

LEGAL PROFESSIONAL PRIVILEGE

- 1 The privilege belongs to the client, not the lawyer. This is absolutely clear on the law. The lawyer has no power to decide what is and is not released from privilege; only the client can do this. In fact, the lawyer has a positive professional obligation to assert the privilege on behalf of his client unless it has been waived (*R v Central Criminal Court ex p Francis & Francis* [1989] 1 AC 346; *Boldish v KPMG* [1999] 2 AC 222) and so the Court may interfere to prevent a lawyer from breaking a client's privilege (*Harmony Shipping v Saudi Europe Lines* [1979] 1 WLR 1380).
- 2 The right to communicate in absolute confidence with a lawyer is now recognised by the House of Lords as a fundamental human right: *Morgan Grenfell v Special Commissioner of Income Tax* [2003] 1 AC 563. The absolute nature of the right is graphically illustrated by the decision of the House of Lords in *R v Derby Magistrates ex p B* [1996] 1 AC 487, in which it was held that privilege even protects a confession to a lawyer of having committed murder.
- 3 This is not a balancing act, in which the Courts (still less the lawyer) weigh up the relative importance of the information against the right of the client to preserve privilege. Privilege is absolute unless overridden by express primary legislation. In one of the leading modern cases in this subject, *Three Rivers DC v Bank of England* [2003] 1 AC 610, Lord Scott explained this at para 24:
 

If a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest. It can be waived by the person to whom it is owed and it can be restricted by statute (*R v Morgan Grenfell*, *Ac v Lloyds v Special Commr of Income Tax* [2003] 1 AC 563). But it is otherwise absolute. There is no balancing exercise that has to be carried out, see *B v Auckland District Law Society* [2003] 2 AC 736, [756-759], para 46-54. The Supreme Court of Canada has said that legal professional privilege although of great importance is not absolute and can be set aside if a substantially compelling public interest, for doing so, not in public safety, can be shown, see *Ross v Smith* [1991] 1 SCR 455. But no other common law jurisdiction has, so far as I am aware, developed the law of privilege in this way. Certainly in this country legal professional privilege, if it is founded by a particular communication between lawyer and client or attached to a particular document, cannot be set aside on the ground that some other, albeit public, law requires that to be done.
- 4 The reason for this absolute privilege existing is because all over the world, it has been recognised that the proper administration of justice requires that a client can consult a lawyer in the absolute certainty that whatever the client tells the lawyer, whatever the lawyer learns about the client, the lawyer is bound not to communicate that information to any third party. As Lord Millett put it in *B v Auckland District Law Society* [2003] 2 AC 736 at para 47:

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