent concept towards the end of the nineteenth century,[83] is rooted in the peculiar requirements of adversarial litigation[84] and is today perhaps regarded as more controversial. In *Re L*[85] Lord Jauncey described litigation privilege as 'essentially a creature of adversarial proceedings'. The rationale is spelt out in the well-known passage in the judgment of James LJ in *Anderson v Bank of British Columbia*:[86]

> . . . as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as materials for the brief.

1.24 Litigation privilege has often been regarded as an aspect of the right to a fair trial.[87] The courts have emphasized that fairness requires a private and confidential sphere of preparation for litigation.[88] Litigation privilege has therefore been characterized

[80] *B v Auckland District Law Society* [2003] 2 AC 736, para 47 (PC) (*per* Lord Millett). *R v Derby Magistrates' Court, ex p B* [1996] 1 AC 487, 508 (*per* Lord Taylor CJ).

[81] On this aspect of the rationale, see also *Ventouris v Mountain* [1991] 1 WLR 607 (CA).

[82] [1978] AC 171, 231–2.

[83] *Three Rivers 6*, para 96.

[84] *Causton v Mann Egerton* [1974] 1 WLR 162, 170 (CA) (*per* Roskill LJ). See S McNicol, *Law of Privilege* (1992), 48–9.

[85] [1997] AC 16, 26.

[86] (1876) 2 Ch D 644, 656 (CA). See also *Wheeler v Le Marchant* (1881) 17 Ch D 675, 684–5 (CA); *Re Saxton* [1962] 1 WLR 968, 972 (CA); *Waugh v British Railways Board* [1980] AC 521, 541–2 (HL) (*per* Lord Edmund-Davies).

[87] *Re Saxton* [1962] 1 WLR 968, 972 (*per* Lord Denning); *Baker v Campbell* (1983) 153 CLR 52, 109 (*per* Brennan J).

[88] *Three Rivers 6*, para 52 (*per* Lord Rodger); *Robert Hitchins Ltd v ICL* (CA, 10 December 1996), *per* Simon Brown LJ; *Sumitomo Corporation v Credit Lyonnais Rouse Ltd* [2002] 1 WLR 479, para 46 (CA) (*per* Jonathan Parker LJ). The rationale is sometimes conflated with the somewhat different rationale for legal advice privilege; *Ventouris v Mountain* [1991] 1 WLR 607, 611–12 (CA) (*per* Bingham LJ).

by Steyn LJ as an auxiliary principle buttressing the constitutional right of access to justice.[89] However, in the light of modern pre-trial case management procedures, some of the judicial statements in support of litigation privilege now look decidedly anachronistic. Thus, Lord Wilberforce referred in *Waugh v British Railways Board* to the justification for litigation privilege being ascribed to the exigencies of adversarial litigation, which entitled a litigant to refuse to disclose the nature of his case before trial, stating:[90]

> Thus one side may not ask to see the proofs of the other side's witnesses or the opponent's brief or even know what witnesses will be called: he must wait until the card is played and cannot try to see it in the hand.

1.25 The rationale for litigation privilege has therefore been called into question in recent years. In *Secretary of State for Trade & Industry v Baker*,[91] Sir Richard Scott V-C, while content with the applicability of privilege to the inner sanctum of lawyer–client communications, attacked litigation privilege as an independent ground of privilege. He questioned whether public policy, which now favours pre-trial disclosure of all relevant material, any longer justified this head of privilege. This view was echoed by the Court of Appeal in a subsequent case.[92] In *Three Rivers 6* both Lord Scott and Lord Rodger suggested *obiter* that the less adversarial approach to civil procedure introduced by the Civil Procedure Rules ought to lead to a reappraisal of the ambit of litigation privilege.[93] While the extent of today's 'cards on the table' requirements of litigation in courts and tribunals[94] might have come as a surprise to the Appellate Committee when *Waugh* was decided, it is doubtful whether the ethos underpinning the Civil Procedure Rules has affected the traditional adversarial nature of litigation other than at the margins. [95] In any event, litigation privilege is firmly established by a number of nineteenth and twentieth century cases in the Court of Appeal[196] and was the subject of detailed consideration by the House of Lords in *Waugh*'s case. Any binding judicial re-evaluation will have to await the consideration of an appropriate case by the Supreme Court.

[89] *Oxfordshire CC v M* [1994] Fam 151, 163 (CA). See also Steyn LJ's judgment in *R v Secretary of State for the Home Department, ex p Leech (No 2)* [1994] QB 198, 210.

[90] [1980] AC 521, 531.

[91] [1998] Ch 356, 371. For a detailed discussion of this case, see N Andrews, *English Civil Procedure* (2003), paras 27.29–27.41. The rationale for litigation privilege has also been questioned in Australia: see S McNicol, *Legal Professional Privilege* (1992), 49–50.

[92] *Visx Inc v Nidex* [1999] FSR 91. C Hollander, *Documentary Evidence* (10th edn, 2009), para 14–11, rightly suggests that this case is of dubious authority and should be treated with caution.

[93] Paras 29 and 53.

[94] *Secretary of State for Trade & Industry v Baker* [1998] Ch 356, 371.

[95] For a persuasive defence of the traditional rationale, see Pattenden, 'Litigation Privilege and Expert Opinion Evidence' (2000) 4 *E&P* 213.

[96] See paras 1.15–1.16 above; *Re Highgrade Traders* [1984] BCLC 151 (CA).

E. The Basic Features of Legal Professional Privilege

1.26 The essential prerequisites of a claim for legal professional privilege were summarized by Lord Scott in *Three Rivers 6* under the following heads.[97]

1.27 **Confidentiality**[98] The communication or document must be confidential. Confidentiality does not by itself enable privilege to be claimed,[99] but if it is not confidential, there can be no question of legal professional privilege arising or being maintained. Confidentiality is therefore a necessary but not a sufficient condition at least for a claim to legal advice privilege.[100] For example, a client who asks his lawyer for advice at a crowded party may well genuinely be seeking legal advice, but the communication is unlikely to be imbued with the necessary character of confidentiality to attract privilege.[101] Likewise a company referring to legal advice in a public announcement, whether for example to a stock exchange or in its published accounts, would need to take care in not being overly specific as to the contents of such advice.[102] On the other hand, it is important to recognize that confidentiality can be lost as between certain parties without necessarily being lost as against the rest of the world.[103] And confidentiality may be lost for a specific purpose without necessarily being lost for all other purposes.[104] A person who places a newspaper advert seeking information or evidence to assist with civil or criminal proceedings will not be able to assert privilege over the advert in the proceedings, even though it could in one sense be said to come into existence to provide 'materials for the brief' for the purposes of adversarial proceedings. However, a letter from a client's solicitor to a potential witness seeking information might well attract litigation privilege, even if it were unsolicited.[105] Confidentiality may, on analysis, operate in a somewhat different manner in the context of litigation privilege.[106]

1.28 **Absolute nature of the privilege**[107] If a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest, for example, by competing public policy considerations. It can be waived by the client to whom the privilege belongs or it

[97] Paras 24–27. Although these were said to apply to legal advice privilege, the sub-head of legal professional privilege under consideration by the House of Lords in *Three Rivers 6*, these requirements apply broadly in substance to both sub-heads.
[98] *Three Rivers 6*, para 24.
[99] *Bourns v Raychem* [1999] 3 All ER 154 (CA).
[100] See, for example, the decision of Sir Richard Scott V-C in *Webster v James Chapman & Co* [1989] 3 All ER 939.
[101] *R v Braham and Mason* [1976] VR 547.
[102] *Switchcorp Pty Ltd v Multimedia Ltd* [2005] VSC 425.
[103] *Gotha City v Sotheby's* [1998] 1 WLR 114, 118–21. See paras 5.13–5.17 below.
[104] *British Coal Corporation v Dennis Rye Ltd* [1988] 1 WLR 1113 (CA).
[105] *ISTIL Group Inc v Zahoor* [2003] 2 All ER 252, para 63.
[106] See para 3.33 below.
[107] *Three Rivers 6*, para 25.

can be overridden by statute,[108] but it is otherwise absolute. There is no balancing exercise that has to be carried out.[109] The Supreme Court of Canada has held that legal professional privilege, although of great importance, is not absolute and can be set aside if a sufficiently compelling public interest for doing so, such as public safety, can be shown.[110] In English law, however, legal professional privilege cannot be set aside on the ground that some other higher public interest requires that to be done.

1.29 The absolute nature of legal professional privilege is graphically demonstrated by the decision of the House of Lords in *R v Derby Magistrates, ex p B*.[111] The background was the notorious canal towpath murder of the teenager Lynn Siddons in 1978. Fitzroy Brookes originally admitted to the police to being solely responsible for the murder. Shortly before his trial at the Crown Court he retracted his statement and alleged that his stepfather, Michael Brookes, had killed the girl. The stepson was acquitted and the stepfather was, over a decade later, charged with the murder, following a successful civil action brought by the Siddons family. The stepson was called as prosecution witness and an application was made on behalf of the stepfather for a witness summons directed to the stepson and his solicitor requiring them to produce attendance notes and proofs of evidence disclosing the stepson's original instructions to his lawyers, ie before he changed his story. The magistrate issued the summons and the Divisional Court dismissed the application for judicial review of that decision made on behalf of the stepson. The documents sought were clearly likely to be highly probative, potentially providing a defence to a charge of murder against the stepfather. It is hard to think of a more important issue which might be said to justify an inroad into legal professional privilege.

1.30 Despite the compelling facts of the *Brookes* case, the House of Lords allowed the stepson's appeal, setting aside the witness summons and overruling previous authorities[112] in the process. The House of Lords held that the type of balancing exercise, which takes place in the context of public interest immunity applications, is inappropriate where legal professional privilege is concerned. Lord Taylor CJ, following a thorough examination of the historical origins and rationale of legal professional privilege, stated:[113]

[108] *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563; *General Mediterranean Holdings SA v Patel* [2000] 1 WLR 272; A useful summary of the approach in this area is set out in the judgment of the Court of Appeal in *Bowman v Fels* [2005] 1 WLR 3083, paras 86–90. A statute would only be construed as overriding legal professional privilege by express language or necessary implication: see paras 1.06–1.07 above.

