



TC02983

Appeal number: TC/2012/07640

LEGAL PROFESSIONAL PRIVILEGE – whether engagement letter and report to client subject to LPP – engagement letter largely not subject to privilege – report privileged

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

EDWARD C BEHAGUE

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S Respondents
REVENUE & CUSTOMS**

TRIBUNAL: JUDGE BARBARA MOSEDALE

The application was decided on the papers on 18 October 2013 with representations from Baxendale Walker LLP on behalf of the appellant and Mr P Massey, HMRC Officer of HMRC Specialist Investigations

DECISION

5 1. HMRC opened an enquiry on 20 November 2007 into Mr Behague's self assessment for the year ended 5 April 2005. On 23 April 2012 HMRC issued Mr Behague with a Notice to provide information and documents under paragraph 1 of Sch 36 of the Finance Act 2008. On 21 May 2012 Mr Behague lodged an appeal with this Tribunal against the notice.

10 2. The grounds of appeal were that (a) the documents were subject to legal professional privilege ("LPP") and (b) not reasonably required for the purpose of HMRC's enquiry. HMRC drew Mr Behague's attention to the Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009/1916 ("the LPP regulations").

15 3. Mr Bahague then made an application to the Tribunal on 22 June 2012 under paragraph 5(5) of the LPP regulations. In the event, this application claimed privilege over only two documents:

(a) Engagement letter dated 10 May 2005 between Baxendale Walker Solicitors and Mr Bahague;

20 (b) Report in relation to the trust arrangements prepared by Baxendale Walker Solicitors dated 1 July 2005.

25 4. The two documents were, as required by the LPP regulations, delivered to the Tribunal. (In breach of the LPP regulations the Tribunal then copied the documents to HMRC. HMRC destroyed the copies it was given. An application was made by the appellant that its appeal be allowed because of claimed irremediable prejudice caused by the Tribunal's mistake. This application was dismissed on 2 August 2013 on the grounds that (a) there was no prejudice and (b) no power to allow an appeal on such grounds.)

30 5. The Tribunal directed that the matter of LPP be determined on the papers after submissions by both parties. This Tribunal must therefore now decide whether the two documents, which I have in front of me, but which HMRC do not possess, are subject to LPP. Once I have made my decision, the appeal against the Information Notice will progress to hearing on 6 November as already notified to the parties.

The law

6. Paragraph 3 of the LPP regulations provides as follows:

35 "These regulations apply where there is a dispute between HMRC and a person to whom an information notice has been given either –

(a) during the course of correspondence, or

(b) [not relevant]

as to whether a document is privileged."

7. Paragraph 5 of the LPP regulations provides as follows:

(1) The following procedure applies where there is a dispute falling within regulation 3(a)

5 (2) On receipt of the information notice, the taxpayer, third party, or person acting on their behalf shall –

(a) by the date given in the notice for providing information or producing documents, specify in a list each document, required under the information notice, which is in dispute, with a description of the nature and contents of that document;

10 (b) to serve that list on HMRC.

(3) But no description of a document or type of document is required where such description would itself give rise to a dispute over privilege.

15 (4) Within 20 working days of receiving the list referred to in subparagraph (2), HMRC must notify the person who served the list of any documents on the list that it requires to be produced and which it considers are not privileged.

20 (5) On receipt of notification under paragraph (4), the taxpayer, third party or person acting on their behalf must make an application to the First-tier Tribunal to consider and resolve the dispute and must include copies of the documents which remain in dispute with that application.

(6) The taxpayer, third party or person acting on their behalf shall provide HMRC with proof of service under paragraph 2(b).

25 (7) Service for the purposes of paragraph 2(b) must take place within a reasonable time to be agreed between the taxpayer, third party or person acting on their behalf and HMRC but in any event no later than 20 working days after the date given in the notice for providing information or producing documents.

