

LEGAL ADVICE PRIVILEGE AND THE CORPORATE CLIENT

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There is much recent debate on the scope of legal advice privilege that is available to a corporation. A major source of controversies is the judgment of the English Court of Appeal in *Three Rivers D.C. v. Bank of England (No. 5)*. This article addresses two particularly difficult questions. First, when is a communication made between the lawyer acting for a corporation and an employee or officer of the corporation privileged? Secondly, under what circumstances, if any, would the privilege apply to a document prepared by an employee or officer for the purpose of enabling the corporation to obtain legal advice? An attempt is made to find answers to these problems within the terms of the *Evidence Act*. Lessons will be drawn from the law of England, Australia and the United States.

I. INTRODUCTION

In *Three Rivers D.C. v. Bank of England (No. 5)*,¹ the English Court of Appeal took an unexpected view of legal professional privilege. The decision, we are told, sent “shockwaves through the legal profession”.² Unfortunately, the House of Lords refused leave to appeal. In another piece of satellite litigation in the same saga (*Three Rivers D.C. v. Bank of England (No. 6)*),³ the House of Lords again declined to examine the correctness of the Court of Appeal’s ruling in *Three Rivers (No. 5)*. This is unfortunate because the matter is of much practical significance for companies and other organizations. The problem is commonly summed up in the form of the

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¹ [2003] E.W.C.A. Civ. 474, [2003] Q.B. 1556. See Jeffrey Pinsler, “New Issues of Professional Privilege for a Singapore Court to Decide” (2005) 17 Sing. Ac. L.J. 596; Joan Loughrey, “Legal Advice Privilege and the Corporate Client” (2005) 9 Int’l J. Evidence & Proof 183; Jimmy Yim, “Developments in Legal Privilege—A Review of the Decisions in *The Three Rivers Case*”, *The Singapore Law Gazette*, May 2005, at 16-22. Extensive discussion of the *Three Rivers* litigation can be also found in the following texts: Adrian Zuckerman, *Zuckerman on Civil Procedure—Principles of Practice*, 2d ed. (London: Thomson, Sweet & Maxwell, 2006) at 625-632; Bankim Thanki *et al.*, eds., *The Law of Privilege* (Oxford: Oxford University Press, 2006) c. 2; Charles Hollander, *Documentary Evidence*, 9th ed. (London: Sweet & Maxwell, 2006) c. 13.

² Thanki *et al.*, *supra* note 1 at 33.

³ [2004] U.K.H.L. 48, [2005] A.C. 610 at paras. 46-48, 63 and 118.

question, “Who is the client?”⁴ This is certainly a convenient way of describing the issue. But it is strictly speaking inaccurate. Where an organization, say, a company appoints an external⁵ lawyer for the purpose of seeking legal advice, the client is the company and not any individual working for the company.⁶ After all, at least in the usual case, the lawyer is instructed to advise on matters that affect the interests of the company and the legal fees are paid out of the company’s funds and not by any individual out of his own pocket. However, a company can only communicate with the lawyer through its employees and officers. Two lines of enquiry arise. First, when is a communication made between the lawyer and one of the company’s employees or officers privileged? In the context of this question, which individual or group of individuals personifies the corporate client? Secondly, can internal reports or memoranda prepared by those employees and officers for the purpose of enabling the company to secure legal advice attract privilege? Under what circumstances would they do so?

Clearly, the privilege should not cover *every* communication between the lawyer and *anyone* working for the company. For example, there is no reason why a letter sent to by an employee to the lawyer without the knowledge or authority of the company should be protected from disclosure. Neither should the privilege apply to all documents prepared internally within the company concerning the subject of legal advice.⁷ Otherwise, too broad a “zone of silence” would be created around corporate affairs.⁸ It is clear that some restrictions must be put in place but unclear how the parameters are to be drawn.

The position taken by the Court of Appeal in *Three Rivers (No. 5)* is widely viewed as impractical. Suppose, to borrow an example, a company is “asked to disclose the memorandum that the accounts department had prepared for the board to discuss with the company’s lawyers”.⁹ If the decision is right (and assuming that the memorandum was not prepared for the dominant purpose of any pending or contemplated litigation),¹⁰ the memorandum is not privileged. This is so even though the document would not have come into existence but for the fact that the company needed to seek legal advice and even where it was prepared solely for that purpose.

The decision of the Court of Appeal in *Three Rivers (No. 5)*, and the reasoning which supported it, are examined in detail in Part II. Part III offers some background

⁴ See e.g., Hodge M. Malek *et al.*, eds., *Phipson on Evidence*, 16th ed. (London: Sweet & Maxwell, 2005) at 623; Thanki *et al.*, *supra* note 1 at 39; Hollander, *supra* note 1 at 261.

⁵ The position of an in-house counsel will not be considered.

⁶ For a similar view expressed in a related context, see David Luban, *Lawyers and Justice—An Ethical Study* (Princeton, N.J.: Princeton University Press, 1988) at 221; Thanki *et al.*, *supra* note 1 at 40.

⁷ David Simon, “The Attorney-Client Privilege as Applied to Corporations” (1956) 65 Yale L.J. 953 at 955-956: “Where corporations are involved, with their large number of agents, masses of documents, and frequent dealings with lawyers, the zone of silence grows large. Few judges...would long tolerate any common law privilege that allowed corporations to insulate all their activities by discussing them with their legal advisers”.

⁸ J. Weinstein *et al.*, eds., *Weinstein’s Evidence* (N.Y.: Matthew Bender, 1995) vol. 2 at para. 503-60; Geoffrey C. Hazard, Jr., Susan P. Koniak & Roger C. Cramton, *The Law and Ethics of Lawyering*, 2d ed. (Westbury, NY: Foundation Press, 1994) at 235.

⁹ Christine Pearson, “Psst, Here’s a bit of Legal Advice”, *The Times*, November 16, 2004.

¹⁰ Hence ruling out litigation privilege. This article focuses on legal advice privilege. On the distinction between legal advice privilege and litigation privilege, see *infra* note 13.

factors that may explain why the Court of Appeal decided as it did. Part IV looks at the responses of practitioners to the decision and examines its practical implications. Part V turns to the law in Singapore and considers how issues raised in the case may be decided under the *Evidence Act*.¹¹ On the assumption that the common law on those issues is relevant in Singapore, Part VI discusses the relative strengths and weaknesses of different common law approaches taken elsewhere, especially in England and the United States. Some broad observations and a summary of main conclusions are provided in Part VII.

II. THE THREE RIVERS LITIGATION

The background to the *Three Rivers* litigation is striking. The Bank of Credit and Commerce International S.A. ('BCCI') collapsed in 1991 as a result of fraud perpetrated by their senior employees on a large scale. After the collapse, a private non-statutory inquiry headed by Bingham L.J. ('the Inquiry') was set up on behalf of the Chancellor of the Exchequer and the Bank of England ('the BOE'). The Inquiry was tasked to investigate the supervision of BCCI by the BOE. This supervision was provided for under the Banking Acts. Bingham L.J. submitted his report ('the Bingham Report') to the Chancellor of the Exchequer and the Governor of the BOE in 1992.

