to protect and enforce the purchaser's equitable interest in the land wrongfully transferred to the company. Fourthly, beyond rejecting the imposition of contractual liability on non-contracting parties as a possible legal response to "piercing" the corporate veil, Lord Neuberger gave no guidance as to what legal responses are possible, whether other limitations exist or what choice of law rule might govern such issues. *Petrodel Resources Ltd v Prest* (UKSC 2013/0004) may yet clarify these issues.

CHRISTOPHER HARE

CONSULTATION WITH NON-LAWYERS IS NOT PRIVILEGED AT COMMON LAW

IN *R. (on the application of Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1; [2013] 2 W.L.R. 325 the Supreme Court, by a five to two majority, confirmed (upholding [2010] EWCA Civ 1094; [2011] Q.B. 669; noted K. Hughes [2011] C.L.J. 19) that legal advice privilege is confined at common law to advice given by lawyers (whether a solicitor, barrister, in-house lawyer, or a foreign lawyer) as distinct from legal advice given by other professionals, such as tax accountants. This common law restriction applies even though it might be a "characteristic" feature of the relevant non-lawyer's professional field of competence to give legal advice (as in the case of modern tax accountants). It follows that only Parliament can extend legal advice privilege to professional legal advice given other than by lawyers. In fact Parliament has accorded privilege to confidential communications between clients and patent attorneys, trade mark agents, and licensed conveyancers, as noted by Lord Neuberger at [31] and [35]).

Prudential had sought judicial review of notices served by the Revenue on Prudential plc in November 2007 under the Taxes Management Act 1970, s. 20. The notices required production of documents by which Prudential had sought or received legal advice on tax matters from the accountants, PriceWaterhouseCoopers. Therefore, the taxpayer (Prudential) could not raise privilege in this case to resist disclosure of documents containing, or evidencing, confidential tax advice given by PriceWaterhouseCoopers, a firm of accountants. The result was that the Revenue could successfully invoke their statutory powers to require such disclosure.

The majority decision was supported by Lords Neuberger, Walker, Hope, Mance, and Reed. Lord Neuberger, giving the main reasoned majority judgment, acknowledged that the giving of tax advice by accountants involves performance of the same function as a lawyer

offering legal advice. For this reason, he suggested that there was no "principled" reason for maintaining the current common law restriction, which confined legal advice privilege to confidential communications between clients and lawyers. However, Lord Neuberger (at [52]) suggested that it would be unacceptable, for the following three reasons, if the Supreme Court were itself to extend the privilege.

First, this would introduce uncertainty into the ambit of the privilege, because it would be necessary to decide on a range of claims from a variety of non-legal advisors, whose professional systems would need to be scrutinised. Lord Neuberger added (at [57]) that recognition of privilege beyond advice given by lawyers would require a distinction to be maintained between non-legal and purely legal advice. This distinction between non-legal and purely legal advice is necessary even in the case of lawyers, whose non-legal activities are traditionally referred to as services by "a mere man of business", a point noted by Lord Mance at [91] (for example, when a lawyer is asked to collect rents, "without any legal input", so that he acts as a client's non-legal agent for this purpose). However, it would become challenging, and produce much uncertainty, if it became necessary to apply the distinction between non-legal and purely legal advice to the activities of non-lawyers, as proposed by the dissenting judges, Lords Sumption and Clarke. Lord Hope also attractively emphasised (at [80]) the need to maintain certainty in this context. Borderline issues would proliferate.

Secondly, Lord Neuberger declared (at [63]) that the proposal that non-lawyers should be capable of giving advice protected by legal advice privilege would require legislative consideration. This would not only be controversial, but such a change might require fine-tuning (at [65], Lord Neuberger noted detailed statutory provisions concerning privilege and tax advisors in New Zealand and Australia). Judicial decision-making is an inappropriate instrument to use when making such finely adjusted legal changes.