[109] *B v Auckland District Law Society* [2003] 2 AC 736, paras 46–54.

[110] *Smith v Jones* [1999] 1 SCR 455.

[111] [1996] 1 AC 487.

[112] *R v Barton* [1973] 1 WLR 115 and *R v Ataou* [1988] QB 798 (CA).

[113] *R v Derby Magistrates, ex p B* [1996] 1 AC 487, 508–9. The potential for the European Convention on Human Rights to impact on the absolute nature of legal professional privilege is discussed below: see paras 1.71–1.76.

> . . . if a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the 16th century, and since then has applied across the board in every case, irrespective of the client's individual merits. . . . [I]t is not for the sake of the applicant alone that the privilege must be upheld. It is in the wider interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors. For this reason I am of the opinion that no exception should be allowed to the absolute nature of legal professional privilege, once established.

1.31 The decision in *Derby Magistrates* has been the subject of criticism.[114] The principal thrust of that criticism is that if legal professional privilege is to be elevated as an absolute constitutional principle, it is apt to trample on other fundamental principles, such as the right of the innocent to be protected from criminal conviction. But it is the impossibility and unpredictability of the balancing exercise required if privilege is to be treated as a qualified right that underpins the reasoning of the House of Lords. The compelling policy considerations were explained by Toulson J in *General Mediterranean Holdings SA v Patel* in terms of three connected factors:[115]

- To admit any exception to the general principle would undermine the lawyer's ability to give an assurance of confidentiality to his client. (The notion that this is an area where certainty is paramount and that privilege has to be absolute to achieve its purpose is very firmly established across virtually all common law jurisdictions.[116])
- There is a difference between setting bounds to the circumstances in which a duty of confidentiality would arise and giving a discretion to the court to override a duty of confidence which had been. To leave the matter to the court's discretion would be unsatisfactory both in terms of the nature of the task which the court would have to carry out and in terms of the client's inability to foretell in advance which way such a discretion might be exercised.
- There is no satisfactory way of limiting in advance what might be regarded as exceptional cases. As Lord Nicholls put it in *Derby Magistrates* 'one man's meat is another man's poison'.[117]

Lord Nicholls rejected the notion of any judicial balancing exercise in *Derby Magistrates* in the following terms:[118]

> . . . the prospect of a judicial balancing exercise in this field is illusory, a veritable will-o'-the-wisp. That in itself is a sufficient reason for not departing from the

[114] For criticisms of the absolute nature of legal professional privilege, see: A Zuckerman, 'Legal Professional Privilege—The Cost of Absolutism' (1996) 113 *LQR* 535; C Tapper, 'Prosecution and Privilege' (1996) 1 *E&P* 5; Tang Hang Wu, 'Legal Professional Privilege and Restitution for Mistake of Law' (2005) 24 *CJQ* 246.

[115] [2000] 1 WLR 272, 294.

[116] See paras 1.21–1.22 above. Canada is the one exception: see para 1.28 above.

[117] *R v Derby Magistrates, ex p B* [1996] 1 AC 487, 511–12.

[118] Ibid, 512

established law. Any development in the law needs a sounder base than this. This is of particular importance with legal professional privilege. Confidence in non-disclosure is essential if the privilege is to achieve its raison d'être. If the boundary of the new incursion into the hitherto privileged area is not principled and clear, that confidence cannot exist.

1.32 This approach inevitably means that other important principles will from time to time be compromised, but as Lord Lloyd indicated, legal professional privilege is now to be regarded as 'the predominant public interest'.[119]

1.33 **Substantive and procedural right**[120] As stated above, legal professional privilege is both a substantive right and a rule of evidence. It can be asserted in response to any demand for documents; it is not confined to a right which may be asserted only in criminal or civil proceedings in a court of law.[121]

1.34 **Differences between legal advice and litigation privilege**[122] A connection with litigation is not a necessary condition for legal advice privilege to attach to lawyer–client communications. A communication between lawyer and client is not a requirement of litigation privilege, which applies to communications between lawyer or client and third parties or to any document (whether communicated or not) brought into existence for the dominant purpose of being used in adversarial litigation, actual or anticipated. Legal advice privilege is dealt with in detail in Chapter 2 of this book, litigation privilege in Chapter 3.

F. The Client's Privilege

1.35 The privilege belongs to the client and not to his lawyer or agent.[123] Only the client can invoke the privilege.[124] It is not open to a lawyer or other agent to do so, unless acting on behalf of the client, and the lawyer or agent cannot invoke the privilege if the client has waived it.[125] Privileged information or documents cannot therefore be disclosed without the client's consent. The right to waive the privilege is also that

[119] Ibid, 509.
[120] *Three Rivers 6*, para 26.
[121] See para 1.06 above.
[122] *Three Rivers 6*, para 27.
[123] *R v Derby Magistrates' Court, ex p B* [1996] 1 AC 487, 504–5 (HL). This principle was first clearly established in the case of *Wilson v Rastall* (1792) 4 Durn & E 753.
[124] Although the lawyer is under a professional obligation to assert the privilege on behalf of his client unless it has been waived: *R v Central Criminal Court, ex p Francis and Francis* [1989] 1 AC 346, 383 (HL); *Bolkiah v KPMG* [1999] 2 AC 222, 235–6 (HL); *Nationwide Building Society v Various Solicitors* [1999] PNLR 52, 69. See also *R (Faisaltex Ltd) v Crown Court at Preston* [2008] EWHC 2832 (Admin). The court may intervene to prevent a third party or even the client's lawyer making disclosure in breach of the client's privilege: *Harmony Shipping v Saudi Europe Line* [1979] 1 WLR 1380, 1384–5 (CA); *Beer v Ward* (1821) Jacob 77, 80.
[125] *Re International Power Industries* [1985] BCLC 128; *R v Peterborough Justices, ex p Hicks* [1977] 1 WLR 1371; *Nationwide Building Society v Various Solicitors (No 2)* The Times, 1 May 1998.

of the client and not the lawyer or agent,[126] but the client's legal advisers are deemed to act with the client's authority in the conduct of litigation and their acts or omissions may therefore have the effect of waiving privilege on the client's behalf even where such waiver is inadvertent and contrary to the client's interests.[127]

1.36 In the case of litigation privilege, a third party (such as a witness or potential witness) with whom a lawyer or client has communicated for the purposes of adversarial proceedings is not entitled to assert the privilege of the party to the actual or prospective litigation.[128] The third party may or may not be able to assert his own privilege, for example on the basis of a common or joint interest, but this is a separate question.

1.37 The privilege survives the death of the client and may enure for the benefit of his successors in title.[129] It would also appear that rights to legal professional privilege can be assigned.[130]

1.38 In the case of natural persons, the identification of the client whose privilege it is ought to be straightforward, although even here there may be difficult cases.[131] In the case of legal persons, especially companies, it may be less so. This topic is addressed in the context of Chapter 2, where the identification of the client is perhaps of greatest importance.[132] The position of those who act in person, without retaining a professional legal adviser, is addressed in Chapters 2 and 3 below.[133]

G. Adverse Inferences

1.39 In short, no adverse inferences may be drawn from the assertion by a person of a claim to legal professional privilege.[134] This principle is fundamentally important

[126] *R v Derby Magistrates' Court, ex p B* [1996] 1 AC 487, 504–5 (HL); *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, para 37 (HL).

[127] Whether the proceedings are civil or criminal. See, for example, *R v Cotrill* [1997] Crim LR 56 (CA), where the accused's written statement was sent to the CPS without his knowledge or consent. See para 5.27 below.

[128] *Lee v SW Thames Health Authority* [1985] 1 WLR 845 (CA); *Schneider v Leigh* [1955] 2 QB 195 (CA).

[129] *Calcraft v Guest* [1898] 1 QB 759 (CA); *Crescent Farm (Sidcup) Sports v Sterling Offices* [1972] Ch 553; *The Aegis Blaze* [1986] 1 Lloyd's Rep 203 (CA); *Re Konigsberg* [1989] 1 WLR 1257; *R v Molloy* [1997] 2 Cr App R 283.

[130] *Winterthur Swiss Insurance v AG (Manchester) Ltd* [2006] EWHC 839 (Comm).

[131] For example in *Winterthur Swiss Insurance v AG (Manchester) Ltd* [2006] EWHC 839 (Comm) insurers communicating with lawyers in deciding whether to underwrite after the event insurance were held to be the clients rather than the prospective personal injury claimants,

[132] See para 2.05 ff.

[133] See paras 2.43–2.47 and 3.88–3.90.

[134] *Wentworth v Lloyd* (1864) 10 HLC 589; *Oxford Gene Technology Ltd v Affymetrix Inc (No 2)* [2001] RPC 18, para 21 (CA) (per Aldous LJ); *Sayers v Clarke Walker* [2002] EWCA Civ 910, para 16 (per Brooke LJ); *China National Petroleum v Fenwick Elliott* [2002] EWHC (Ch) 60, para 52

to the effective operation of the privilege. If it did not exist there would be an overwhelming pressure on parties to waive privilege because the privilege could only be asserted by damaging one's own case.[135] In *Wentworth v Lloyd* Lord Chelmsford stated:[136]

> The law has so great a regard to the preservation of the secrecy of this relation, that even the party himself cannot be compelled to disclose his own statements made to his solicitor with reference to professional business.
>
> . . . The exclusion of such evidence is for the general interest of the community, and therefore to say that when a party refuses to permit professional confidence to be broken, everything must be taken most strongly against him, what is it but to deny him the protection which, for public purposes, the law affords him, and utterly to take away a privilege which can thus only be asserted to his prejudice.

