bank account governed by English law is incorrect. Recognition of the foreign judgment at common law would depend solely on the jurisdiction taken by the foreign court, generally on the basis that the bank had a place of business in the territory of that court. A judgment from another EU court is generally recognised without question (EC Regulation 2001/44). The fact that the account was held at a branch in England would be irrelevant in both cases, as would the law applied by that court.

Finally, focusing on the situs of the account leads into the difficult territory of locating obligations. The rules on bank accounts are relatively clear: the account is situated at the place of the branch at which it is held. Not so for other obligations. The most recent authority is *Kwok* v. *Commissioner of Estate Duty* [1988] 1 W.L.R. 1035 (albeit a Privy Council case) which was not referred to by the court but held that debts are situated at the debtor's residence. Where the debtor is a company, its residence is where it does business—which can be many places. A company's debt is situated at the residence of the debtor where it is payable as that is where it is presumably enforceable. This rule can lead to uncertain results. The case of a debt expressly payable in a State where the debtor is not resident has never been tested. One can foresee a good many more cases in which the situation and the applicable law of the account are tested.

PIPPA ROGERSON

DISCIPLINARY INVESTIGATIONS AND LEGAL PROFESSIONAL PRIVILEGE

DISCIPLINARY investigations into professional misconduct allegations almost inevitably involve examination of documents held by the person under investigation. Where such documents attract legal professional privilege, belonging either to the professional's client or to the professional himself, the question arises whether the investigator can demand their production. That question becomes particularly acute where the investigation concerns the professional conduct of a barrister or solicitor, as in the recent New Zealand case, *B* v. *Auckland District Law Society* [2003] UKPC 38.

Complaints were made to the Auckland District Law Society ("ADLS") against a leading firm of barristers and solicitors regarding its role in the formation and conduct of several bloodstock investment partnerships in the 1980s. Complaints were also made regarding the firm's defence of litigation arising out of the collapse of those investment partnerships. The firm therefore

possessed material in which its former clients held privilege, arising from the investment transactions, as well as material in which the firm itself had privilege, containing advice regarding the litigation. Investigating the complaints, the ADLS requisitioned that material under the Law Practitioners Act 1982 (NZ), s. 101(3), raising the question whether the requisition overrode the clients' and the firm's privileges. By a majority decision, the New Zealand Court of Appeal held that it did, although without deciding whether privilege could answer such a requisition where the privileged material was itself advice given regarding the professional propriety of the solicitor's conduct once a complaint had been made or was imminent: *Auckland District Law Society* v. *B* [2002] 1 N.Z.L.R. 721. The Privy Council disagreed with the Court of Appeal, holding that legal professional privilege is a good answer to a requisition made under section 101(3).

The Privy Council would have respected the Court of Appeal's decision had it made a deliberate policy decision to depart from English law. However, the majority in the Court of Appeal had based its decision on a misunderstanding of a long line of English and Commonwealth authority which emphasises the importance of privilege as a fundamental condition upon which the administration of justice rests (*e.g.*, *Commissioner of Inland Revenue* v. *West-Walker* [1954] N.Z.L.R. 191 (C.A.), *R.* v. *Derby Magistrates' Court, ex p. B* [1996] 1 A.C. 487). The need to be confident that communications with one's legal adviser will remain confidential has led the courts to refuse to consider in individual cases whether some higher public interest outweighs privilege such that it ought to be overridden in that case. In this sense, privilege is said to be absolute. It remains clear, however, that Parliament is free to conduct such a balancing exercise and to abrogate privilege by statute. This leaves courts with the task, not of deciding where the balance ought to be struck, but rather of determining where Parliament has struck it. Ultimately, the Privy Council's decision therefore rests on interpretation of the New Zealand statute under which the ADLS requisitioned the privileged documents. However, it remains instructive elsewhere for the approach taken to that interpretation exercise, and for its affirmation of the status of legal professional privilege.

