



Privilege and professional advisers

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Party wall surveyors and rights of light surveyors frequently take the view that they are free to communicate with their appointing owners and, in particular, to provide advice on legal matters, without any fear that the advice that they give may ultimately have to be disclosed in later litigation. It is common for party wall surveyors to suppose that their communications with appointing owners and with clients are privileged from disclosure in some way, either because they have used the words “without prejudice” on those communications or because the communications attract legal privilege. In many cases, the surveyors would be wrong to make that assumption and will find that their communications with their appointing owners and clients have to be disclosed.

The without prejudice rule only applies where there is an existing dispute and where the communications in question are designed predominantly for the purposes of negotiating a settlement of that dispute. If those are the facts, then the communications will be privileged from disclosure whether or not the words “without prejudice” are actually written on the document. The use of those words does not, by itself, have the effect of conferring privilege. They are merely a useful label to identify documents which, in the opinion of the author, are indeed protected in this way. It is common for the label to be applied to unprotected letters and, when that occurs, the error should be pointed out immediately by the recipient who should also indicate that he or she would consider it permissible to refer to those letters in subsequent court proceedings, despite the use of the “without prejudice” label. It would rarely be appropriate for a party wall surveyor to use the label on communications to his own appointing owner or client unless of course he is in dispute with them.

Legal privilege consists of two elements, only one of which is available to party wall surveyors and rights of light surveyors, namely, litigation privilege. This applies to any documents which are brought about for the principal purpose of dealing with existing or contemplated litigation and applies whether the author is a legal adviser or not. Where a surveyor writes to his appointing owner or client or anybody else in connection with such actual or contemplated litigation, therefore, the communication will be privileged from disclosure.

The other element of legal privilege is known as legal advice privilege. This form of privilege protects the disclosure of documents and communications between a client and his *lawyer* where the main purpose of the communication is to provide legal advice. Commonly, surveyors assume that, where they give legal advice, the communications will be privileged from disclosure on this basis. Sadly, they are wrong about that, as confirmed in the recent case of *R (on the application of Prudential plc and another) v. Special Commissioner of Income Tax* where the Court of Appeal considered whether accountants can take advantage of legal advice privilege.

The case concerned HMRC's investigation into a tax scheme entered into by Prudential. HMRC served notices which required Prudential to disclose the tax advice they had received from their accountants, PWC. Litigation was not contemplated at the time that the advice was given.

Prudential accepted that the conventional view is that legal advice privilege only protects communications between a client and his lawyer but argued that the scope of the protection should be enlarged to include accountants in circumstances where the accountants are providing specialist legal advice on areas of distinct expertise such as the law relating to taxation. They argued that the availability of the privilege should be assessed by reference to the nature of the advice given, rather than the legal qualification of the adviser.

The Court of Appeal saw the force in Prudential's argument but held that they continued to be bound by earlier the authority of *Wilden Pump Engineering Co. v. Fufeld 1985* where it was held that the legal advice privilege cannot extend to advisers who are not lawyers. On that basis, Prudential's appeal was dismissed. The Supreme Court recognise, however, that this is a matter of significant importance and have given permission to appeal against the decision. The appeal is listed to be heard on 6th November 2012.

This case concerned accountants but it also impacts on other professionals such as party wall surveyors and rights of light surveyors whose job will often require them to provide advice of a legal nature. A party wall surveyor may wish to give advice to his or her appointing owner in respect of matters such as compensation, access and security and whether an appeal against an award is likely to be successful. Rights of light surveyors may frequently wish to give advice as to whether a particular reduction in light would be likely to be considered by the court to be actionable and, if so, whether or not an injunction is likely. If that advice is given at a time when litigation is not genuinely in prospect, it will not be privileged from disclosure and may be required to be produced to the court in any subsequent litigation if it is relevant to the matters in issue.

Surveyors can therefore find themselves in a difficult position when called upon to give advice to their appointing owners or clients. They will need to bear in mind that, unless that advice is given in the context of actual or contemplated litigation, it will not be protected from disclosure and may be referred to in subsequent legal proceedings.

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