1.40 The case of *Sayers v Clarke Walker*[137] illustrates the operation of this principle in practice. Mr Sayers sued his accountants for negligent advice in connection with a share purchase arrangement. One of the defendant firm's arguments was that Mr Sayers ignored trenchant advice *inter alios* from his own solicitor (as to which the firm adduced some limited evidence available to it) to take independent specialist financial advice in respect of the transaction; this, it was argued, was so unreasonable as to break the chain of causation in respect of any negligence on the part of the firm. On appeal, the firm submitted that the trial judge ought to have drawn adverse inferences against Mr Sayers because he had refused to waive privilege in respect of the actual advice he had received from his solicitor. The Court of Appeal rejected this argument, Brooke LJ saying:[138]

> Ever since *Wentworth v Lloyd* (1864) 10 HLC 589 the courts have refused to permit a party to draw adverse inferences from the refusal by the other party to waive privilege in respect of the legal advice he has received.

This should be contrasted with the privilege against self-incrimination, where the courts are permitted to draw adverse inferences from the assertion by a litigant of that privilege.[139]

(per Morritt V-C). In the criminal context, see *R v Mitchell (A-G's Reference No 11 of 1997)* [1998] EWCA Crim 3357.

[135] Laddie J suggested in *Kimberly-Clark Worldwide Inc v Procter & Gamble Ltd* [2000] RPC 422, 424 that the obligation to make full disclosure imposed on patentees wishing to amend their patents prior to the Patents Act 1977 placed pressure on patentees to waive their entitlement to legal professional privilege since if they failed to do so there was a risk that the court would conclude that they had failed to make full disclosure. It is now clear that such an approach by the court would have been wrong in law: *Oxford Gene Technology Ltd v Affymetrix Inc (No 2)* [2001] RPC 18, para 58.

[136] (1864) 10 HLC 589. *R v Derby Magistrates, ex p B* [1996] 1 AC 487, 508–9.

[137] [2002] EWCA Civ 910.

[138] Ibid, para 16.

[139] See paras 8.17–8.18 below.

H. Who Are Lawyers for the Purposes of the Privilege?

1.41 It has been accepted for several hundred years that the answer to this question is essentially 'professional legal advisers'[140] or 'professional lawyers'.[141] Who are professional legal advisers or professional lawyers for the purposes of legal professional privilege? In *Derby Magistrates* Lord Taylor, in his seminal analysis of the origins and development of legal advice privilege,[142] noted that the case of *Wilson v Rastall* had 'decided that the privilege is confined to the three cases of counsel, solicitor and attorney'.[143] Since *Wilson's* case there has never been any serious doubt that the privilege is confined to communications with professional lawyers.[144] In *R (Prudential PLC) v Special Commissioner of Income Tax* the Court of Appeal has recently confirmed that legal professional privilege is applicable only to communications with 'a solicitor or barrister, or an appropriately qualified foreign lawyer'.[145]

1.42 **Status or function?** In the *Prudential* case an attempt was made to argue that the concept of 'legal adviser' was broad enough at common law to encompass a chartered accountant advising on tax law. This was rejected by Charles J at first instance[146] and by the Court of Appeal. The Court of Appeal held that it was bound by its own previous decision in respect of patent agents, namely *Wilden Pump Engineering Co v Fusfield*,[147] to hold that legal professional privilege applied to no professional

[140] *Lawrence v Campbell* (1859), 4 Drew 485, 490; *Southwark and Vauxhall Water Co v Quick* (1878) 3 QBD 315, 317, 321 (CA).

[141] *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, 649 (*per* Jessel MR).

[142] *R v Derby Magistrates' Court, ex p B* [1996] 1 AC 487, 504–6 (HL).

[143] The term 'attorney' was previously used in England and Wales for lawyers who practised in the common law courts. In 1873, however, attorneys were re-designated as solicitors (which had hitherto been the title for those lawyers who practised in the courts of equity).

[144] *Wilson* followed the result in the *Duchess of Kingston's Case* (1776) 1 East PC 469. See C Passmore, *Privilege* (2nd edn, 2006), para 1.143. The early cases are replete with references to the privilege extending to a variety of legally qualified professional advisers: *Bolton v Liverpool Corporation* (1833) 1 M & K 88 (counsel); *Greenough v Gaskell* (1833) 1 M & K 98 (solicitor); *Herring v Clobery* (1842) 1 Ph 91 (attorney); *Carpmael v Powis* (1846) 1 Ph 687 (solicitor); *Pearce v Foster* (1885) LR 15 QBD 114 (solicitor). In *Andersen v Bank of British Columbia* (1876) 2 Ch D 644, at 650–1, Sir George Jessel MR observed that the object of legal professional privilege was to protect a party who wishes to take the advice of 'members of the legal profession'. In *Wheeler v Le Marchant* (1881) 17 Ch D 675, 681–2 (CA), Sir George Jessel MR emphasized the limited character of the privilege, being restricted to to obtaining the assistance of lawyers. See generally E Bray, *The Principles and Practice of Discovery* (1885), 356–7.

[145] *R (Prudential PLC) v Special Commissioner of Income Tax* [2011] 2 WLR 50, para 82. There are a number of modern cases which can be cited in support of the restriction of legal professional privilege to communications with lawyers: *Minter v Priest* [1930] AC 558, 581 (HL); *AG v Mulholland* [1963] 1 All ER 767, 771 (CA); *D v NSPCC* [1978] AC 171, 244 (HL); *Paragon Finance PLC v Freshfields* [1999] 1 WLR 1183, 1188 (CA); *R v Derby Magistrates' Court, ex p B* [1996] 1 AC 487, 507–8 (HL).

[146] [2009] EWHC 2494 (Admin).

[147] [1985] FSR 159.

relationship other than the relationship with a qualified lawyer. But even if it had not been bound, the Court would have reached the same conclusion. Lloyd LJ said:

> I would conclude that it is not open to the court to hold that [legal professional privilege] applies outside the legal profession, except as a result of relevant statutory provisions. It is of the essence of the rule that it should be clear and certain in its application, since it is not the subject of any ad hoc balancing exercise but is, to all intents and purposes, absolute. As applied to members of the legal professions, acting as such, it is sufficiently clear and certain. If it were to apply to members of other professions who give advice on points of law in the course of their professional activity, serious questions would arise as to its scope and application. [148]

The paradigm Thus there is no doubt that at common law a duly qualified solicitor[149] and a barrister,[150] in independent practice and subject to an appropriate regime of professional ethics and discipline,[151] are relevant lawyers for the purposes of legal professional privilege. Patten J has held that the lawyer must be subject to the control of his professional body and the rules of practice which govern him; in other words, he must have a current practising certificate. Therefore a qualified solicitor who has been struck off the roll is not a lawyer for the purposes of legal professional privilege,[152] unless the client in good faith does not know that the solicitor has been struck off.[153] Communications with non-lawyer employees or subordinates of a solicitor or a firm of solicitors, including secretaries,[154] trainee solicitors, or paralegals acting under the direction of a solicitor, will also be privileged.[155] Presumably also included would be pupils of barristers and employees of barristers or their chambers, such as clerks or practice managers. **1.43**

[148] *R (Prudential PLC) v Special Commissioner of Income Tax* [2011] 2 WLR 50, para 83. Mummery and Stanley Burnton LJJ agreed with Lloyd LJ's judgment, paras 87–88.

[149] *Greenough v Gaskell* (1833) 1 M & K 98, 101, 103; *Carpmael v Powis* (1846) 1 Ph 687, 692; *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, 658 (CA); *Southwark and Vauxhall Water Co v Quick* (1878) 3 QBD 315, 322 (CA); *Wheeler v Le Marchant* (1881) 17 Ch D 675, 682, 683, 684–5 (CA).

[150] *Greenough v Gaskell* (1833) 1 M & K 98, 101, 103; *Mayor and Corporation of Bristol v Cox* (1884) 26 Ch D 678; *Lowden v Blakey* (1889) 23 QBD 332.

[151] *AM&S Europe Ltd v Commission of the European Communities* [1983] 1 QB 878, 906, 914. Wigmore, 580ff.

[152] *Dadourian Group International and others v Simms and others* [2008] EWHC 1784 (Ch), paras 119–128. See also *Waterford v Commonwealth of Australia* (1987) 163 CLR 54, 81–2 (*per* Deane J).

[153] *Dadourian Group International and others v Simms and others* [2008] EWHC 1784 (Ch), para 127. The burden is on the client to show that he continued to believe that the solicitor held a practising certificate at the time.

[154] *Descoteaux v Mierzwinski* (1982) 141 DLR (3d) 590, 603.

[155] *Taylor v Forster* (1825) 2 C&P 195; *Wheeler v Le Marchant* (1881) 17 Ch D 675, 682 (CA). Interpreters in the context of a privileged exchange are subject to the same obligations of confidentiality as lawyers: *R (Bozkurt) v Thames Magistrates Court* [2002] RTR 15.

1.44 **Foreign lawyers** Communications with foreign lawyers also attract legal professional privilege,[156] even where the lawyer advises on matters of English law.[157] If an adviser is a lawyer admitted in a foreign country it is unnecessary to require evidence about legal and ethical practices and controls by foreign courts, though the position may be different if the circumstances otherwise raise questions as to the position of the lawyer, such as whether he is a lawyer at all.[158]

1.45 **In-house lawyers** Subject to one qualification arising under EC law, in-house lawyers are treated in the same way as lawyers in independent practice.[159] Lord Denning MR put the matter thus:

> The law relating to discovery was developed by the Chancery Courts in the first half of the 19th century. At that time nearly all legal advisers were in independent practice on their own account. Nowadays it is very different. Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer. For that reason Forbes J. thought they were in a different position from other legal advisers who are in private practice. I do not think this is correct. They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges. . . . I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege. . . . The validity of it has never been doubted.[160]

1.46 **EC law and in-house lawyers** The qualification referred to in the previous paragraph is possibly a narrow one but it is nonetheless potentially significant as EC law expands its reach. Although legal professional privilege is guaranteed as a fundamental right under EC law, the European Court of Justice held in the early 1980s in *AM&S Europe Ltd v European Commission* that parties to investigations into

[156] *Lawrence v Campbell* (1859) 4 Drew 485; *Macfarlan v Rolt* (1872) LR 14 Eq 580; *Re Duncan* [1968] P 306; *Great Atlantic Insurance v Home Insurance* [1981] 1 WLR 529, 536 (CA); *Minnesota Mining and Manufacturing v Rennicks* [1991] FSR 97, 98; *Société Française Hoechst v Allied Colloids Ltd* [1992] FSR 66; *R v Middlesex Guildhall Crown Court, ex p Tamosius* [2000] 1 WLR 453 (DC); *R (Prudential PLC) v Special Commissioner of Income Tax* [2011] 2 WLR 50.