Soon after the Inquiry was set up, three officials of the BOE were appointed by the Governor of the BOE to deal with all communications between the BOE and the Inquiry. These three officials came to be known as the Bingham Inquiry Unit ('the BIU'). The BOE engaged Freshfields as solicitors. Advice was obtained by the BIU from Freshfields, and from the counsel instructed by them, on virtually all communications made with the Inquiry. In order to reply to requests for information from the Inquiry, and to prepare submissions before it, the BIU had to co-ordinate the collation of a wide range of information from various sources within the BOE. Reports were obtained by the BIU from many of their colleagues working in other departments. Many of the reports were shown to Freshfields. They advised the BIU on the best way to respond to the Inquiry, and on the preparation and presentation of submissions and evidence with a view to putting the BOE's case in the most favourable light.

The claimants in this case (Three Rivers District Council and others, numbering more than six thousand) were liquidators and creditors of BCCI. They sued the BOE for misfeasance in public office. This action was started in 1993, after the conclusion of the Inquiry. The claimants based their case substantially on the Bingham Report. Documents related to the Inquiry were likely to support their claim. Not surprisingly, the claimants sought discovery and inspection of the documents prepared by the BOE in connection with the Inquiry. These were documents created internally by the BOE *after* the collapse of BCCI. The BOE had waived privilege for virtually all of the documents that came into existence before the collapse.¹²

¹¹ Cap. 97, 1997 Rev. Ed. Sing.

¹² See the first instance judgment in *Three Rivers D.C. v. Bank of England* [2002] E.W.H.C. 2730 (Comm.) at paras. 10 and 32, per Tomlinson J.

The claimants accepted that communications passing between the BIU and Freshfields were privileged. But they sought discovery of the internal documents that had been prepared on the instructions of and for the BIU by employees of the BOE who were not themselves members of the BIU. These documents fell into the following categories:

- (i) documents prepared by those employees which were intended to be sent to and were in fact sent to the lawyers;
- (ii) documents prepared by those employees with the dominant purpose of seeking legal advice but not sent to the lawyers; and
- (iii) documents prepared by those employees without the dominant purpose of seeking legal advice but sent to the lawyers.

A further question was raised as to whether any of the above categories should be treated differently where, as was the case in relation to some of the documents, the relevant employee no longer worked for the BOE.

Disclosure of the above documents was resisted by the BOE on the ground of legal professional privilege, specifically, that head of legal professional privilege that is commonly called “legal advice privilege”. This is different from the so-called “litigation privilege”, which is often also included under the umbrella term “legal professional privilege”. In *In re L. (a Minor) (Police Investigation: Privilege)*, Lord Jauncey drew this distinction between the two heads of privilege:

There is ... a clear distinction between the privilege attaching to communications between solicitor and client and that attaching to reports by third parties prepared on the instructions of a client [or lawyer] for the purposes of litigation. In the former case the privilege attaches to all communications whether related to litigation or not, but in the latter case it attaches only to documents or other written communications prepared with a view to litigation.¹³

In *Three Rivers (No. 5)*, the Court of Appeal rejected the claim of legal advice privilege. There were two discernible steps in its reasoning. First, it surprisingly held that, so far as the privilege is concerned, the employees who had created the documents were third parties:

[I]nformation from an employee stands in the same position as information from an independent agent. It may ... be a mere matter of chance whether a solicitor, in a legal advice privilege case, gets his information from an employee or an agent or other third party. It may also be problematical, in some cases, to decide whether any given individual is an employee or an agent and undesirable that the presence or absence of privilege should depend upon the answer.¹⁴

This reasoning is surprising since in this case there was no dispute that the persons who created the documents in question were employees of the BOE. As a counsel pointed out in a later case, “whatever the full connotations of ‘third party’, an employee of a company is not a third party vis-à-vis the company that employs

¹³ [1997] A.C. 16 at 24-25. Words in brackets inserted.

¹⁴ *Supra* note 1 at para. 18.

him”.¹⁵ It was accepted in *Three Rivers (No. 5)* that, for purposes of the privilege, the “client” comprised only the three officials in the BIU; in the circumstances, the “client” did not include any other employee or officer of the BOE, not even the Governor of the BOE.¹⁶ Although the Court of Appeal engaged in extensive analysis of authorities, those authorities are widely regarded as either irrelevant or inconclusive.¹⁷ According to many commentators, the ruling in the first part of the reasoning was both strained and novel. It will, however, be argued below that the Court’s identification of the “client” is not as indefensible as it is commonly thought.¹⁸

Secondly, the Court of Appeal held that legal advice privilege protects only communication between lawyer and client. It does not “apply to documents communicated to a client or his solicitor for advice to be taken upon them but only to communications passing between that client and his solicitor ... and documents evidencing such communications.”¹⁹

The documents in question in this case were considered not privileged because (i) following from the first part of the reasoning, they were prepared by persons other than the client, and (ii) they were neither in themselves communications with Freshfields nor did they evidence any such communications.

The claim that legal advice privilege is confined to lawyer-client communication contains two different propositions that were not clearly distinguished in the reasoning. The first is that legal advice privilege applies only to communication made with the *client* (including communication made *via* an agent of the client) but not to communication made with a third party. The second is that legal advice privilege applies only to what is truly a *communication* between lawyer and client.

On the first proposition, the Court of Appeal did not but could have considered *In re Sarah Getty Trust*.²⁰ In that case, a solicitor, acting in his professional capacity,

¹⁵ Sir Sidney Kentridge Q.C. in his submission before the House of Lords in *Three Rivers (No. 6)*, *supra* note 3 at 631.

¹⁶ The Court of Appeal remarked in a dictum that even if the Governor had written something he thought of relevance to the Inquiry and had passed on the note to the BIU for transmission to Freshfields, that note would not have been privileged: *supra* note 1 at para. 31.

¹⁷ The closest authority was arguably *Anderson v. Bank of British Columbia* (1876) 2 Ch. D. 644 [*Anderson*]. But this was a case on litigation privilege and the letter in question, written by a branch manager in Oregon to the manager in the London office, was not a confidential communication made for the dominant purpose of enabling the company to obtain legal advice. According to Jessel M.R., the letter was never meant “to be a confidential one for the purpose of being submitted to the...solicitor...for advice” (*Anderson* at 648) and, similarly, James L.J. held that the communication was made “in the ordinary course of business...and it not necessarily connected with the litigation either actually commenced or expected” (*Anderson* at 648). The dominant purpose of the correspondence between the managers, it would appear, was for the Bank to understand, verify, and answer to, the customer’s complaint rather than to prepare for litigation. (See *Pratt Holdings Pty. Ltd. v. Commissioner of Taxation* (2004) 136 F.C.R. 357 at 383; *Three Rivers (No. 6)*, *supra* note 3 at 630.) In any event, the correctness of *Anderson* in the light of modern authorities has been doubted: *Ventouris v. Mountain* [1991] 1 W.L.R. 607 at 612; *Three Rivers (No. 6)*, *supra* note 3 at para. 96.

¹⁸ See below, Part VI.A.1.

¹⁹ *Supra* note 1 at para. 19. See also *ibid.* at para. 21: “privilege could not be claimed for documents other than those passing between the client and his legal advisers and evidence of the contents of such communications”.