30 (8) An application under paragraph (5) must be made within a reasonable time to be agreed between the taxpayer, third party or person acting on their behalf and HMRC but in any event no later than twenty working days of the date of the notification required under paragraph (4).

8. Regulation 8 provides:

35 “When an application is made under regulation 5(5) or 6(5), the First tier Tribunal shall –

(a) resolve the dispute by confirming whether and to what extent the document is or is not privileged;

40 (b) direct which part or parts of a document (if any) shall be disclosed.”

The matter of timing

9. The LPP Regulations lay down strict time limits. No doubt the reason for this is to ensure a claim for LPP does not slow down any more than absolutely necessary compliance with a well-founded Information Notice.

5 10. Combining the rather odd provisions of Regulation 5(2)(a) and (b), 5(6) and (7) it appears that the taxpayer is required to submit to HMRC his list of documents on which he claims LPP no later than twenty working days after the date that the information is required to be produced by the Information Notice.

11. HMRC then have only 20 working days from date of receipt to accept or reject that claim: Regulation 5(4).
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12. The taxpayer then has only 20 working days to notify the dispute to the Tribunal: regulation 5(5) combined with 5(8).

13. In this case the due date for submission of the information under the Information Notice was 28 May 2012. The appellant provided to HMRC its list of documents on which it claimed privilege on 20 June 2012, which I find was within 20 working days of 28 May. This was therefore done in time. Its submission to the Tribunal, on 22 June, was early rather than late.
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14. I note in passing that the LPP Regulations give this Tribunal no power to extend time for service of the list of documents to HMRC. While Rule 5(3)(a) of this Tribunal's rules may give this Tribunal power to extend time limits in other regulations, that can only be in relation to the conduct of proceedings before the Tribunal. So while it might give the Tribunal power to extend time for compliance with Regulation 5(5) and 5(8) which deal with the time for notification of the dispute to the Tribunal, although I express no view on this, it does not give power to extend time in relation to something which happened before notification. The Regulations give HMRC no power to extend time either.
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The dispute on LPP

15. I have the benefit of written submissions from both parties.

16. The appellant's submissions were dated 11 September 2013. The submission was that "it is trite law that a client care letter is part of the continuum of legal advice and is equally protected by LPP". An earlier letter had referred to *R v Special Commissioner ex parte Morgan Grenfell & Co Ltd* [2001] EWCA Civ 329. I can't see the relevance of this decision which was that, although the precursor provisions to schedule 36 did not expressly provide an exemption from disclosure for material subject to LPP, such an exemption should be in effect be read in. *Morgan Grenfell* has no relevance here as Sch 36 expressly includes an exemption for LPP material:
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Finance Act 2008 Schedule 36

Paragraph 23

(1) An information notice does not require a person -

- (a) to provide privileged information, or
- (b) to produce any part of a document that is privileged.

5 17. HMRC's submissions were dated 26 September 2013 and included five enclosures:

- (a) The House of Lords decision in *Three Rivers*;
- (b) The Court of Appeal's decision in *Balabel and another v Air India*
- (c) The High Court decision in *Dickinson v Rushmer*
- 10 (d) the decision of the High Court in *Baxendale-Walker v Middleton and others* [2011] EWHC 998 (QB);
- (e) the findings of the Solicitors Disciplinary Tribunal dated January 2007 in the matter of P M Baxendale-Walker and another.

18. The appellant did not submit a reply to HMRC's submissions although the directions permitted it to do so.

15 *The case law on LPP other than litigation privilege*

19. HMRC accept that all communications made between a client and his legal adviser for the purpose of giving or obtaining legal advice are subject to LPP. Mr Massey cited *Balabel and others v Air India* [1988] 1 Ch 317 at 330G where Taylor LJ said:

20 "…Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly to be done in the relevant legal context."