[157] *IBM v Phoenix International (Computers) Ltd* [1995] 1 All ER 413, 429.

[158] *Kennedy v Wallace* (2004) 213 ALR 108, paras 203–204.

[159] *Alfred Crompton Amusement Machines Ltd v Customs & Excise Comrs (No 2)* [1972] 2 QB 102, 129 (CA); *AM&S Europe Ltd v European Commission* [1983] QB 878, 914.

[160] *Alfred Crompton Amusement Machines Ltd v Customs & Excise Comrs (No 2)* [1972] 2 QB 102, 129 (CA). This conclusion was not challenged on appeal: *Alfred Crompton Amusement Machines Ltd v Customs & Excise Comrs (No 2)* [1974] AC 405, 430–1 (HL).

alleged breaches of the anti-trust provisions of Articles 101 and 102 of TFEU cannot claim legal professional privilege for internal communications with employees, even if the employee is acting as an in-house lawyer. Privilege could only be claimed for communications with *independent* legal advisers, namely advisers who are not bound to the client by a relationship of employment.[161]

1.47 The issue was re-visited by the European Court of Justice in its 2010 judgment in the case of *Akzo Nobel Chemicals Ltd v European Commission*.[162] The background to the case goes back to 2003, when the Commission, assisted by the Office of Fair Trading, carried out raids on the UK premises of Akzo Nobel, seizing a considerable number of documents in aid of an anti-trust investigation. Among the documents seized were internal emails exchanged between employees and one of Akzo's in-house counsel, a Dutch lawyer. Akzo asserted that these and certain other documents seized by the Commission were protected by legal professional privilege. A number of bodies intervened in the proceedings in support of Akzo's case, including the Council of the Bars and Law Societies of the European Union, the International Bar Association, the European Company Lawyers Association, and the American Corporate Counsel Association, as well as the governments of the UK, Ireland, and the Netherlands. However, the European Court of Justice rejected Akzo's argument and those of the interveners. It reached its conclusion principally on the basis that no predominant trend towards protection of communications within a company with in-house lawyers could be discerned in the legal systems of the 27 Member States of the European Union since the *AM&S* judgment.[163] Accordingly there was no justification for departing from the decision in that case. Hence, under EC law, legal professional privilege only protects communications with independent lawyers since an in-house lawyer supposedly does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his clients. This is a questionable proposition,[164] but Advocate-General Kokott stated in her opinion that:

> Both their considerably greater economic dependence and their much stronger identification with the client—their employer—militate against the proposition that enrolled in-house lawyers should enjoy the protection afforded by legal professional privilege in respect of internal company or group communications. [165]

1.48 **Independence** The independence of the lawyers involved has also been identified as essential to the availability of legal professional privilege in Australian law.[166]

[161] *AM&S Europe Ltd v European Commission* [1983] QB 878, 951 (para 27).
[162] [2010] 5 CMLR 19.
[163] Judgment, paras 74–76.
[164] External lawyers can come under significant threats to their complete independence—such as the economic imperative for some firms to get on and remain on panels of approved legal service providers for large corporations such as banks.
[165] Opinion, para 71.
[166] JD Heydon, *Cross on Evidence* (8th Australian edn, 2010), 894.

In *Waterford v Commonwealth of Australia*[167] the High Court of Australia expressed differing views as to whether privilege should extend generally to communications with in-house lawyers. The case concerned whether the Crown could claim privilege in respect of documents containing legal advice obtained from salaried lawyers within the relevant Crown Law Officers' departments. The High Court held, in essence, that the advice was privileged in that there was in that case a professional relationship which secured to the advice an independent character, notwithstanding the employment relationship.[168] The independence of the lawyers was assured by the Commonwealth, State, and Territory statutes under which the lawyers were employed. Dawson, Deane, and Brennan JJ considered the general question whether an employment relationship with his 'client' impairs a lawyer's independence. Deane and Dawson JJ[169] considered that, subject to certain safeguards relating to adequate legal and professional standing, privilege should generally extend to include salaried lawyers, effectively endorsing the approach of the English Court of Appeal in the *Alfred Crompton* case. Although he found the necessary degree of independence to be present on the facts of the *Waterford* case, Brennan J considered that professional independence in a salaried lawyer was a contradiction in terms and rejected the notion that salaried lawyers should be assimilated to the position of the independent legal profession for the purposes of determining the availability of legal professional privilege.[170] The other two judges did not express a view on the wider point, presumably because independence is a question of fact to be determined on a case-by-case basis.[171] This has left the position of employed lawyers in some doubt in Australia, although a number of decisions at first instance in separate state jurisdictions and the New South Wales Court of Appeal have held that legal professional privilege may attach to communications between in-house lawyers and their employers.[172] The Australian courts will, however, look closely at whether as a matter of fact the lawyer is truly independent of the client: thus independence from the employer was not established in relation to serving full-time military officers.[173]

1.49 In the light of Lord Denning's judgment in the *Alfred Crompton* case it is very doubtful whether the precise status of in-house lawyers will be scrutinized quite so closely in this country for the purposes of legal professional privilege at common law. To the extent it is regarded as a relevant question, the independence of an in-house lawyer who is a fully qualified solicitor or barrister with a current practising certificate will be assumed. The areas where the applicability of legal professional

[167] (1987) 163 CLR 54.
[168] (1987) 163 CLR 54, 62.
[169] Ibid, 81, 97.
[170] Ibid, 72.
[171] See, for example, *Seven Network Ltd v News Ltd* (2005) 225 ALR 672, para 15 (*per* Whelan J).
[172] See R Desiatnik, *Legal Professional Privilege in Australia* (2nd edn, 2005), 92, fn 139.
[173] *Vance v McCormack* (2004) 154 ACTR 12.

privilege is more likely to be questioned will include, for example, the situation where an employee happens to be qualified as a lawyer but there is an issue as to whether he actually functions as a lawyer. Likewise, the role of an employed lawyer who has several different functions, including that of legal adviser, may have to be scrutinized carefully in respect of particular communications to ascertain if he is acting as a lawyer or in some other capacity.[174] This may not be at all straightforward where a lawyer assumes the role of a client's 'man of business'.[175]

1.50 **Professional capacity** The mere fact that a party to a communication is a lawyer will not be sufficient to establish privilege. The lawyer must be acting in a professional capacity as a lawyer, although there does not need to be any formal retainer. The relationship exists where the lawyer is not paid because he is acting *pro bono* or where, although considering himself entitled to a fee, the client does not pay him.[176] A lawyer working on a *pro bono* basis at a law centre would clearly come within the rule.[177] Privilege will also attach, for example, to a meeting between a potential client and a lawyer with a view to deciding whether the client will retain the lawyer or whether the lawyer will accept a retainer.[178] Communications made in the context of a 'beauty parade' would therefore attract privilege, even where the lawyer does not subsequently secure any instructions to act.[179] Privilege will not attach to communications made after a lawyer has ceased to act for the client.[180] Nor will privilege attach to a law firm's marketing material, whether addressed to existing or prospective clients, even where it is specifically legal in content (for example, a briefing paper identifying new developments in a particular area of the law).[181]

1.51 If you ask your lawyer for advice about your love life, this will clearly not be privileged. But even if he is consulted about the law, privilege will not arise if a lawyer is consulted on a social rather than on a professional basis.[182] While a formal retainer is not necessary, there are limits. Buttonholing your lawyer neighbour for free advice

[174] *Blackpool Corporation v Locker* [1948] 1 KB 349, 379–80 (CA); *Seven Network Ltd v News Ltd* [2005] FCA 142, para 38 (*per* Tamberlin J)

[175] See para 2.124 below.

[176] *Foster v Hall* (1831) 29 Mass (12 Pick) 89.

[177] The position of a law student working at the same centre would be more difficult. A law student would not normally be a lawyer for the purposes of legal professional privilege. However, if a student worked at a law centre under the general supervision of a qualified lawyer, there appears to be no principled reason why privilege should not attach.

[178] *Minter v Priest* [1930] AC 558 (HL). The lawyer–client relationship arises before the establishment of a formal retainer for the purposes of privilege: see *Descoteaux v Mierzwinski* (1982) 141 DLR (3d) 590, 606, 618. Wigmore, 587.

[179] This principle is well established: see E Bray, *Principles and Practice of Discovery* (1885), 378. Presumably the privilege will not attach after the client indicates that he will not instruct the lawyer or the lawyer declines to act: see Wigmore, 587.

[180] *Minter v Priest* [1930] AC 558, 577 (HL).

[181] *Commissioner of Taxation v Coombes* [1999] FCA 842. Such material will, in any event, be unlikely to enjoy the degree of confidentiality necessary for a valid claim to privilege.

[182] See E Bray, *Principles and Practice of Discovery* (1885), 377; *R v Woodley* (1834) 1 M & Rob 390; *Smith v Daniel* (1874) LR 18 Eq 649; *Kelly v Denman*, 21 February 1996 (*per* Rimer J).

at a barbecue is unlikely to attract privilege, even if the subject matter is entirely legal. Where a lawyer holds an executive position, such as a company secretary, a board member, or a town clerk, the court may need to determine in which capacity he is consulted.[183] The fact that an individual happens to be a lawyer will not cloak all communications with him with privilege unless he is consulted professionally in his capacity as lawyer.[184]

1.52 **Mistaken belief** Privilege will apply even if the 'lawyer' whom a client instructs is not in fact qualified or does not hold a current practising certificate, provided that the client believes he is a properly qualified lawyer.[185] It also applies where a client believes the lawyer has consented to act for him even if this is not in fact the case.[186] The rule is based on the reasonable expectations of persons seeking legal advice.[187] Although this has been the subject of criticism,[188] such a rule does appear to be consistent with the rationale of legal advice privilege, provided the belief is genuine, as to which the burden is on the party asserting privilege.[189]

1.53 **Extension to other professionals giving legal advice unlikely at common law** Subject to certain specific statutory exceptions,[190] communications with other professionals will not attract legal advice privilege, even where they are giving advice on

[183] *Blackpool Corporation v Locker* [1948] 1 KB 349, 379–80 (CA). In this case it was held that a town clerk who was also a lawyer was consulted in the former rather than the latter capacity. See also *Alfred Crompton Amusement Machines Ltd v Customs & Excise Comrs (No 2)* [1972] 2 QB 102, 129 (CA).