²⁰ [1985] Q.B. 956.

obtained information from third parties and passed it on to his client when no litigation was in existence or within contemplation. It was held that the communication of that information was protected by legal advice privilege as part of the general process of professional communication. This was a significant extension of the law, especially as it was not clear on the facts whether the third-party information was severable from the legal advice that was given and the failure of the judge to make an explicit finding on this point suggests that he did not think this was a factor that mattered.²¹ Even if the Court of Appeal was right to have held in *Three Rivers (No. 5)* that the employees who created the documents sought to be discovered were third parties, one could argue by analogy with *In re Sarah Getty Trust* that the information received from third parties by the client (the BIU) and passed on to Freshfields in their professional capacity should similarly be protected under legal advice privilege. That the third-party information had passed from lawyer to client in *In re Sarah Getty Trust* whereas it had passed from client to lawyer in *Three Rivers (No. 5)* should make no difference in principle.

But the two cases can be distinguished. In *In re Sarah Getty Trust*, the applicant sought to compel the lawyer to disclose what he had said orally to his client, including the information he had obtained orally from the third party. On the other hand, in *Three Rivers (No. 5)*, discovery was sought of documents that, according to the Court of Appeal, constituted communication from third parties. As Parker J. rightly said in *Birmingham Midshire Mortgage Services Ltd. v. Phillips*, “[i]t does not follow from the fact that a communication between solicitor and client is privileged notwithstanding that it may contain information provided by a third party that the communication from the third party conveying that information is itself privileged”.²²

In most common law jurisdictions, “the scope of legal advice privilege is restricted to communications passing between the lawyer and his client, whereas documents emanating from third parties may attract litigation privilege”.²³ In the present context, a “third party” is someone who communicates with the client or lawyer other than as “agent” of either of them. (The issue of agency is discussed in Part V.B below). Australia however appears to have taken her law in a different direction. In Australia, a communication between the client and a third party, even in the absence of any pending or contemplated litigation, may attract legal advice privilege. In the recent case of *Pratt Holdings Pty. Ltd. v. Commissioner of Taxation*,²⁴ the Australian Federal Court, unimpressed with *Three Rivers (No. 5)*, upheld a claim of legal advice privilege over a report prepared by an accounting firm for their client, a corporation, which needed the report for the dominant purpose of legal consultation on a corporate reconstruction programme. In coming to that decision,

²¹ As noted by Ian Eagles, “Legal Professional Privilege and the Corporate Client” (1987) 12 N.Z.U.L. Rev. 297 at 299.

²² Unreported decision of the Chancery Division dated 6 November 1997.

²³ *U.S.A. v. Philip Morris* [2004] E.W.C.A. Civ. 330, [2004] 1 C.L.C. 811 at para. 59. Similarly: *Hellenic Mutual War Risks Association (Bermuda) Ltd. v. Harrison* [1997] 1 Lloyd’s Rep. 160 at 164 (“It is established law that third party documents, such as statements or expert reports, are only protected by litigation privilege, and not by legal advice privilege”); *Guardian Royal Exchange Assurance of New Zealand Ltd. v. Stuart* [1985] 1 N.Z.L.R. 596 at 602 (“When litigation is not in prospect the traditional view is that communications between a party or his solicitor and a third party are not privileged, even although they may have been for the purpose of the giving or obtaining of legal advice”).

²⁴ (2004) F.C.R. 357 [*Pratt Holdings*].

the Court observed that the “complexity of present day commerce means that it is increasingly necessary for a client to have the assistance of experts” and emphasized that legal advice privilege should be adapted “to ensure that the policy supporting [it] is not sabotaged by rigid adherence to form that does not reflect the practical realities”.²⁵

With respect, the decision is not self-evidently an instance of substance prevailing over form. From the angle of “practical realities”, it was far from obvious that the company ought to be allowed to obstruct the tax audit by hiding pertinent information from the Commissioner of Taxation.²⁶ The rationale which traditionally supports the right of a human being to claim privilege is questionable;²⁷ it is even more dubious as we will see that the privilege should be made available to corporations, which are, after all, abstract and artificial entities. The decision in *Pratt Holdings* is also at odds with judicial suggestions made elsewhere that we should *reduce* the current scope of the privilege that confers secrecy over third party communications.²⁸

It is submitted that the Court of Appeal was right to have held in *Three Rivers (No. 5)* that legal advice privilege does not cover communication with a third party. In this sense, it was correct to say that legal advice privilege is confined to lawyer-client communication. However, the employees of the BOE were not truly third parties. And this leads us to the second proposition identified earlier. Should the application of legal advice privilege be confined to what is strictly speaking a *communication* between lawyer and client? In the corporate context, communication between the lawyer and the persons representing the company will naturally run alongside internal discussion on the same subject matter amongst employees or officers of the company; some commingling of these two streams of communication is, from the practical point of view, inevitable.²⁹ The rationale which justifies protection of lawyer-client communication justifies as strongly protection of internal documents written specifically

²⁵ *Ibid.* at 386. See also *DSE (Holdings) Pty. Ltd. v. InterTan Inc* [2003] F.C.A. 1191.

²⁶ For a critical discussion on the extent to which we should allow the privilege to thwart a tax investigation, see Law Commission of New Zealand, *Tax and Privilege*, Report 67 (Wellington, 2000).

²⁷ See H.L. Ho, “Legal Professional Privilege and the Integrity of Legal Representation”, forthcoming in *Legal Ethics*.

²⁸ In *Secretary of State for Trade v. Baker* [1998] Ch. 356 at 366, Sir Richard Scott held that “there was no general privilege that attached to documents brought into existence [by third parties] for the purposes of litigation independent of the need to keep inviolate communications between client and legal adviser. If [the] documents ... did not relate in some fashion to communications between client and legal adviser, there was no element of public interest that could override the ordinary rights of discovery and no privilege”. Followed in *The Patraikos 2* [2001] 4 S.L.R. 308 at 314; see also *Three Rivers (No. 6)*, *supra* note 3 at para. 29; Malek *et al.*, *supra* note 4 at 639-641.

²⁹ In *Akzo Noble Chemicals Ltd. and Akcros Chemicals Ltd. v. Commission of the European Communities* (Joined Cases T-125/03R and T-253/03 R, 30 October 2003) [*Akzo Noble*], the Court of First Instance gave hope that legal advice privilege under European law might be extended to the internal “working or summary documents” created “for the purpose of gathering the information which the lawyer may find useful, or indeed indispensable, in understanding the context, the nature and the scope of the facts in respect of which his assistance was sought”. (*Akzo Noble* at para. 102). Although the interim order of the Court of First Instance was subsequently annulled by the European Court of Justice (*Commission of the European Communities v. Akzo Noble Chemicals Ltd. and Akcros Chemicals Ltd.*, Case C-7/04 P(R), 27 September 2004), the latter based its decision on the lack of urgency for the interim order and did not venture into the privilege point. Both judgements can be obtained at <http://curia.eu.int/en/content/juris/index_note.htm>.

for the dominant purpose of enabling the client to seek legal advice.³⁰ In principle, we should interpret communication broadly, as a “continuum” wide enough to include the client’s self-created preparatory documents.³¹

Consider the situation where the client is an individual. Suppose he wishes to obtain legal advice on the legality of a sensitive transaction. He collates information that he thinks his lawyer will need to know. If he communicates the information in a letter he writes and posts to his lawyer, with a view to obtaining legal advice, the letter is privileged. Suppose, instead, he writes down the information in notes prepared in anticipation of a meeting with his lawyer. He passes the notes to his lawyer at the meeting. Surely the notes, having been written specifically for the purpose of getting legal advice, deserve as much to be privileged as the letter. Even if he does not pass on his notes but orally communicates the information contained in them to the lawyer at the meeting, it is arguable that the notes should still be privileged.³² In the case where the client is a company, the company, being an artificial and abstract entity, can prepare “notes” for itself only by asking its employees or officers to undertake the work. In principle, the internal memoranda and reports in *Three Rivers (No. 5)* that were prepared by employees of the BOE and for the dominant purpose of allowing the BOE to receive advice from Freshfields ought as much to be protected as the notes prepared by an individual client in the example just given.³³