Thirdly, Lord Neuberger noted (at [61]) that there are strong indications that the UK Parliament in modern times has chosen not to extend the privilege to non-lawyers even though their advice might concern legal matters. Indeed Parliament has stepped back from such a change notably in the present context of non-lawyer tax advisors (at [36]).

Lords Sumption and Clarke gave separate dissenting opinions. Both considered that the law should acknowledge the reality that tax specialists have acquired recognised legal expertise in this field, for which clients pay large fees, and that this confidential advice cannot be functionally distinguished from that provided by legally qualified professionals. Lord Sumption, responding to the majority's anxiety concerning uncertainty, proposed (at [137]) a formulation of privilege

which would require that the provision of pure legal advice should form the essence of the relevant professional service.

Both dissentients took the surprisingly "activist" view that difficulties raised by judicial expansion of a legal category or doctrine could be met by legislation and that it was not for the court to be anxious that its legal adventure might precipitate such problems. In this sanguine spirit, Lord Sumption thought (at [136]) that there could be legislation to introduce qualifications, if this were felt necessary. Lord Clarke, in particular, expressed (at [146]) a conception of the common law which is difficult to reconcile with the customary opinion that judicial changes should not occur in respect of technical topics where the legislature has already refrained from further intervention because it has been perceived to be difficult to extend the current law. In short, neither dissentient regarded the modern pattern of legislation and failed legislative proposals as a constitutional veto on development of the common law in this field.

However, the majority decision is sound. It reflects the consensus, shared by the courts, legislature, and commentators, that legal advice privilege, in the absence of specific legislation, is confined at common law to confidential legal advice given by lawyers to clients (and communications between clients and lawyers for this purpose). The clients of non-lawyers can be expected to understand this limitation. The fact that non-lawyers have developed skill and special expertise in fields of law does not change the widespread understanding that lawyers alone provide privileged advice at common law. There is a difference between confidentiality and privilege: "privilege is confidentiality admitted to a higher level of legal protection; but not all confidential relations are raised to that level" (*Andrews on Civil Processes* (2013), vol. 1, at para. 12.02).

The majority decision also reflects the fact that there has been some legislative qualification of the common law position, so as to extend privilege to the advisory activities of patent attorneys, trade mark agents, and licensed conveyancers (for details, see [31] and [35]). It would be an illegitimate usurpation by the courts to extend the common law scope of legal advice privilege in a manner which would (a) render otiose these piecemeal legislative extensions and (b) ignore and indeed override the legislature's decision not to add to these extensions, despite specific proposals.

The leading decisions (notably, *Three Rivers D.C. v Governor and Company of the Bank of England (No. 6)* [2004] UKHL 48; [2005] 1 A.C. 610; *R. v Derby Magistrates' Court, Ex p. B* [1996] A.C. 487, H.L.; *R. (on the application of Morgan Grenfell & Co. Ltd.) v Special Commissioners of Income Tax* [2002] UKHL 21; [2003] 1 A.C. 563) make clear that legal advice privilege is a powerful defence to

applications for disclosure of information, whether in criminal or civil proceedings. It can be used, as in the present case, as a shield against a statutory demand for information made by a public body. The privilege is perpetual, unless the privilege-holder waives its protection. And it cannot be judicially suppressed in the name of other public interests. Given the potency of this privilege, an argument based solely on "functional similarity" is not a sufficient reason for extending the privilege by judicial decision.

The dissentients in the *Prudential* case (Lords Sumption and Clarke) would prefer the common law to extend beyond confidential consultation with lawyers to advice on points of law given by certain categories of non-lawyers. But this fundamental expansion of legal advice privilege's scope would generate a host of borderline uncertainties. Is it a responsible act of judicial decision-making to expect the legislature to intervene to sort out problems caused by an imperialistic common law advance? The dissenting judges' proposal that the common law should introduce this radical change is flawed and unattractive, for this would generate decades of uncertainty.

NEIL ANDREWS