[184] *Minter v Priest* [1930] AC 558, 581 (*per* Lord Atkin).

[185] *Calley v Richards* (1854) 19 Beav 401, 404 (*per* Romilly MR), holding that the decision in *Fountain v Young* (1807) 1 Esp 113 that if the client mistakenly thinks the person he is communicating with is a lawyer, but the person is not a lawyer in fact, no privilege attaches, 'is not now the rule of this court'. The decision in *Calley's* case was considered in *R (Prudential PLC) v Special Commissioner of Income Tax* [2011] 1 WLR 50, para 38, and applied in *Dadourian Group International and others v Simms and others* [2008] EWHC 1784 (Ch), paras 126–129 (*per* Patten J).

[186] *Cromack v Heathcote* (1820) 2 Bro & Bing 4; *Smith v Fell* (1841) 2 Curt 667.

[187] *Calley v Richards* (1854) 19 Beav 401, 407. In *Global Funds Management (NSW) Ltd v Rooney* (1994) 36 NSWLR 122 it was held that the belief ought to be *bona fide* and based on reasonable grounds . Cf the decision of the Full Federal Court of Australia in *Grofam Pty Ltd v Australia and New Zealand Banking Group Ltd* (1993) 45 FCR 445, 456, where it was held that a genuine belief would suffice. This also appears to have been the approach of Patten J in *Dadourian Group International and others v Simms and others* [2008] EWHC 1784 (Ch), paras 127–128. The distinction may be academic since any party without reasonable grounds will struggle to discharge the burden of establishing a genuine belief that the lawyer was properly qualified.

[188] J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 166–7.

[189] *Dadourian Group International and others v Simms and others* [2008] EWHC 1784 (Ch), para 127.

[190] For example: patent agents (Copyright, Designs and Patents Act 1988, s 280); trade mark agents (Copyright, Designs and Patents Act 1988, s 284); licensed conveyancers (Administration of Justice Act 1985, s 33); authorized advocates and litigators (Courts and Legal Services Act 1990, s 63). It is clear that patent and trade mark agents do not attract legal professional privilege at common law: *Dormeuil Trade Mark* [1983] RPC 131; *Wilden Pump Engineering Co v Fusfield* [1985] FSR 159 (CA).

strictly legal matters.[191] For example, apart from the most complex cases, most advice on tax law in this country is given by accountants rather than lawyers, but such communications do not attract legal advice privilege.[192] All attempts to extend the privilege beyond the legal profession have failed at common law.[193] Specific professions considered include medical practitioners,[194] the clergy,[195] bankers,[196] accountants,[197] auditors,[198] and journalists.[199]

1.54 A possible exception in the case law is *Grazebrook Ltd v Wallens*,[200] in which the National Industrial Relations Court held that communications between employers and their personnel consultants would attract privilege for the purposes of proceedings before industrial tribunals.[201] Sir John Donaldson, quoting from a note to the County Court rules, stated:[202]

> 'Communications not only with legal advisers, but with other agents, with an actual view to the litigation in hand, and the mode of conduct of it, also are privileged: *Pearce v Foster* (1885) 15 QBD 114.' . . . Miss Alton rightly submits that that particular decision does not support the proposition for which it is cited. She goes on to submit that there is no authority binding upon the traditional courts of this country which does support this proposition.
>
> . . . if Miss Alton is right and this is not the law in relation to the traditional courts, it must be held to be the law in relation to industrial tribunals and this court. We say that for this reason. Before industrial tribunals it is the rule rather than the exception, for parties to be represented by persons other than lawyers. Indeed, it is the policy of

[191] *Wilson v Rastall* (1792) 4 Durn & E 753, 759; *Wheeler v Le Marchant* (1881) 17 Ch D 675, 681–2 (CA). See R Pattenden, *The Law of Professional–Client Confidentiality* (2003), para 16.42, for a comprehensive list of other professions to which privilege has been expressly denied, including doctors, accountants, priests, bankers, auditors, and journalists.

[192] *R (Prudential PLC) v Special Commissioner of Income Tax* [2011] 2 WLR 50. Auditors and tax advisors enjoy a limited privilege entitling them to withhold documents which are their property and which they have created for their auditing function or for the purpose of giving tax advice in response to statutory notices served by the Inland Revenue in the exercise of its functions under sections 20–20A of the Taxes Management Act 1970.

[193] *R (Prudential PLC) v Special Commissioner of Income Tax* [2011] 2 WLR 50. See also *Barristers' Board of Western Australia v Central Tax Service Pty Ltd* (1985) 16 ATR 115.

[194] *D v NSPCC* [*1978*] AC 171, 244 (*per* Lord Edmund-Davies).

[195] *Wheeler v Le Marchant* (1881) 17 Ch D 675, 681 (*per* Jessel MR: 'Communications made to a priest in a confessional on matters perhaps considered by the penitent to be more important than his life or his fortune, are not protected').

[196] *Tournier v National Provincial and Union Bank* [1924] 1 KB 461, 486 (*per* Atkin LJ).

[197] *R (Prudential PLC) v Special Commissioner of Income Tax* [2011] 2 WLR 50; *Chantrey Martin (A Firm) v Martin* [1953] 2 QB 286. Legal advice given by an accountant is unlikely to attract privilege even if the accountant has a degree in law: *Glengallen Investments Pty Ltd v Arthur Andersen* [2002] 1 Qd R 233.

[198] *Price Waterhouse v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583.

[199] *AG v Mulholland* [1963] 1 All ER 767, 771 (*per* Lord Denning MR). Journalists are now entitled to protect their sources from disclosure to an extent by virtue of section 10 of the Contempt of Court Act 1981.

[200] [1973] ICR 256, 259.

[201] Now known as employment tribunals.

[202] [1973] ICR 256, 258–9.

> Parliament to encourage such representation. If the law to be applied to industrial tribunals were not as stated in the note in the county court rules, the position would arise that, for example, a personnel officer, when examining as a witness a works foreman, could, at the end of the works foreman's evidence, be called upon to hand over the proof of evidence from which he had been examining the witness. Obviously, that would be a wholly untenable situation. Accordingly, we rule that, if and insofar as the general law applicable to all courts does not give the privilege set out in the note in the county court rules, then, in the interests of the administration of justice, we hold that that privilege exists in relation to proceedings before an industrial tribunal.

1.55 The reasoning in the *Grazebrook* case is puzzling. Sir John Donaldson was correct to state that *Pearce v Foster* is not authority for the proposition set out in the relevant note to the County Court Rules. But it is difficult to see why any special rule might have to be crafted. There would have been no question of a personnel officer in the postulated circumstances being called upon to hand over the proof of evidence from which he had been examining the witness as a matter of common law, whether before the 'traditional courts' or before an industrial tribunal. Rather, he could simply be regarded as a third party communicant in circumstances where the proof came into existence for the dominant purpose of litigation and where there was no question of waiver.[203] Such a proof would therefore almost certainly have been subject to litigation privilege and there was no need to treat the personnel officer as a quasi-lawyer to assert privilege in the proof.

1.56 The *Grazebrook* case is thus a doubtful basis for any extension of the law in this area. In *New Victoria Hospital v Ryan*,[204] the Employment Appeal Tribunal declined to allow privilege to extend to communications between the hospital and a firm of personnel consultants giving employment law advice before litigation was contemplated, Tucker J stating:

> . . . the privilege should be strictly confined to legal advisers such as solicitors and counsel, who are professionally qualified, who are members of professional bodies, who are subject to the rules and etiquette of their professions, and who owe a duty to the court. This is a clearly defined and easily identifiable qualification for the attachment of privilege. To extend the privilege to unqualified advisers such as personnel consultants is in our opinion unnecessary and undesirable.

1.57 **Justification for the established limitation to lawyer–client communications** Baroness Hale made clear in *Three Rivers 6* that there is a clear policy justification for singling out communications between lawyers and their clients from other professional communications.[205] Lawyer–client communications represent a limited

[203] The proof might also be regarded as part of the employers' 'materials for the brief' and covered by litigation privilege on that basis: see para 3.24 ff below.

[204] [1993] ICR 201, 203–4, distinguishing and, in any event, declining to follow *Grazebrook Ltd v Wallens* [1973] ICR 256. In Australia privilege has not been extended to an industrial officer of a trade union who is not a legal practitioner: *Wood v Commonwealth Bank of Australia* (1996) 67 IR 46.

[205] Para 61.

and readily controllable exception to the public interest in disclosure based on the centrality of the lawyer–client relationship to the administration of justice.[206] It would be far more difficult to police the boundaries of the privilege if it were applied to other professionals. In short, the line has to be drawn somewhere and the focus of a professional lawyer's role as a specifically legal adviser allows for a sensible and practically workable line to be drawn in allowing an adequate sphere to obtain confidential legal advice. Since legal professional privilege restricts the courts' access to potentially relevant material it is unlikely that any extension to other professions happening to give advice which can be characterized as 'legal' will be countenanced (see paragraph 1.03 above).

1.58 The contours of legal professional privilege have been shaped over the centuries by the status of the lawyer as a specifically *legal* adviser. This has allowed a ready presumption to be made that communications with his client are for the overall purpose of legal advice even where not strictly concerned with the law. As Wigmore[207] states, by way of generalization it can be said that a matter committed to a lawyer is *prima facie* committed for the purposes of legal advice. To borrow Lord Rodger's phrase, there is a general expectation that in analysing any issue a professional lawyer will look at it through *legal spectacles*.[208] Thus the *Balabel* test,[209] endorsed by the House of Lords in *Three Rivers 6*, is readily applicable to the legal profession, but it is difficult to see how it would be practically workable when applied to other professions.