Both parts of the reasoning examined above were used to dispose of the BOE’s claim of legal advice privilege. Since the Court of Appeal treated the employees as third parties, why did the BOE not rely on “litigation privilege”? Litigation privilege protects from disclosure communication made by a lawyer or his client with a third party for the dominant purpose of litigation. It could not be invoked in this case

³⁰ As an experienced English solicitor wrote before *Three Rivers (No. 5)* was decided: “business entities necessarily have to operate through the medium of human agents who initially will communicate with each other. Since privilege is essentially concerned with lawyer-client communications, these internal communications ought to be seen, ultimately, as part of the employer-client’s chain of communications with the lawyers. So, a business entity should be entitled to claim privilege for internal communications which otherwise satisfy the scope of the advice test and which are necessarily made to instruct or inform its lawyers”. Colin Passmore, *Privilege* (Birmingham: CLT Professional Publishing, 1998) at 120. Similarly, see Thanki *et al.*, *supra* note 1 at 95-96: “If the dominant purpose for which a document comes into existence is to obtain legal advice, why should it matter whether the document is preparatory to a communication with a legal adviser rather than being the final communication itself? There is no principled distinction between the two types of document”. In a criminal case, such internal communications, so it would seem, may be privileged under s. 10(1)(c)(i) of the United Kingdom’s *Police and Criminal Evidence Act 1984*, c. 60. Under that provision, the internal documents are privileged if made by the company “in connection with the giving of legal advice”, and “enclosed with or referred to” in the communications between the company and its lawyer. Since it is accepted that s. 10(1) merely gives effect to the common law (e.g., *R v. Central Criminal Court, ex p Francis & Francis* [1989] A.C. 346 at 392, per Lord Goff), it is arguable that even in civil cases, to which the common law applies, the same documents should also be privileged where the facts satisfy the conditions stated in s. 10(1)(c)(i).

³¹ Although not squarely on point, some support for this view may be found in *Balabel v. Air India* [1988] Ch. 317 at 330 where the English Court of Appeal adopted an expansive conception of “communication”.

³² There is eminent sense in the view expressed by Jacobs J. in *Grant v. Downs*, (1976) 135 C.L.R. 674 at 690 that legal advice privilege “extends not only to communications actually made but to material prepared for the purpose of communication thereof to the legal adviser”.

³³ In the case itself, the Court of Appeal accepted in a dictum that the solicitors’ “working papers and memoranda” could attract legal advice privilege. *Supra* note 1 at para. 29. In principle, it is difficult to see why the privilege should not equally apply to the “working papers and memoranda” created by the client for the purpose of seeking legal advice. See further Thanki *et al.*, *supra* note 1 at 62-63.

because the House of Lords had ruled in *In Re L. (a Minor) (Police Investigation: Privilege)*³⁴ that litigation privilege did not apply to non-adversarial proceedings and the Inquiry in *Three Rivers* was non-adversarial.³⁵ Thus the BOE conceded that they could not claim litigation privilege.

Non-adversarial proceedings are not confined to the kind of formal inquiry seen in the *Three Rivers* saga.³⁶ For example, a corporation may be required to appear before an investigatory or regulatory body in a proceeding regulated by a system of rules that lacks adversarial features.³⁷ In such a situation, legal advice privilege is not available at common law. As in the *Three Rivers* saga, the corporation would then only have legal advice privilege to fall back on unless the statute under which the proceeding or investigation is held provides otherwise.³⁸ More importantly, a corporation will often need to seek legal advice on matters that are not specifically the subject of any existing or envisaged litigation. These matters may be highly sensitive from a commercial point of view and require legal analysis from lawyers who are specialised experts. For example, a corporation may need to consult lawyers on how to comply with, or avoid infringement of, complex legislation that exists in fields such as competition law.³⁹ Again, in such cases, litigation privilege will not bite; there is scope only for the application of legal advice privilege. For these reasons, *Three Rivers (No. 5)* has important implications.

III. WHY WAS THE PRIVILEGE SO NARROWLY INTERPRETED?

Why was such a narrow approach taken by the Court of Appeal in *Three Rivers (No. 5)*? Were there special circumstances in this case to which the decision should be confined? It is suggested that the combined effect of at least three extraneous factors partly motivated the decision.

First, section 1(4) of the *Banking Act 1987* exempted the BOE from any liability in the discharge of its function unless it had acted in bad faith. The claimants therefore had to base their action on the tort of misfeasance in public office. This tort requires bad faith on the part of the relevant public officers.⁴⁰ It is very difficult to obtain evidence to establish this element of the tort. This difficulty was exacerbated by the fact that the claimants were not privy to the relevant events, regulatory operations and exchanges between the BCCI and the BOE. Dismissal of the discovery application would have made it practically impossible for the claimants to prove their case. As Lord Hope noted in *Three Rivers District Council v. Bank of England (No. 3)*:

³⁴ *Supra* note 13.

³⁵ *Three Rivers (No. 5)*, *supra* note 1 at 1561.

³⁶ On the impact of *Three Rivers* on arbitration conducted in a non-adversarial mode, see Sophie Nappert and Simon Blyth, "The Legacy of Three Rivers in Non-Adversarial Arbitral Proceedings" [2004] Int'l Arb. L. Rev. 108.

³⁷ See Andrew Henderson, "FSA Proceedings and Legal Professional Privilege Revisited in the Light of *Three Rivers D.C. v. Bank of England (No. 5)*" (2002) 152 New L.J. 1924.

³⁸ *E.g.*, s. 66(a)(ii), *Competition Act* (Cap. 50B, 2006 Rev. Ed. Sing.); s. 89(4), *Business Trusts Act* (Cap. 31A, 2005 Rev. Ed. Sing.); s. 40A(3), *Insurance Act* (Cap. 142, 2002 Rev. Ed. Sing.); s. 311(4), *Securities and Futures Act* (Cap. 289, 2006 Rev. Ed. Sing.).

³⁹ See *Three Rivers (No. 6)*, *supra* note 3 at 631 (example given in the submission for the Law Society).

⁴⁰ The elements of the tort were clarified by the House of Lords in *Three Rivers D.C. v. Bank of England (No. 3)* [2003] 2 A.C. 1 [*Three Rivers (No. 3)*]. The scope of this tort received further attention by the House of the Lords in the recent case of *Watkins v. Home Office and Others* [2006] U.K.H.L. 17.

