Legal professional privilege

37 An authoritative exposition of the rationale of legal professional privilege is to be found in the speech of Lord Taylor of Gosforth CJ in *R v Derby Magistrates' Court, Ex p B* [1996] AC 487, with whom the rest of the House agreed. Lord Taylor CJ described it in these words, at pp 507 and 508:

"The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since 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. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests ... it is not for the sake of the applicant alone that the privilege must be upheld. It is in the wider interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors."

38 In explaining the rationale which underpins the doctrine and its consequences, Lord Taylor CJ drew on a long and consistent line of English authority. In *Bolton v Liverpool Corpn* (1833) 1 M & K 88 the defendant sought inspection of the plaintiff's instructions to counsel, though not of the advice which counsel gave. Refusing the application Lord Brougham LC said, at p 94:

"It seems plain, that the course of justice must stop if such a right exists. No man will dare to consult a professional adviser with a view to his defence or to the enforcement of his rights."

39 In *Holmes v Baddeley* (1844) 1 Ph 476, 480-481 Lord Lyndhurst LC said:

"The principle upon which this rule is established is that communications between a party and his professional advisers, with a view to legal proceedings, should be unfettered; that they should not be restrained by any apprehension of such communications being afterwards divulged and made use of to his prejudice. To give full effect to this principle it is obvious that they ought to be privileged, not merely in the cause then contemplated or depending, but that the privilege ought to extend to any subsequent litigation with the same or any other party or parties ... The necessary confidence will be destroyed if it be known that the communication can be revealed at any time." (Emphasis added.)

40 In *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, 649 Sir George Jessel MR said:

"The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and if being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim,
or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him, should be kept secret, unless with his consent ... that he should be enabled properly to conclude his litigation."

41 In Southwark and Vauxhall Water Co v Quick (1878) 3 QBD 315, 317-318, Cockburn CJ said:

"The relation between the client and his professional legal adviser is a confidential relation of such a nature that to my mind the maintenance of the privilege with regard to it is essential to the interests of justice and the well-being of society. Though it might occasionally happen that the removal of the privilege would assist in the elucidation of matters in dispute, I do not think that this occasional benefit justifies us in incurring the attendant risk." (Emphasis added.)

42 In Pearce v Foster (1885) 15 QBD 114, 119-120 Sir Baliol Brett MR said:

"The privilege with regard to confidential communications between solicitor and client for professional purposes ought to be preserved, and not frittered away. The reason of the privilege is that there may be that free and confident communication between solicitor and client which lies at the foundation of the use and service of the solicitor to the client; but, if at any time or under any circumstances such communications are subject to discovery, it is obvious that this freedom of communication will be impaired. The liability of such communications to discovery in a subsequent action would have this effect as well as their liability to discovery in the original action." (Emphasis added.)

43 The same rationale is seen as underlying the doctrine in New Zealand today. In R v Uljee [1982] 1 NZLR 561, 572 Richardson J said:

"For the focus of the solicitor and client privilege is not on the conduct of third parties at all. It is on the freedom of communication between lawyer and client. So it is on the effect on solicitor and client if that confidentiality is not assured."

44 Some principles are well established and were confirmed by Lord Taylor CJ in R v Derby Magistrates' Court, Ex p B [1996] AC 487, 503g-h. First, the privilege remains after the occasion for it has passed: unless waived "once privileged, always privileged". Secondly, the privilege is the same whether the documents are sought for the purpose of civil or criminal proceedings and whether by the prosecution or the defence. Thirdly, the refusal of the claimant to waive his privilege for any reason or none cannot be questioned or investigated by the court. Fourthly, save in cases where the privileged communication is itself the means of carrying out a fraud, the privilege is absolute. Once the privilege is established, the lawyer's mouth is "shut for ever": see Wilson v Rastall (1792) 4 Durn & E 753, 759, per Buller J. The society has not alleged that any of the documents fall within the excepted category, but if any of them does it retains the right to make such a claim hereafter.

45 It is, of course, well established that the privilege belongs to the client and not to his lawyer, and that it may not be waived by the lawyer without his client's consent. But the privilege is available to the client whether he is a layman or a lawyer; even a lawyer - perhaps especially a lawyer - has need of the services of another lawyer if he becomes personally embroiled in legal proceedings.

[...]

**Referring Principles:**

XII.6 - Attorney-client privilege