1.59 The nomenclature used in the common law world is instructive in identifying the true nature and rationale of the prevailing rule. It is no accident that the privilege is called 'legal professional privilege' in this jurisdiction, in Australia[210] and in New Zealand.[211] The cases from common law jurisdictions show that the only relevant professional is a lawyer.[212] Indeed in the United States the privilege is known as 'attorney–client privilege'[213] and in Canada 'solicitor–client privilege.[214] The names underline the distinctive position of the legal profession (as opposed to other professionals) in the *administration of justice*. The jurisprudence of the common law

[206] See the convincing analysis in S McNicol, *Law of Privilege* (1992), 4–7.
[207] *Wigmore*. 567.
[208] *Three Rivers 6*, paras 59–60.
[209] See para 2.92 below.
[210] *Esso Australia Resources Ltd. v* Commissioner *of Taxation* (1999) 201 CLR 49; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.
[211] *R v Uljee* [*1982*] 1 NZLR 561.
[212] In Australia the courts have resisted extending privilege at common law to anyone other than a professionally qualified lawyer and there are indications that the privilege might not apply to in-house lawyers: see R Desiatnik, *Legal Professional Privilege in Australia* (2nd edn), 84–92. In New Zealand the privilege at common law is limited to communications with solicitors and barristers: *R v Uljee* [1982] 1 NZLR 561, 568. In both countries, just as in this country, privilege from disclosure has been extended to other relationships only by statute.
[213] *Upjohn Company v United States* 449 US 383 (1981); *Swidler & Berlin v United States* 524 US 399 (1998).
[214] *Descoteaux v Mierzwinski* [1982] 1 SCR 860, 875; *Smith v Jones* [1999] 1 SCR 455, 476.

world is closely related to English law and their legal procedures are comparable to English procedures. But equivalent protection for lawyer–client communications is justified on a like basis in the jurisprudence of the European Court of Justice and the European Court of Human Rights, which have different origins. The European Court of Justice has adopted the principle that 'the public interest and the proper administration of justice demand as a general rule that a client should be able to speak freely, frankly and fully to his lawyer' on the ground that it is treated as fundamental in the law of every Member State of the European Community.[215] The European Court of Human Rights has held that the principle that 'a person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion' is protected by Article 6 of the Human Rights Convention where litigation is contemplated and by Article 8 where it is not.[216]

1.60 The distinctive position of the legal profession in the administration of justice was emphasized by the High Court of Australia in *Baker v Campbell*:[217]

> Whilst legal professional privilege was originally confined to the maintenance of confidence pursuant to a contractual duty which arises out of a professional relationship, it is now established that its justification is to be found in the fact that the proper functioning of our legal system depends upon a free flow of communication between legal advisers and their clients which would not exist if either could be compelled to disclose what passed between them for the purpose of giving or receiving advice. This is why the privilege does not extend to communications arising out of other confidential relationships such as those of doctor and patient, priest and penitent or accountant and client. . . . The restriction of the privilege to the legal profession serves to emphasize that the relationship between a client and his legal adviser has a special significance because it is part of the functioning of the law itself. Communications which establish and arise out of that relationship are of their very nature of legal significance, something which would be coincidental in the case of other confidential relationships.

The Canadian Supreme Court has explained the rationale of legal advice privilege in similar terms:[218]

> The important relationship between a client and his or her lawyer stretches beyond the parties and is integral to the workings of the legal system itself. The Solicitor–client relationship is a part of that system, not ancillary to it. The prima facie protection for solicitor–client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the system.

[215] *AM&S Europe Ltd v Commission* [1983] 1 QB 878, 949–51 in the judgment of the Court, and the analysis of the laws of Member States by Advocates General Warner and Slynn, 892–8 and 909–19 respectively.
[216] *Campbell v United Kingdom* (1993) 15 EHRR 137, 160–1, paras 46, 48.
[217] (1983) 153 CLR 52, 128 (per Dawson J).
[218] *R v McClure* [2001] SCC 14, [36].

This simply could not be said of any other profession, however eminent. Nor do the statements of principle running through the case law have the same resonance if transposed to the relationship between a man and, say, his accountant: the potential interests at stake will tend to be very different.

New forms of legal structure The law will of course need to adapt to take account of the Legal Services Act 2007. This will allow new forms of legal practice to develop. Currently the 2007 Act allows legal disciplinary practices or LDPs (firms involving different kinds of lawyers, and up to 25 per cent *non-lawyers*, but still providing legal services). It will also permit the establishment of alternative business structures or ABSs, which will allow external ownership (possibly by supermarkets or other large organizations[219]) of legal businesses,[220] multidisciplinary practices (providing legal and other services), and possibly many things in between these and a traditional law firm. The 2007 Act makes clear that Parliament intended no great changes to the way in which legal professional privilege should apply to such new forms of business structure.[221] Legal professional privilege will apply to communications with an individual who is not a barrister or solicitor but who provides certain reserved legal services, that is advocacy services, litigation services, conveyancing services, or probate services as an authorized person (namely, a person authorized to carry on the relevant activity by a relevant approved regulator)[222] or a non-lawyer working at a licensed body (such as an alternative business structure)—provided such person is acting at the direction and under the supervision of a 'relevant lawyer'.[223] A relevant lawyer is essentially a solicitor, barrister, or registered foreign lawyer.[224] **1.61**

However, whatever Parliament may have intended, the operation of legal professional privilege may not be straightforward under new legal structures. In *Balabel v Air India*[225] the Court of Appeal assumed that most communications between a client and his solicitor in, for example, a conveyancing transaction would be exempt from disclosure. Why should the same ready assumption apply in relation to **1.62**

[219] Hence the sobriquet 'Tesco law' used by the former Lord Chancellor, Lord Falconer.

[220] ABSs are likely to be permitted from 2011 or 2012.

[221] See A Higgins, 'Legal Advice Privilege and its Relevance to Corporations' (2010) 73(3) *MLR* 371, 396.

[222] Legal Services Act 2007, s 190(1) and (2), in force from 1 January 2010. This reproduces the effect of section 63 of the Courts and Legal Services Act 1990.

[223] Legal Services Act 2007, ss 190(3)–(5). The Ministry of Justice's Explanatory Notes to the Legal Services Act state that the provisions in section 190 ensure that the clients of certain legal services providers such as authorized litigators and advocates, recognized bodies, licensed conveyancers, trade mark and patent firms or alternative business structures have similar legal professional privilege protection to clients of solicitors at the common law.

[224] Legal Services Act 2007, s 190(5)(a)–(g). Also included is 'an individual . . . who is an authorised person in relation to an activity which is a reserved legal activity' or 'a European lawyer (within the meaning of the European Communities (Services of Lawyers) Order 1978 (S.I. 1978/1910)' (s 190(5)(h)–(i)).

[225] [1988] 1 Ch 317, 330–1 (*per* Taylor LJ).

communications with, for example, a multi-disciplinary partnership—especially where the rationale of the firm is to provide a one stop shop for different types of professional advice? And what if a lawyer in such a firm happens to provide advice on non-reserved legal activities? The courts might now require much more detailed evidence establishing the precise purpose of the communications. If the organization engaged various professionals such as accountants and mortgage advisers it may well be the case that the documents were sent for a mixed purpose of obtaining legal and financial advice or a client may send information not knowing whether he required specifically legal advice. The need for legal advice in respect of the communication may not emerge until later. Legal professional privilege would be unlikely to apply to such a communication, since the privileged status of a document should not depend on the subsequent use to which it happens to be put.[226] As for communications from the organization to the client, it is suggested that a document from a lawyer employed by the organization to the client setting out legal advice would be privileged but that a document setting out a mixture of legal and financial advice would be more problematic. The courts will no doubt be astute to prevent documents being generated routinely under the supervision of a 'relevant lawyer' so as to cloak them in legal professional privilege when they are not in truth created for the purposes of legal as opposed to other professional advice.

I. How Long Does the Privilege Last?

1.63 The old aphorism is 'once privileged, always privileged'.[227] What does this mean? In essence, once a particular client's privilege has attached to a document or other privileged exchange it remains, subject only to waiver,[228] for his benefit and that of his successors in title for all time and in all circumstances. Both the privilege and the right to waive it survive the death of the client in favour of his personal representative or successors in title.[229] The famous case of *Calcraft v Guest* [230] provides a vivid illustration. In 1787 a Mrs Fry brought an action against three brothers named Stevens for assault, one of whom was a tenant of Mr Calcraft's fishery in Dorset. Mr Calcraft was a party to that action (for reasons which are not apparent from the report). Over a hundred years later another Mr Calcraft, the successor in title to the earlier Mr Calcraft, brought an action against a Mrs Drax for trespass in relation to the same fishery. The question arose whether documents, in respect of which the earlier Mr Calcraft was entitled to claim privilege in the first action, including

[226] See para 2.59 below.
[227] See, for example, *Calcraft v Guest* [1898] 1 QB 759, 761 (CA); *Pearce v Foster* (1885) 15 QBD 114, 119 (CA).
[228] See Chapter 5 below.
[229] *Minet v Morgan* (1873) LR 8 Ch App 361 (CA); *R v Molloy* [1997] 2 Cr App R 283 (CA).
[230] [1898] 1 QB 759, 761 (CA).

statements of witnesses, were privileged or liable to production in the second action. The Court of Appeal upheld the entitlement of the later Mr Calcraft to assert privilege, Lord Lindley MR stating:

> . . . as regards professional privilege, on looking at the authorities, it appears to me that this case is covered by the case of *Minet v Morgan* . . . and that if there are any documents which were protected by the privilege to which I am alluding that privilege has not been lost. I take it that, as a general rule, one may say once privileged always privileged. I do not mean to say that privilege cannot be waived, but that the mere fact that documents used in a previous litigation are held and have not been destroyed does not amount to a waiver of the privilege.[231]

1.64 Thus, documents prepared for one action will continue to be privileged in subsequent litigation without temporal restriction.[232] Nor does it matter if the subject matter or the parties to the subsequent action are different. *The Aegis Blaze*[233] is a case in point. At the end of 1980 a cargo of steel coils was damaged while being transported in the defendant's vessel. Proceedings by the cargo-owners were in contemplation ('action A') when in March 1981 the defendants' solicitors instructed surveyors to gather evidence and prepare a survey report. In July 1981 further cargo was damaged while being carried in the same vessel on another voyage. Two different cargo-owners commenced proceedings ('action B') against the same defendants in July 1981 in respect of the later cargo and, knowing of the earlier survey report, sought its disclosure in action B. The defendants claimed that since the report was privileged in relation to action A (that much being common ground[234]), it remained privileged in relation to action B. The survey report was clearly relevant to action B, there being issues relating to the condition of the vessel, and Sheen J ordered disclosure in action B on the basis that a document does not retain its privilege in subsequent proceedings concerning different parties and a different subject matter. The Court of Appeal reversed this decision. Parker LJ stated that if there were genuinely no connection of subject matter, it would be most unlikely that the document would be subject to disclosure in the subsequent action on the grounds of relevance; no question of privilege would ever arise. But since the document was relevant to the subsequent action the defendants were entitled to assert their privilege to refuse inspection.[235]

[231] Ibid, 761–2.