The present case is, as everyone concerned with it has recognised, one of a quite exceptional character. The issues of fact which the claimants seek to raise are highly complex. They relate to matters in which they were not directly involved, as they were third parties to the system of regulation which was set up to protect them. They involve meetings and discussions between many parties at which they were not represented and they extend, through no fault of theirs, over a very long period. The issues of law are also complex, as the claim depends on an assessment of the state of mind of the Bank's officials at each of the various stages in the history. Much of what was passing through their minds can be discovered by examining the documents.⁴¹

Secondly, the collapse of BCCI was a high profile event that affected the financial state of thousands of deposit-holders⁴² and placed a heavy burden on the banking sector as a whole.⁴³ There was public pressure to get to the truth of the circumstances that led to the collapse and to find out how the fiasco was allowed to happen. This did not pass unnoticed by the Court of Appeal. It stressed: "One ought not to lose sight of the public interest that the courts, if possible, should come to the correct judgments on the basis of all relevant material".⁴⁴

Thirdly, and most importantly, the claimant of legal advice privilege in *Three Rivers (No. 5)* was no ordinary business entity but a "national institution"⁴⁵ serving a vital function in the economic and financial life of the country. The traditional justification for legal advice privilege ill fits the situation. It is odd to claim that the privilege is necessary to secure candour on the part of the officers and employees of the BOE. These persons are public servants. One would have thought they have a duty of accountability simply in virtue of the weight of responsibilities on their shoulders. It is not obvious that the rationale of the privilege should apply, in full measure, to a body like the BOE. It is of much greater concern that, so far as possible, there should be transparency in the performance of its public role.⁴⁶

In these three respects, the present litigation was very different from an ordinary commercial dispute between private entities. Special factors were at work which probably explained why the Court of Appeal adopted a restrictive reading of the privilege in *Three Rivers (No. 5)*. To draw a general rule from this decision might well be an instance of a hard case making bad law.

⁴¹ *Supra* note 40 at 261-262. Similarly, in *Three Rivers (No. 6)*, *supra* note 3 at para. 7, Lord Scott noted that the requirement of bad faith "plainly placed before the claimants ... a very high hurdle and it is not in the least surprising that they have been, and still are, seeking the widest possible discovery from the [BOE] in order to assist their efforts to jump it".

⁴² A search on Lexis for news articles appearing in the main broadsheets between 1991 and 1992 using the terms "BCCI", "collapse" and "Bank of England" generated 259 hits! The Times reported on 6 July 1991 that BCCI had 25 branches in Britain and had about 120,000 British account-holders, many of whom belonged to working class minority groups.

⁴³ The Guardian reported in 6 July 1991 that the closure of BCCI presented "British banks with more than £250 million worth of bills as the price of bailing out BCCI's 120,000 UK depositors".

⁴⁴ *Supra* note 1 at para. 26.

⁴⁵ *Supra* note 1 at para. 35, per Longmore L.J.

⁴⁶ For comments along a similar line, see C. Tapper, "Privilege, Policy and Principle" (2005) 121 Law Q. Rev. 181 at 184; Zuckerman, *supra* note 1 at 631. While higher public policies sometimes justify secrecy in relation to affairs of state and such like (see *e.g.*, ss. 125 to 127 of the *Evidence Act* and Jeffrey Pinsler, *Evidence, Advocacy and the Litigation Process*, 2d ed. (Singapore: LexisNexis, 2003) at 290-292), this "public interest immunity" is distinct from legal advice privilege.

IV. PRACTICAL REACTIONS AND IMPLICATIONS

The Court of Appeal's narrow reading of legal advice privilege, although understandable against the background of the case, makes it difficult for big organisations to consult lawyers without losing the privilege somewhere amongst or along the chains of communication. As one critic puts it, the judgment places companies in a difficult position when they have to "investigate the factual background and gather evidence in relation to an issue on which legal advice is required but litigation is not yet contemplated".⁴⁷ Practitioners have reacted to the decision by offering suggestions on practical means of protecting their corporate clients' interests. It is tempting to see some of these measures as covert ways of getting around the law, that subvert the aim of establishing a more open discovery regime. The more interesting suggestions include the following.⁴⁸

First, organisations are advised to designate and identify clearly the person or group of persons who is to communicate with the lawyer regarding the matter on which legal advice is sought.⁴⁹ The lawyer should, where possible, record this information in his retainer letter. All communications made between the organisation and the lawyer on the transaction in relation to which the lawyer is engaged should be channelled through the designated person or group. This piece of advice rests on the assumption that it is up to the organisation to decide which persons working for it should have the authority to make privileged communications on its behalf. If this assumption is right, a company might be tempted to include a large section of its employees, or even all of its employees or all of them who has any relevant knowledge, in the group of persons authorised to speak with the lawyer. Most writers think this strategy will not work. It is "unlikely that the courts would countenance arrangements which are put in place to circumvent the rule".⁵⁰

A second common suggestion is that written communication between the lawyer and any employee or officer of the company who is not the person, or does not belong to the group, designated as the "client" should be avoided so far as possible. This is because a document containing such a communication will not be protected from disclosure by legal advice privilege.⁵¹ Interestingly, it is reported that, in the wake of the *Three Rivers* litigation, in-house lawyers in England began "to rely more and more on oral communication with other employees".⁵² Similarly, corporate clients have

⁴⁷ Hans C. Hirt, "Legal Advice Privilege in the Context of Inquiries: Time for Review" (2004) *Bus. L. Rev.* 220 at 223.

⁴⁸ See e.g., Mark Lewis, "The Privileged Few" (2003) 24 *The Company Lawyer* 245 at 247; David Knight *et al.*, "Privilege after the House of Lords" Ruling in *Three Rivers*" (2005) 170 *Pat. World* 19 at 21; Brooke Whitaker & Mark Paton, "What Flows from *Three Rivers*?" (2005) *N.Z.L.J.* 237; Robin Preston-Jones & James Paterson, "Three Rivers Run Deep?" (2004) *New L.J.* 19; Jonathan Fortnam & Joanna Lobo, "*Three Rivers*: Comfort or Missed Opportunity?" (2004) *New L.J.* 26.

⁴⁹ In *Philip Morris*, *supra* note 23 at para. 81, the court noted that, in consequent of the Court of Appeal decision in *Three Rivers (No. 5)*, there is now a need "to identify more precisely the person or people who should be treated as [the] clients".

⁵⁰ Hollander, *supra* note 1 at 263; see also *ibid.* at 262; Malek *et al.*, *supra* note 4 at 624; Preston-Jones & Paterson, *supra* note 48.

⁵¹ Hollander, *supra* note 1 at 264.

⁵² See the submission of Counsel for the Law Society before the House of Lords in *Three Rivers (No. 6)*, *supra* note 3 at 631-632. However, this tactic does not ensure full secrecy since such oral communications are in theory discoverable through the administration of interrogatories.

been advised to carefully control the inter-departmental dissemination of sensitive information in writing.

Thirdly, the relevant documents should preferably be prepared personally by the lawyer or the employee designated as the client.⁵³ Unfortunately, and this is said to highlight the impracticability of the Court of Appeal's decision in *Three Rivers (No. 5)*, such is the complexity of modern corporate structures that it is frequently infeasible to ask these individuals to undertake all the investigatory work by themselves. First, this will incur much delay and high costs. Secondly, the information may be widely dispersed among many departments and easy to retrieve or analyse only by the relevant employees of the respective departments.⁵⁴ A coordinated group effort, involving many ground-level employees, is often indispensable in putting together an overarching report. Yet, if those ground-level employees are to be treated as third parties, as they were in *Three Rivers (No. 5)*, any document they generate in this group effort will not be protected by legal advice privilege.

Critics of *Three Rivers (No. 5)* have relied on a number of arguments in their attack on the decision. But in their haste to champion the privilege,⁵⁵ they tend to overlook countervailing pressures to constrain its scope in the corporate context. Indeed, as we will see in Part VII, some have questioned whether the privilege should apply to corporations at all. That however is likely to remain an academic question. It is too late in the day to withdraw altogether the right to claim privilege from corporations.⁵⁶ Realistically, the only question is how broad a protection they should have. The Court of Appeal chose to keep the privilege within narrow bounds. Can the decision be justified from the policy point of view?