Consistently with authority in England (*e.g.*, *R. (Morgan Grenfell & Co. Ltd.)* v. *Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 A.C. 563) and abroad (*e.g.*, *West-Walker* [1954] N.Z.L.R. 191 (C.A.); *Daniels Corporation International Pty. Ltd.* v. *Australian Competition and Consumer Commission* [2002] HCA 46, (2002) 77 A.L.J.R. 40), the Privy Council recognised that the

fundamental importance of privilege justifies the conclusion that Parliament did not intend its abrogation unless that was done expressly or by necessary implication. There was no express statutory abrogation of privilege, but the Court of Appeal majority held abrogation was necessarily implied because the effectiveness of the ADLS's investigation of complaints would be seriously impeded without it. Disagreeing, the Privy Council emphasised that abrogation is not necessarily implied simply because abrogation would assist in achieving the statutory purpose or because that purpose would be impeded without the implication. Asserting privilege *always* impedes an investigation. Abrogation of privilege is only *necessarily* implied where an inconsistency would arise or the statutory purpose would be stultified if privilege could be asserted against the investigator: paras. [58]–[59]. The Privy Council concluded that the ability to assert privilege in response to a requisition for documents under the Law Practitioners Act 1982 (NZ), s. 101(3) does not stultify the statutory purpose.

Similarly, in the English context, it seems unlikely that the Solicitors Act 1974, s. 44B abrogates privilege by necessary implication. Section 44B empowers the Law Society to require production of "all relevant documents in the possession of the solicitor or his firm" for the purpose of investigating whether a solicitor has committed professional misconduct. The bulk of complaints regarding solicitors will be made by the solicitor's own client, who will normally willingly waive privilege to allow the Society to investigate. Where the complaint comes from a third party, the client may choose not to waive privilege. However, such a set of circumstances will be relatively rare and, as the Privy Council indicated, the fact that the Society's investigation is made more difficult by the assertion of privilege does not mean that its disciplinary function under the statute is stultified. Hence there is no necessarily implied abrogation of privilege. In *Parry-Jones* v. *Law Society* [1969] 1 Ch. 1, 8 (C.A.), Lord Denning M.R. held that the Solicitors' Account Rules 1945 overrode client privilege or confidentiality. Rule 45 of the Solicitors' Account Rules 1998 reverses this insofar as privilege is concerned, and accounts will only rarely contain privileged material anyway, but the Privy Council's approach in *B* v. *ADLS* also suggests that *Parry-Jones* would not support the view that the Society may override privilege more generally. Information which is merely confidential, and not privileged, could however be required: *Medcalf* v. *Mardell* [2002] UKHL 27, [2003] 1 A.C. 120, at [60]. This also suggests that the Law Society's advice that a solicitor may reveal confidential information concerning a client where the solicitor's conduct is

under investigation (The Law Society, *Guide On Line*, ch. 16.02, note 12) should be treated with caution. Such revelation may be possible if the information is merely confidential, but if it is privileged the solicitor has a positive obligation to protect the client's privilege until the client waives it.

B v. *ADLS* also holds that there may be a limited disclosure of privileged material without necessarily losing privilege. The firm had disclosed some privileged material, expressly preserving privilege in it, to counsel for the ADLS at a time when the ADLS had not revealed that it was investigating complaints against the firm. Expressing dismay that the ADLS should now be seeking to disregard the terms of that arrangement, the Privy Council accepted that privilege is not necessarily lost by limited disclosure: paras. [68]–[71] and [74]. The firm could therefore request the return of the documents and continue to assert privilege to resist their requisition. The ADLS's failure to comply with that request hardly seems consonant with its function of promoting and encouraging proper conduct among members of the legal profession: Law Practitioners Act 1982 (NZ), ss. 4(1)(*b*) and 26(1). It is to be hoped that the Privy Council's clear advice will help to obviate the need for drawn-out litigation in similar cases in the future.

MATTHEW D. J. CONAGLEN

ANTI-SOCIAL BEHAVIOUR ORDERS—CRIMINAL PENALTIES OR CIVIL INJUNCTIONS?

IN *R. (McCann and others)* v. *Crown Court at Manchester and another, Clingham* v. *Kensington and Chelsea Royal London Borough Council* [2002] UKHL 39, [2002] 3 W.L.R. 1313 the House of Lords, dismissing the defendants' appeals, unanimously held that the application for an Anti-Social Behaviour Order (ASBO) under section 1 of the Crime and Disorder Act 1998 was civil and not criminal in nature. Therefore the rule against the admissibility of hearsay evidence in criminal proceedings (which can arguably also be inferred from the provision on examination of witnesses in Article 6(3)(*d*) of the European Convention on Human Rights) did not apply; however, the heightened civil standard of proof, indistinguishable from the criminal standard of proof, would nevertheless be required.

The House of Lords took various factors into account in deciding that section 1 is civil and not criminal in nature: the Crown Prosecution Service is not involved in the decision; ASBOs