[232] *Pearce v Foster* (1885) 15 QBD 114, 119 (CA). In Canada some courts have sought to limit litigation privilege to the dispute in which the communication is made or to closely related litigation: see R Pattenden, *The Law of Professional–Client Confidentiality* (2003), para 16.28.

[233] [1986] 1 Lloyd's Rep 203 (CA).

[234] [1986] 1 Lloyd's Rep 203, 204.

[235] Ibid, 209–10. Parker LJ suggested that no question of privilege would arise unless the party entitled to claim the privilege in the first action was also a party to the subsequent action (or his successor in title), relying on *Schneider v Leigh* [1955] 2 QB 195 (CA). This appears to be based on a misreading of *Schneider's* case, which merely held that, in the case of third party communications, the privilege is that of the client, not the third party. This part of Parker LJ's judgment in *The Aegis Blaze* was unnecessary to his decision, but is now unsustainable in the light of the *Derby Magistrates* case,

1.65 The decision in *The Aegis Blaze* makes obvious practical sense. At the time of the hearing in the Court of Appeal action A was still pending.[236] If the cargo-owners' argument in action B were correct and the survey report had been deployed in the trial of action B it would have rendered the defendants' uncontested privilege in respect of action A worthless. The defendants clearly had a legitimate interest to protect in asserting the privilege in action B. But what would the position be if the client had no legitimate interest to protect in maintaining the privilege?

1.66 **A recognizable interest?** In *R v Derby Magistrates, ex p B*[237] Lord Nicholls suggested that in the ordinary course a client has an interest in asserting his right to claim privilege in so far as disclosure might prejudice him.[238] He considered that there might be circumstances where the client's privilege could be regarded as 'spent', in that the client had no remaining interest in maintaining his privilege (presumably meaning that any disclosure could not cause him any prejudice). He suggested *obiter* that it was unattractive to allow a client to insist on non-disclosure where this might be seriously prejudicial to a third party defending a criminal charge or in some other way. In such circumstances a judge might be able to conclude that there was no continuing interest to protect in allowing the privilege to be maintained.[239] There is a great deal of force in Lord Nicholls' observations so far as litigation privilege is concerned: if the rationale for the privilege in relation to third party communications is to enable parties to prepare their case within a private sphere, then it is debatable whether there is any justification for permitting litigation privilege to be asserted in respect of later unrelated litigation, still less forever.[240] But in the case of legal advice privilege, Lord Nicholls' suggestion is one which should be resisted.[241] This is for a number of reasons:

- Lord Nicholls' starting point is suspect in that potential prejudice to the client has never been the basis for allowing the privilege to be asserted; on the contrary, the approach of the law since at least *Wentworth's* case[242] is that an assertion of privilege is morally neutral. The law does not pry into the motive for asserting the privilege: the claim might perfectly properly be made even if the client is thereby actually suppressing evidence helpful to his own case. For example, a corporate client might decide, for perfectly rational reasons, not to waive privilege in an

which demonstrates that a privilege holder need not be a party to subsequent litigation in order to rely upon his privilege. In any event, a third party would have the option of trying to obtain injunctive relief if it had a claim to privilege in respect of material which was to be referred to in proceedings to which it was not a party: see Chapter 5, Section D below.

[236] In Greece: [1986] 1 Lloyd's Rep 203, 204.
[237] [1996] 1 AC 487.
[238] [1996] 1 AC 487, 510.
[239] Ibid, 512–13.
[240] In Canada, for example, litigation privilege ceases once the relevant litigation is over: *Blank v Canada* (*Ministry of Justice*) [2006] 2 SCR 319, paras 8, 37.
[241] [1996] 1 AC 487, 511.
[242] *Wentworth v Lloyd* (1864) 10 HLC 589. See paras 1.39–1.40 above.

otherwise helpful document because it wished to maintain a blanket policy preserving privilege in legal advice.

- Such grey areas would lead to great uncertainty. What types of interest would entitle a client to continue to maintain his privilege? For example, even if it were possible to say with confidence that there were no realistic possibility of adverse legal consequences flowing from disclosure (which may not be a straightforward conclusion to reach), would the risk of mere embarrassment be sufficient to establish prejudice? In *Three Rivers 6* Lord Rodger rejected the Court of Appeal's assertion that there was no good reason for privilege to attach to the drawing up of a will; on the contrary, he held that people had legitimate interests to protect in keeping delicate familial concerns private, the provisions of a will being shaped by 'past relationships, indiscretions, experiences, impressions and mistakes, as well as jealousies, slights, animosities and affections, which the testator would not wish to have revealed'.[243] Hence, Lord Rodger concluded in support of maintaining the privilege, that '[d]ivulging the provisions during the testator's lifetime or disclosing the reasons for them after the testator's death could often cause incalculable harm and misery'.[244] What confidence could a client have that a judge would conclude that such misery would override the interests, for example, of a third party defending a civil claim or criminal charge?
- The problem of maintaining the client's confidence is fundamental. The justification for privilege normally arises at an earlier stage: the principal foundation of legal advice privilege is the need for candour in the exchanges between lawyer and client. Lord Millett emphasized in *B v Auckland District Law Society* that to facilitate this candour a lawyer must be able to give his client an absolute and unqualified assurance that whatever the client tells him in confidence will never be disclosed without his consent.[245] If Lord Nicholls' suggestion were to be adopted, such an assurance could not fairly be given. Any assurance would have to be qualified by a warning from the lawyer that there might come a time when a court could decide that even if the client wished to maintain his privilege he had no proper basis to do so in the face of an application by a third party, no doubt with a compelling personal interest in disclosure. It is suggested that such a state of affairs would undermine the essential rationale underpinning legal professional privilege. Would it not effectively be the introduction by the back door of the balancing exercise eschewed by the House of Lords in the *Derby Magistrates* case?

[243] *Three Rivers 6*, para 55.
[244] Ibid.
[245] [2003] 2 AC 736, 757 (PC). See also *R v Derby Magistrates' Court, ex p B* [1996] 1 AC 487, 508 (*per* Lord Taylor CJ).

1.67 It may be for reasons such as these that none of the other members of the Appellate Committee in *R v Derby Magistrates, ex p B*[246] expressed agreement with Lord Nicholls' speech and Lord Nicholls himself reserved his final view on what he called the 'no interest' point.[247] In fact, on analysis, the majority of the House of Lords can be said to have rejected the 'no interest' point in *Derby Magistrates*. Lord Taylor's reasoning is inconsistent with any concept of 'no interest':[248]

> Mr. Richards, as amicus curiae, acknowledged the importance of maintaining legal professional privilege as the general rule. But he submitted that the rule should not be absolute. There might be occasions, if only by way of rare exception, in which the rule should yield to some other consideration of even greater importance. He referred by analogy to the balancing exercise which is called for where documents are withheld on the ground of public interest immunity . . . But the drawback to that approach is that once any exception to the general rule is allowed, the client's confidence is necessarily lost. The solicitor, instead of being able to tell his client that anything which the client might say would never in any circumstances be revealed without his consent, would have to qualify his assurance. He would have to tell the client that his confidence might be broken if in some future case the court were to hold that he no longer had 'any recognisable interest' in asserting his privilege. One can see at once that the purpose of the privilege would thereby be undermined.

In very similar vein, Lord Lloyd stated:[249]

> Once the privilege is established, the lawyer's mouth is 'shut for ever:' see *Wilson v. Rastall* (1792) 4 Durn. & E. 753, 759, *per* Buller J. If the client had to be told that his communications were only confidential so long as he had 'a recognisable interest' in preserving the confidentiality, and that some court on some future occasion might decide that he no longer had any such recognisable interest, the basis of the confidence would be destroyed or at least undermined. There may be cases where the principle will work hardship on a third party seeking to assert his innocence. But in the overall interests of the administration of justice it is better that the principle should be preserved intact.

1.68 In *Nationwide Building Society v Various Solicitors*[250] Blackburne J therefore held that, notwithstanding Lord Nicholls' observations, an analysis of the speeches in *Derby Magistrates* showed that the privilege remains even where the client cannot show a recognizable interest in preserving the privilege.[251] Thus, the law remains very firmly that affirmed in *Calcraft v Guest*[252] and endorsed in the

[246] Lords Keith, Mustill, and Lloyd all agreed with Lord Taylor CJ's speech: [1996] 1 AC 487, 495, 509.
[247] [1996] 1 AC 487, 513.
[248] Ibid, 508.
[249] Ibid, 509–10.
[250] [1999] PNLR 52, 69.
[251] Curiously in *McE v Prison Service of Northern Ireland* [2009] 1 AC 908, para 82, Lord Carswell referred to Lord Nicholls' concept of 'spent' privilege as if it were an established exception to legal professional privilege. It is not.
[252] See para 1.63 above.

speech of Lord Taylor, with which Lords Keith, Mustill, and Lloyd agreed, in *Derby Magistrates*:

> The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests. [253]

1.69 There are, as yet, no signs that the incorporation of the Convention will impact on the absolute and permanent nature of legal professional privilege.[254] Subject, of course, to the various ways in which privilege can be lost, the basic position in English law therefore remains 'once privileged, always privileged'.[255]

J. EC Law

1.70 The ECJ has adopted the principle of legal professional privilege as part of its case law on the basis that it is treated as fundamental in the law of every Member State of the European Community.[256] Although communications with lawyers employed by parties to investigations into alleged breaches of the anti-trust provisions of Articles 101 and 102 of TFEU are not subject to legal professional privilege, there is otherwise no indication that a valid claim to privilege under English law would be inadmissible as a matter of EC jurisprudence.[257]

K. The Impact of the Convention

1.71 The adoption of the Convention into English law by virtue of the Human Rights Act 1998 has hitherto not had any appreciable effect on the detailed content of English law relating to legal professional privilege, largely because the courts have

[253] [1996] 1 AC 487, 507.