Critics find it evident from the advice given by English solicitors to their corporate clients in the aftermath of *Three Rivers (No. 5)* that the decision is likely to increase the costs of business operation. The costs will ultimately filter down to consumers. But this is not a fair criticism of the decision. The increase in costs is not the logical result of *Three Rivers (No. 5)*; it comes from the extra efforts lawyers and companies take to circumvent that decision, to avoid discovery under the newly stated law.

Another criticism of *Three Rivers (No. 5)* is that it makes legal consultation a more risky affair than before. There is less assurance that sensitive information that needs to be made known to the lawyer will be kept within the company. But is this necessarily a bad thing? Retrospectively, less corporate secrecy might well mean less management cover-ups. Prospectively, a narrow privilege "could actually deter organizational wrongdoing";⁵⁷ it stands to reason that the greater the risk of disclosure, the less willing business executives will be to embark on shady transactions. The danger of being found out may well have a wholesome effect on corporate behaviour.

A third argument stresses the fact that companies are heavily regulated by the law. Many aspects of their operation are governed by legal rules that tend to be complex and technical. Companies need to get advice from lawyers on legal compliance

⁵³ On this point, see also Hirt, *supra* note 47 at 227.

⁵⁴ Michael L. Waldman, "Beyond *UpJohn*: The Attorney-Client Privilege in the Corporate Context" (1987) 28 Wm. & Mary L. Rev. 473 at 476.

⁵⁵ Motivated perhaps by professional self-interests: see Donald Nicolson & Julian Webb, *Professional Legal Ethics—Critical Interrogation* (Oxford: Oxford University Press, 1999) at 255.

⁵⁶ S. 8E and s. 393, *Companies Act* (Cap. 50, 2006 Rev. Ed. Sing.) expressly recognises the right of the lawyer acting for a company to refuse to disclose privileged communication.

⁵⁷ Luban, *supra* note 6 at 219.

much more frequently than individuals need to. One cannot comply with the law unless one knows what the law is.⁵⁸ To the extent that *Three Rivers (No. 5)* makes companies think twice about obtaining advice from lawyers, it undermines one key objective of the privilege, namely, to encourage legal consultation with a view to keeping within the law.⁵⁹

We must be careful not to be carried away by this argument. Realistically, companies seek legal advice simply because they have to; this necessity does not go away in the absence of the privilege. Further, the argument assumes that companies would by and large comply voluntarily with the law provided they are told what it is. This may or may not be a reasonable assumption to make. From the policy perspective, to the extent that companies cannot be trusted to comply with the law voluntarily, tougher measures should be taken to enforce financial and commercial regulations. If we want to make it easier to detect and penalize companies that violate such regulations, we should make it harder for them to hide behind the shield of privilege.⁶⁰

It is not denied that critics have a case when they claim that the Court of Appeal took too narrow a view of the privilege in *Three Rivers (No. 5)*. Our starting point is that the privilege is available to companies; it is, if nothing else, practically infeasible not to commence from this starting point. The question we need to address is a much more modest one: how much protection should companies have under the privilege? Our examination of the underlying policies shows that they do not all point in one direction. A difficult balance must be struck between the interests of corporate confidentiality and the value of corporate transparency.

V. RELEVANT RULES UNDER THE *EVIDENCE ACT*

In the Introduction, two problems were identified relating especially to a corporation's claim of legal advice privilege. First, when is a communication between a person working for the corporation and the lawyer engaged by it privileged? Secondly, is a document created internally within the corporation for the dominant purpose of enabling it to receive legal advice privileged? The second question is different from the first because the internal document referred to in the second question is not, strictly speaking, in itself a communication with the lawyer that is the subject of the first question. How can these two problems be resolved under the *Evidence Act* (hereafter, "the Act")? The relevant provisions are mainly sections 128 and 131. Unfortunately, these provisions do not reveal any clear answer to our problems. Some possible arguments are explored below. But first we must consider whether the Act applies at all in discovery proceedings.

⁵⁸ That this is an aim of legal advice privilege is long established. See *e.g.*, *Greenough v. Gaskell* (1833) 1 My. & K. 98 at 103: "If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous".

⁵⁹ See Vicki Waye, "The Corporation and Legal Professional Privilege" (1997) 8 *Austl. J. Corp. Law* 25 at 32: "A corporation armed with appropriate legal advice is better placed to carry out its activities within the confines of the law. Without proper legal advice, a corporation risks incurring liability and engaging in costly defensive litigation. To advice properly, the corporation's lawyer must be apprised of all relevant fact".

⁶⁰ John E. Sexton, "A Post-*Upjohn* Consideration of the Corporate Attorney-Client Privilege" (1982) 57 *N.Y.U.L. Rev.* 443 at 468-471.

A. Law of Privilege Applicable in Discovery Proceedings

Local cases on litigation privilege have applied the common law without reference to the Act.⁶¹ Is this the right approach to take? Should it be taken as well in discovery cases involving legal advice privilege? Do the provisions in the Act on legal advice privilege operate where neither the lawyer nor his client is in the witness stand; in other words, do the sections extend to pre-trial applications?⁶² Are discovery applications entirely governed by the common law on all issues of privilege?⁶³

The advantage of applying common law is that it frees us from the textual constraints of a very old piece of legislation. (Much of the Act can be traced to the Indian *Evidence Act* of 1872.) It is true that section 2(1) states that the Act applies “to all judicial proceedings in or before any court”, and a discovery application would probably fall under this description. However, sections 128 and 131, and related provisions, are located in that part of the Act headed “Witnesses.” Read as a whole, that part seems to envisage a trial setting in which either the client or the lawyer is called as a witness⁶⁴ and questioned by counsel on a lawyer-client communication. However, as Jeffrey Pinsler has pointed out, the prohibitions imposed by section 128(1) on the lawyer applies “at any time”, which suggests that they apply not only at the trial.

Apart from these ambiguities, it is, to say the least, inconvenient to have two different regimes of privilege, with the relevant sections of the Act operating at the trial and the common law governing discovery (and other pre-trial) applications. Australia recently found herself in a similar situation.⁶⁵ The Australian High Court, faced with clear statutory wording, held in *Eso Australia Resources Ltd. v. Commissioner of Taxation*⁶⁶ that (i) the provisions on legal professional privilege in the Commonwealth *Evidence Act 1995* applied only to the “adducing of evidence” (which occurs at the trial itself) and (ii) the courts must turn to the common law when dealing with privilege claims in pre-trial discovery hearings. The result was that different laws applied at different stages of litigation. This was widely regarded as an unsatisfactory

⁶¹ *Brink's Inc. v. Singapore Airlines Ltd.* [1998] 2 S.L.R. 657 [*Brink's Inc.*]; *Wee Keng Hong Mark v. ABN Amro Bank N.V.* [1997] 2 S.L.R. 629; *The Patraikos 2*, supra note 28.

⁶² See Yim, supra note 1 at 22: “the correct view is probably that the ambit of privilege in sections 128 to 131 [of the Act] is confined to court hearings and that the common law position on legal privilege is a necessary complement to our law”. He expressed the same view in Legal Update, 2005, vol. 6, issue 4, 7 at 9 (this is a publication of Drew & Napier LLC, available at http://www.drewnapier.com/pdf/legal_june05.pdf). Compare Jeffrey Pinsler, “Approaches to the Evidence Act: The Judicial Development of a Code” (2002) 14 Sing. Ac. L.J. 365 at 373-374 (suggesting that it might be inconsistent with the Act to apply the common law litigation privilege in Singapore).