25 20. These comments were approved and expanded on by the House of Lords in *Three Rivers DC and others v Governor and Company of the Bank of England (no 6)* [2005] 1 AC 610:

30 [38] ...That there must be a 'relevant legal context' in order for the advice to attract legal professional privilege should not be in doubt....[approves *Balabel*]...If a solicitor becomes the client's 'man of business' and some solicitors do, responsible for advising the client on all matters of business, including investment policy, finance policy and other business matters, the advice may lack a relevant legal context....In cases of doubt the judge called upon to make the decision should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law. If it does not, then, in my opinion, legal advice privilege would not apply. If it does so relate then, in my opinion, the judge should ask himself whether the communication falls within the policy underlying the justification for legal advice privilege in our law. Is the occasion on which the communication takes place and is the purpose

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for which it takes place such as to make it reasonable to expect the privilege to apply? The criterion must, in my opinion, be an objective one.”

21. It seems to me the same concept was expressed more shortly by Lord Rodger in
5 the same case as follows:

“[58] In relation to the legal advice privilege what matters ...[is] whether the lawyers are being asked qua lawyers to provide legal advice.”

22. HMRC submit that engagement letters between a solicitor and his client are not
10 privileged at least if they merely set out the terms on which the solicitor will act. This is consistent with authority. Rimer J in *Dickenson (t/a Dickinson Equipment Finance) v Rushmer (t/a F J Associates)* [2002] 1 Costs LR 128 said:

15 “not all such documents [ie client engagement letters] will necessarily and automatically be privileged. It is possible that, in any particular case, the client care letter will reflect or contain advice or other material which would serve to clothe it with privilege. It is not, however, suggested that the letter produced to the judge was privileged on that basis. In principle, I cannot see why a letter merely setting out the terms of which the solicitor is to act for the client should be
20 privileged.”

23. It is also consistent with logic. A client engagement letter normally sets out the terms on which a solicitor will act. It is a contract between the client and solicitor. The solicitor cannot (and does not) give legal advice about the contract between himself and his client. In so far as the client engagement letter, therefore, sets out the
25 terms of the contract, it cannot attract LPP as the lawyer is not giving advice qua lawyer. He is not giving legal advice at all.

24. I therefore reject the appellant’s submission that engagement letters are by their nature subject to LPP.

25. However, all this depends on what the actual engagement letter says. If it goes
30 beyond setting out the terms on which the solicitor will act it may attract LPP at least in part.

26. In particular, it is likely that an engagement letter will specify the particular matter or matters on which the solicitor is contracted to provide legal advice. Does this make the whole or part of the letter subject to LPP? It seems to me that it must.
35 The justification for LPP is that:

40 “a client should be able to obtain legal advice in confidence...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...once any exception to the general rule is allowed, the client’s confidence is necessarily lost.” *R v Derby Magistrates Court Ex p B* [1996] AC 487 per Lord Taylor.

LPP must extend not only to the content of the legal advice but the fact that a person sought legal advice on any particular matter. Therefore, to the extent that an engagement letter sets out what the advice will cover it must be subject to LPP.

Decision on the client engagement letter

5 27. In this case I therefore find that the client engagement letter dated 10 May 2005 is not in general subject to LPP. Nevertheless those parts of the letter which set out the legal advice for which Baxendale-Walker was retained are subject to LPP. The parts of the letter which are subject to LPP are:

- (a) The first heading;
- 10 (b) The first sentence under the first heading;
- (c) The first paragraph (including its numbered sub-paragraphs 1-6) under the heading “Work to be performed”;

15 28. I find that nothing else in the letter is subject to LPP. Whether it is relevant to the tax investigation is a different matter and I am not called on to decide that in this determination, and make no comment on it.

Report on trust arrangements

29. HMRC suggest that it might be the case that in a report Baxendale Walker were not giving advice qua lawyer but as financial or wealth management advisers.

20 30. I am satisfied that the report (excluding its schedules) largely comprises legal advice. It is subject to LPP and does not fall to be disclosed.

