Disciplinary Investigations and Legal Professional Privilege

20 June 2003

The recent Privy Council decision in B and Others v Auckland District Law Society and Another [2003] UKPC 38 reaffirms the importance of the right to legal professional privilege as part of the public interest in the administration of justice, and sets out guidance on the limited circumstances in which the right can be overridden.

The principle of legal professional privilege prevents the disclosure of confidential communications between a client and his lawyer which were created for the dominant purpose of obtaining legal advice. The issue before the Privy Council was whether this fundamental right could be overridden in circumstances where another public interest i.e. the maintenance of the integrity of the legal profession, which may be said to require the production of all relevant information to those charged with the investigation and determination of complaints against legal practitioners, would support the disclosure of such documents.

Background

The appeal to the Privy Council from the Court of Appeal in New Zealand was brought by a law firm based in Auckland, New Zealand, and a number of its present and former partners. The partners were the subject of complaints to the respondent, the Auckland District Law Society (the Society), a statutory body with jurisdiction to investigate complaints of professional misconduct and bring disciplinary proceedings against its members.

The main issue was whether the Society was entitled under section 101(3)(d) of the Law Practitioners Act 1982 to require the firm to produce privileged documents for the purpose of an inquiry into allegations of professional misconduct. Section 101(3)(d) of the Act provides for the relevant District Law Society to require the production of any books, documents, papers, accounts or records in the possession or under the control of the person complained against or his employer which relate to the subject-matter of the inquiry. However, the Act was silent as to whether or not the power to require the production of documents extended to privileged material.

By a majority, the New Zealand Court of Appeal had held that the Act overrode any claim to legal professional privilege which may subsist in the documents. The Court accepted the high importance of the privilege, but considered that it was overridden by the even higher

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Andrew Lidbetter
+44 (0)20 7466 2066
email

public interest in maintaining the integrity of the legal profession. However, the Privy Council took a different view.

Legal professional privilege: the public interest test

Lord Millett, giving judgment on behalf of the Privy Council, noted the authoritative exposition of the rationale of legal professional privilege in the speech of Lord Taylor CJ in R v Derby Magistrates' Court ex parte B [1996] 1 AC 487.

He stated that the present case involved a contest between two competing public interests of high importance, namely:

1. *The public interest in the maintenance of the integrity of the legal profession, which requires that all relevant information be made available to those responsible for investigating and determining complaints against legal practitioners; and*
2. *The public interest in the administration of justice, which requires that 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.*

Lord Millett stated that where the right to compel production of documents was statutory, as in this case, the balance between these factors was struck by Parliament when enacting the statute in question. In such a case the task of the Court was not to decide where the balance should be struck in the particular case, but where Parliament had struck it.

The question, therefore, was whether the Act excluded legal professional privilege from its scope either expressly or by necessary implication. The Court considered the wording of section 101(3)(d) of the Act and concluded that it did not expressly exclude legal professional privilege, nor did it do so by necessary implication. In reaching this conclusion, the Court had regard to New Zealand caselaw to the effect that, if the statutory section was capable of being interpreted on the supposition that the privilege was not abrogated by it, then it should be so interpreted.

Accordingly, the Privy Council concluded that legal professional privilege was a good answer to a requisition under the Act, whether at the investigative stage or in proceedings before a disciplinary tribunal.

Comment

The Privy Council's judgment in this case highlights the importance of

the principle of legal professional privilege. The Privy Council's judgment adopted a similar approach to that taken by the House of Lords in R (Morgan Grenfell & Co Limited) v Special Commissioner of Income Tax [2002] 2 WLR 1299 (see email bulletin dated 24 May 2002). In that case it was held that the Inland Revenue could not compel production of privileged communications when exercising statutory powers in the conduct of their investigations.

The impact of the decision is that it will be very difficult for a regulatory authority to argue that a statutory regime by necessary implication allows an investigator to override legal professional privilege. In giving guidance on those instances where privilege might be abrogated other than where it is expressly overridden, the Court suggested that a useful test was to write in the words "not being privileged documents" at the end of the relevant statutory provision and ask "does that produce an inconsistency?" or "does that stultify the statutory purpose?" The Court considered that the circumstances in which such a question would produce an affirmative answer would be rare.

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