[254] See paras 1.71–1.76 below.

[255] The various ways in which privilege can be lost are discussed in Chapter 5 below.

[256] In Case 155/79 *AM&S Europe Ltd v Commission* [1983] 1 QB 878, 949–51, the ECJ held that communications between lawyer and client, both before and after proceedings are begun, could be withheld from the Commission in the course of investigations into alleged breaches of EC competition law. See also the analysis of the laws of Member States by Advocates General Warner and Slynn: 892–8 and 909–19. Advocate General Slynn referred to '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' (913). The opinions were in favour of a wider definition in line with English law. Some Member States limit privilege to circumstances where it is essentially a privilege in aid of litigation, which probably accounts for the more restrictive approach in the judgment of the ECJ.

[257] See para 1.46 ff above.

not generally perceived any tension between the privilege and the Convention.[258] In the *Derby Magistrates* case, Lord Taylor considered that legal professional privilege is a fundamental human right which is protected by the Convention.[259] In essence, the right to consult a lawyer in confidence is underpinned by Article 6 of the Convention (the right to a fair trial), where litigation is contemplated,[260] and by Article 8 (the right to respect for a private and family life) where it is not.[261]

1.72 The right to legal representation is recognized internationally as a fundamental human right.[262] There is no express reference to legal professional privilege in Article 6, but the ECHR has made clear that the confidentiality of communications between lawyer and client is necessary to guarantee the effectiveness of legal representation.[263] Article 6 is an absolute right; if Article 6 is engaged privilege cannot be invaded by statutory exception.[264] Where only Article 8 applies, it can be legitimately invaded by statutory exception, but only where the exceptional circumstances set out in Article 8(2) apply.[265] In some respects the Convention may therefore entail greater protection for privileged communications. For example, in *McE v Prison Service of Northern Ireland*[266] it was held that the Regulation of Investigatory Powers Act 2000 permitted covert surveillance of communications

[258] Toulson J sought to buttress his conclusion in *General Mediterranean Holdings SA v Patel* [2000] 1 WLR 272 by reference to Article 6. However, there is no sign that the result would have been different but for Article 6. In *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, para 7, Lord Hoffmann regarded legal professional privilege as a fundamental right as a matter of English common law quite apart from the Convention. The area in which the Convention has undoubtedly had the greatest impact is in relation to the privilege against self-incrimination, which is the subject of Chapter 8 of this book.

[259] *R v Derby Magistrates Court, ex p B* [1996] 1 AC 487, 507 (HL).

[260] And probably in such circumstances by Article 8 as well.

[261] *Campbell v United Kingdom* (1993) 15 EHRR 137, 160–1, paras 46, 48 (the opening and reading of correspondence between a prisoner and his lawyer breached Article 8; correspondence with lawyers 'whatever their purpose, concern matters of a private and confidential character. In principle, such letters are privileged under Article 8'); *Foxley v UK* (2000) 31 EHRR 637 (the reading and copying by a bankrupt's trustee in bankruptcy of the bankrupt's letters from his legal advisers breached Article 8).

[262] I Dennis, *The Law of Evidence* (4th edn, 2010), 408.

[263] *Brennan v UK* (2002) 34 EHRR 18, para 62; see also: *S v Switzerland* (1991) 14 EHRR 670, para 48; *Huvig v France* (1990) 12 EHRR 528; *Kruslin v France* (1990) 12 EHRR 547; *Kopp v Switzerland* (1991) 27 EHRR 91.

[264] In *Foxley v UK* (2000) 31 EHRR 637 the applicant also argued that the interception of correspondence between himself and his legal advisers concerning proceedings violated Article 6 of the Convention. The Court stated (para 50): '. . . where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the Convention. However, the applicant has not provided the Court with any information on the conduct and outcome of the receivership proceedings. In these circumstances, and having regard to its finding of a violation of Article 8 of the Convention, the Court considers it unnecessary to examine the Applicant's complaint under Article 6 of the Convention.' See R Pattenden, *The Law of Professional–Client Confidentiality* (2003), para 16.26.

[265] In *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, para 39, Lord Hoffmann stated that he very much doubted that the public interest in the collection of the revenue could provide the necessary justification.

[266] [2009] 1 AC 908.

between persons in custody and their legal advisers. However, the surveillance was held to be unlawful in that the Code of Practice issued by the Home Secretary failed to provide sufficient safeguards under Article 8(2) of the Convention.

1.73 In other respects the Convention may in due course come to clash with the common law.[267] The principal area where a collision with the Convention appears to be a possibility is the extent to which legal professional privilege should be regarded as an absolute right.[268] It has been suggested that the absolute nature of legal professional privilege emphasized in the *Derby Magistrates* case cannot in fact be reconciled with Article 6 of the Convention.[269] A blanket rule may be incompatible with the right to a fair trial, especially where the need for disclosure is as compelling as in the *Derby Magistrates* case.[270] In *Medcalf v Mardell*[271] Lord Hobhouse suggested, in his dissenting speech, that the absolute nature of legal professional privilege might need to be reconsidered in the light of Article 6, saying:

> . . . the nature and extent of legal professional privilege has not been in question on this appeal nor has it been the subject of any argument. Its absolute and paramount character has been accepted by the respondents, citing *R v Derby Magistrates' Court, Ex p B* [1996] AC 487 and *General Mediterranean Holdings SA v Patel* [2000] 1 WLR 272. . . . It may be that, as in the context of articles 6 and 8 of the European Convention on Human Rights, the privilege may not always be absolute and a balancing exercise may sometimes be necessary: *Campbell v United Kingdom* (1992) 15 EHRR 137 and *Foxley v United Kingdom* (2000) 31 EHRR 637.[272]

1.74 However, the decisions of the Privy Council and the House of Lords since *Medcalf* have provided strong reaffirmations of the principle laid down in *Derby Magistrates*.[273] In *B v Auckland District Law Society*,[274] decided over a year later, the Privy Council reversed the decision of the New Zealand Court of Appeal which had performed a balancing act between competing public and private interests in the context of a statutory investigation into a complaint against a law firm. Referring to *Derby Magistrates*, Lord Millett stated:

> The House of Lords overruled *R v Ataou* and upheld B's claim to privilege. It expressly rejected the argument that legal professional privilege is an interest which falls to be balanced against competing public interests. . . .

[267] The Court of Appeal was perhaps too optimistic to suggest that the driving principles of domestic law, EC law, and the Convention were virtually identical in *Bowman v Fels* [2005] 1 WLR 3083, para 82.
[268] See paras 1.28–1.31 above.
[269] *Phipson on Evidence* (17th edn, 2010), para 23–12.
[270] R Pattenden, *The Law of Professional–Client Confidentiality* (2003), para 16.25.
[271] [2003] 1 AC 120 (HL).
[272] Ibid, para 60.
[273] The speech of Lord Bingham in *Medcalf* itself, with which Lords Steyn, Hoffmann, and Rodger agreed, did not hold out any hope of a relaxation of the existing rules relating to legal professional privilege: [2003] 1 AC 120, para 24.
[274] [2003] 2 AC 736.

> Their Lordships do not overlook the fact that a different approach has been adopted in Canada, where the courts do conduct a balancing exercise by reference to the facts of the particular case. The common law is no longer monolithic, and it was open to the New Zealand Court of Appeal to make a deliberate policy decision to depart from the English approach on the ground that it is not appropriate to conditions in New Zealand. Had it done so, their Lordships would have respected its decision. But it did not. All the members of the Court of Appeal considered that they were applying established principles of English law. Their Lordships respectfully consider that the majority misunderstood them.
>
> . . . In saying that the balance was struck once for all in the 16th century, Lord Taylor CJ had in mind the case where the right to compel production of documents is a common law right. Where the right is statutory, as in the present case, the balance is struck by Parliament when enacting the statute in question. In such a case the task of the court is not to decide where the balance should be struck in the particular case, but where Parliament has struck it.[275]

1.75 The House of Lords has likewise reaffirmed *Derby Magistrates* in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*,[276] decided only a few weeks before *Medcalf*, and most recently in *McE v Prison Service of Northern Ireland*.[277] In *Three Rivers 6*, decided two years after *Medcalf*, Lord Scott stated:

> . . . if a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest. . . . There is no balancing exercise that has to be carried out (see *B v Auckland District Law Society* [2003] 2 AC 736 paras 46 to 54). The Supreme Court of Canada has held that legal professional privilege although of great importance is not absolute and can be set aside if a sufficiently compelling public interest for doing so, such as public safety, can be shown. . . . But no other common law jurisdiction has, so far as I am aware, developed the law of privilege in this way. Certainly in this country legal professional privilege, if it is attracted by a particular communication between lawyer and client or attaches to a particular document, cannot be set aside on the ground that some other higher public interest requires that to be done.[278]

1.76 Legal professional privilege therefore remains very firmly enshrined as a fundamental principle of the English common law and no dilution of that principle appears to be on the horizon.

[275] Ibid, paras 50–56.
[276] [2003] 1 AC 563, para 7.
[277] [2009] 1 AC 908, paras 6, 81.
[278] *Three Rivers 6*, para 25.