⁶³ Common law cases are cited in abundance in the local practitioner reference work, *Singapore Civil Procedure 2003* (Singapore: Sweet & Maxwell Asia, 2003) at paras. 24/3/6-24/3/32.

⁶⁴ Legal professional privilege gives only limited immunity against compulsion to answer certain kinds of questions. It does not give the lawyer or client the right to refuse to be examined altogether: see e.g. *Chi Man Kwong Peter & Anor. v. Lee Kum Seng Ronald* [1984-1985] S.L.R. 227.

⁶⁵ See Colin Ying, *Essential Evidence* (Coogee, N.S.W.: Cavendish Australia, 3rd ed., 2005) at 118-119; D.J. Desiatnik, *Legal Professional Privilege in Australia* (St. Leonards, N.S.W.: Prospect Media, 1999) at 145-152; Stephen Odgers, *Uniform Evidence Law*, 5th ed. (Pyrmont, N.S.W.: Lawbook Co., 2002) at 351-352.

⁶⁶ (1999) 201 C.L.R. 49. See also *Mann v. Carnell* (1999) 201 C.L.R. 1.

state of affairs.⁶⁷ In response to criticisms, the rules of court in New South Wales (where the uniform evidence legislation had been adopted) were amended. The amendments brought the law of privilege applicable at civil pre-trial applications in line with the law as stated in the New South Wales *Evidence Act 1995*.

It is reasonable to argue for the adoption of the common law on litigation privilege in Singapore since there is no provision in the Act that clearly provides for it. But there are provisions in the Act that do provide for legal advice privilege. It is preferable, for the sake of uniformity, for those provisions to operate in discovery proceedings as well.⁶⁸ However, on finer points not explicitly dealt with by the provisions, section 2(2) allows the common law to be followed insofar as no inconsistency with the Act results from doing so. The ensuing discussion takes this approach.

B. First Limb of Section 128(1)⁶⁹

The first limb of section 128(1) prevents the lawyer from disclosing communication made to him “by” his client. This begs the question: in the corporate context, which individual or group of individuals personifies the client? Note that the first limb also prevents the lawyer from disclosing communication made to him “on behalf of” his client. It is certainly arguable that the privilege contained in section 128(1) therefore extends to communication made to the lawyer by an employee, officer or other agent of the corporate client where it is made “on behalf of” the corporate client. This extension, so it may be argued, is implicitly supported by section 129. That provision brings the lawyer’s employees under the obligation of non-disclosure contained in section 128(1). Since the privilege extends to employees of the lawyer, as section 129 says it does, it seems reasonable that the privilege should be read such that it reaches employees of the client as well.⁷⁰

However, there are problems with this interpretation. The phrase “on behalf of” was inserted to cater to agency in the narrow sense. It is clear from a consistent line of English cases, with the earlier authorities predating the Act, that the privilege applies to a communication made to the lawyer by someone other than the client in restricted circumstances. These are situations where, in making the communication, the person was acting merely as a *channel* (or, to use other popular descriptions, *conduit* or *medium*) of communication, passing on information from client to lawyer, or giving

⁶⁷ In *Trade Practices Commission v. Port Adelaide Co. Pty. Ltd.* (1995) 60 F.C.R. 366 at 370, Branson J. made the compelling remark that “logic at least would seem to suggest that the ambit of client legal privilege should be constant throughout the litigation process”.

⁶⁸ It is true that discoverable documents are not limited to documents admissible at the trial. But discovery may have consequences adverse to the party against whom the application is made: it may lead to divulgence of sensitive information and give the applicant strategic advantages. To the extent that the chilling effect of allowing discovery of a document is no less real than allowing it to be admitted in evidence, the traditional rationale for legal advice privilege holds equally at all stages of litigation. If this is correct, we should have a single regime of the privilege.

⁶⁹ It provides: “No advocate or solicitor shall at any time be permitted, unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate or solicitor by or on behalf of his client” [emphasis added].

⁷⁰ Interestingly, s. 117(1)(b) of the Australian *Evidence Act 1995* defines “client” explicitly to include “an employee or agent of the client”, and in England, s. 10(1)(a) of the *Police and Criminal Evidence Act 1984* defines “items subject to legal privilege” to include communication made between a lawyer and “any person representing his client”.

instructions to the lawyer under the authority of the client.⁷¹ The communication made by the BIU to Freshfields in *Three Rivers (No. 5)* fell within the meaning of communication made “by or on behalf of” the client under the first limb of section 128(1). Although there were statements in the judgment to the effect that the three officers in the BIU were the client, the better view is that the client was the BOE and those officers communicated with Freshfields either *as* the client (being employees who personified the BOE for purposes of the privilege) or *on behalf of* the client (as employees authorised by the BOE to conduct privileged communications on its behalf with Freshfields).⁷²

But the first limb would not cover a case where a person is asked, either by the client or the lawyer, to investigate, gather information and bring new material into existence for subsequent use by the lawyer.⁷³ That person cannot properly be said to be making that communication “on behalf of” the client; he is a “third party” for the purposes of legal professional privilege. The distinction between an agent in the proper sense and a third party was drawn in *Wheeler v. Le Marchant*.⁷⁴ In that case, the Court of Appeal had to decide whether certain communications made between the solicitor and the property surveyors engaged by the solicitor came under legal advice privilege. Cotton L.J. explained:

If the representative is a person employed as an agent on the part of the client to obtain the legal advice of the solicitor, of course he stands in exactly the same position as the client as regards protection, and his communications with the

⁷¹ See *e.g.*, *Bunbury v. Bunbury* (1839) 2 Beav. 173 at 176 (where “a party, not being able himself to have a direct communication with his solicitor” is compelled to get someone to act as “the channel of communication between him and his solicitor”, the communication is privileged); *Walker v. Wildman* (1821) 6 Madd. 47 at 47-48 (“protection was the same whether the client communicated directly with his professional adviser, or through the intervention of a third person”); *Carpmael v. Powis* (1845) 9 Beav. 16 at 20 (communication made between client and solicitor through client’s brother, who acted as the “medium of communication” between the two, held to fall within the privilege); upheld on appeal, *Carpmael v. Powis* (1846) 1 Ph. 687 at 693 (client was “not a person of business” and relied on her brother to deal with her solicitor; communication made between the brother, as “intermediate agent”, and solicitor held to be privileged); *Reid v. Langlois* (1849) 1 Mac. & G. 627 at 632 and 638-639 (defendant, who was resident in Canada, engaged London mercantile agents to act as “mere conduit pipes to convey information” to defendant’s English solicitors; communications which passed between defendant and agents, and between agents and solicitor, were held to be privileged); this case was cited in *Hooper v. Gumm* (1862) 2 J. & H. 602 at 607 for the proposition that “a person resident abroad, and *bona fide* and reasonably employing an agent here as a channel of communication with his solicitor, is entitled to privilege for all the letters which he sends to the agent for that purpose”, and at 606, the Vice-Chancellor held that “a person resident in America, who has a litigation to carry on in England ... is ... at liberty, without forfeiting his privilege, to send his communications through an agent”.