25 31. The document provided to the Tribunal included schedules. No mention of these schedules was made in the index of the documents in respect of which privilege was claimed and I am assuming that that is because the appellant regards them as part and parcel of the report. I therefore go on to consider whether the claim to LPP in respect of any of them is made out.

Schedule 4

32. This appears to be a copy of a memorandum produced by Baxendale Walker for the benefit of their clients in around 2002.

30 33. The last three pages of the document comprises legislation or draft legislation which could not ordinarily be the subject of LPP. Other than this, I find the document contains a statement of Baxendale-Walker’s opinion of an aspect of the law and/or proposed law. It proposed changes to some legal structures put in place by some clients. I find on what limited information that I have that it was, as it purports to be, issued to all or a selected number of Baxendale-Walker’s clients at that time, which
35 did not include the appellant.

34. I consider that as a schedule to a report giving legal advice to the appellant in 2005 it must necessarily be seen as a part of that advice given to him by his solicitors. Baxendale-Walker in 2005, by including this Schedule, were giving to the appellant individually the generic advice which they had given to the general body of their clients in 2002. It is therefore subject to LPP. Even the last three pages are subject to LPP simply because knowing the particular provisions of the legislation would enable a person to identify the subject matter on which the advice was given. The whole of Schedule 4, as Schedule 4 to this report, is therefore subject to LPP.

Schedule 1

35. This is a note of a meeting between representatives of Baxendale-Walker, a barrister and representatives of an external body. Perusal of the notes of the meeting satisfies me that the meeting was not about the affairs of any particular client of any person present and it was certainly not about the affairs of the appellant (who I find from the date of the engagement letter being 2005 was not even a client at the time). The note does not record the giving of legal advice; it merely records a discussion of the legal position. By itself, it is not subject to LPP.

36. However, my concern is that if LPP was not extended to it as an annex to the report in this case, its disclosure would identify the subject matter (and to some extent the content) of the legal advice given by Baxendale-Walker to the appellant in the report. For that reason I consider that although the note itself is not subject to LPP, as it was part of the report to the appellant which is subject to LPP, it is similarly covered by LPP in this context.

37. I make no comment on whether it would be disclosable in any event on the grounds of relevance.

Schedules 2-3

38. These are copies of information published by other bodies (one being HMRC). Neither by themselves are subject to LPP. Nevertheless, as with Schedule 1, the concern is that to order their disclosure, as they are schedules to the privileged report, would identify the subject matter on which Baxendale-Walker gave legal advice to their client. For this reason the LPP to which the report is subject extends to its schedules and in this context they are not disclosable.

Summary of decision:

- (1) The client engagement letter is not subject to LPP save to the extent identified in §27;
- (2) The report dated 1 July 2005 including its schedules is subject to LPP.

Footnote 1

39. The last two decisions referred to by Mr Massey (see §17) relate to the firm of Baxendale-Walker Solicitors. LPP can only be claimed by solicitors or barristers

lawfully acting as such. However, while Mr P Baxendale-Walker and his partner were struck off the roll of solicitors in 2007, this was after the date of the engagement letter and report which are the subject of this hearing. I am satisfied that at the date of the two documents at issue in this determination, Baxendale-Walker was a firm of
5 solicitors regulated by the Law Society and LPP could be claimed over legal advice given by the firm

Footnote 2

40. Baxendale-Walker's letter of 11 September 2013 appears to indicate that the appellant is claiming LPP over more than just the two documents submitted to the
10 Tribunal under the LPP regulations.

41. I find that the LPP regulations are clear. In this determination under the LPP Regulations, I only have jurisdiction to determine whether the claim to LPP is valid in respect of documents actually submitted to the Tribunal (see LPP regulations paragraph 5(5)). I have therefore considered and only made a determination in
15 respect of the two documents the subject of the application under the LPP Regulations.

42. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later
20 than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

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**BARBARA MOSEDALE
TRIBUNAL JUDGE**

RELEASE DATE: 21 October 2013

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