⁷² In *Three Rivers (No. 5)*, *supra* note 1 at para. 3, the Court of Appeal referred to Freshfields as “the Bank’s solicitors”. It is true that counsel for the claimant accepted that “the BIU was ... the client of Freshfields” (para. 4) and the Court of Appeal also referred to the BIU as the client (at para. 31). But these statements should be read as loose ways of saying that, for purposes of the matter on which Freshfields was engaged, the three officers were the only persons within the BOE who were duly authorized by the BOE to speak for the BOE.

⁷³ See *Price Waterhouse v. BCCI Holdings (Luxembourg) SA* [1992] B.C.L.C. 583 at 588, per Millet J.; *In re Highgrade Traders Ltd.* [1984] B.C.L.C. 151 at 164. See also Hollander, *supra* note 1 at 259-260; Malek *et al.*, *supra* note 4 at 613-614. Thanki *et al.*, *supra* note 1 at 71 proposes this test: “Intellectual input by the agent will generally preclude him acting as a mere intermediary and will turn him into a third party for the purposes of the privilege”.

⁷⁴ (1881) 17 Ch. D. 675.

solicitor stands in the same position as the communications of his principal with the solicitor. But these persons [namely, the surveyors] were not representatives in that sense. They were representatives in this sense, that they were employed on behalf of the clients, the Defendants, to do certain work, but that work was not the communicating with the solicitor to obtain legal advice. So their communications cannot be protected on the ground that they are communications between the client by his representatives and the solicitor.⁷⁵

Cotton L.J. went on to add that, had the third party communication been made “in contemplation of litigation, or for the purpose of giving advice or obtaining evidence with reference to it”,⁷⁶ the communication would have come under litigation privilege. However, litigation privilege is different from legal advice privilege and, as is generally accepted, section 128 is not about litigation privilege.

Importantly, in *Three Rivers (No. 5)*, no communication was made to Freshfields directly by any of the employees who had prepared the contested documents. Those documents were not in themselves communications with Freshfields.⁷⁷ They were communications *between* employees, originating from the employees-authors of the reports and addressed to the officers of the BIU. Internal reports written by lower-level employees for senior management are not expressly covered under the first limb of section 128(1). However, for reasons given earlier, the concept of lawyer-client communication should be given an interpretation wide enough to cover documents prepared by employees of an organisation for the dominant purpose of allowing it to seek legal advice. It does not make sense to protect legal consultation *stricto sensu* without also protecting the reports created internally by the organisation to effectuate legal consultation. In principle, therefore, and leaving aside other textual problems to be discussed below, it is a reasonable interpretation of the first limb that it implicitly renders privileged documents created by the client for the dominant purpose of effectuating the communication that that limb expressly protects.

C. Second Limb of Section 128(1)⁷⁸

The second limb of section 128(1) is very widely formulated. One might be tempted to argue: were the *Three Rivers* type of scenario to arise in Singapore, the documents would be privileged by virtue of the second limb since, *ex hypothesi*, the lawyer became “acquainted” with the documents “in the course and for the purpose of his professional employment”. This literal construction will not do. On this reading, the second limb protects from disclosure *any* document with which the lawyer has become so acquainted. The risk of abuse is evident. For example, if this reading is right, the client can protect any document from disclosure, and hide it from the

⁷⁵ *Ibid.* at 684.

⁷⁶ *Ibid.*

⁷⁷ Noted, for *e.g.*, by Tomlinson J. at first instance in *Three Rivers (No. 5)*, *supra* note 12 at para. 3.

⁷⁸ It provides: “No advocate or solicitor shall at any time be permitted, unless with his client’s express consent, ... to state the contents or condition of any *document* with which he has become *acquainted in the course and for the purpose of his professional employment*”. (Italics added.)

opposing side, by simply passing it to his lawyer.⁷⁹ The second limb has to be read subject to some implicit and restrictive conditions. What this means is that the answer to our problem cannot be found in the express wording alone. Further, it may be noted that the second limb bars the lawyer from “*stating* the content or condition” of the document in question. It is not obvious that the second limb applies to the production of documents for inspection.

D. Section 131⁸⁰

The previous point raises a larger problem that affects the arguments made in connection with both the first and second limbs. Section 128 imposes on the *lawyer* a duty of secrecy. The dispute in *Three Rivers (No. 5)* was about the *client's* immunity from discovery of documents. Under the Act, the client himself is protected from being compelled to make disclosure under section 131. So perhaps we should really be looking at section 131. That provision protects the client from compelled disclosure of any confidential communication made between him and his lawyer.

Section 131 does not provide any explicit solution to either of the two problems identified at the beginning of this Part. First, it does not tell us how to identify the client in the corporate context. As suggested above, the simplest approach is to say that the client is the corporation that appointed the lawyer. But that still leaves unresolved the conditions under which a communication between the lawyer and one of the client's employees or officers would come under section 131. Since section 131 does not state the answer to this question, the answer may be drawn from the common law. This is permitted under section 2(2) since it is not inconsistent with the Act to use common law to fill a legislative gap.

Section 131 is technically confined to client-lawyer communication. But it should also protect from disclosure intra-corporate communications made specifically to enable the corporation to receive legal advice. The reasons for this reading are exactly the same as those given earlier in Part V.B for a liberal interpretation of the first limb of section 128(1). This interpretation is consistent with the approach taken at first instance by Tomlinson J. in *Three Rivers (No. 5)*.⁸¹ His judgment is discussed in the next Part.

⁷⁹ At common law, it is clear that the client cannot make a pre-existing document privileged by simply forwarding it to his lawyer: see *e.g.*, *R v. Peterborough Justices, ex p. Hicks* [1978] 1 All E.R. 225; *R v. King* (1983) 77 Cr. App. R. 1. Also relevant but less clearly: *Government of the State of Selangor v. Central Lorry Service and Construction Ltd.* [1972] 1 M.L.J. 102. See also John W. Strong *et al.*, eds., *McCormick on Evidence*, 5th ed. (St. Paul, Minn.: West Group, 1999) at 360 (noting that it would cause “an intolerable obstruction to justice” if the client could prevent pre-existing documents from disclosure simply by passing them to his lawyer). In the converse case, where the client is entitled to claim privilege over the document and he passes it to his lawyer, the latter would be entitled to claim privilege over the document too: s. 133 of the Act.

⁸⁰ This section, which is headed “Confidential Communications with Legal Advisers”, states: “No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser”.

⁸¹ *Supra* note 12.

VI. LESSONS FROM THE COMMON LAW

As we have seen in Part V, the Act does not dictate a specific solution to either of the two problems surrounding a corporation's claim of privilege. Two problems that arise in the corporate context are left unanswered. First, on a literal reading, both sections 128(1) and 131 confer privilege only on "communications" between lawyer and client. It was argued they ought to be read constructively such that they apply to documents created by the corporate client for the dominant purpose of seeking legal advice. As this Part shows, there is common law support for this approach.

Secondly, neither provision stipulates the circumstances under which a communication made by individual working for a company to the lawyer retained by it is privileged. On the basis that the common law on this issue complements the Act, this Part undertakes a comparative study of various common law approaches to "identifying the corporate client". The first two approaches are drawn from the English experience. The other approaches are taken in the United States, a country that happens to have the most developed law in this area. Another reason for examining cases from the United States is that the leading Supreme Court judgment in this area, *Upjohn Co. v. United States*,⁸² was much discussed during the hearing of arguments in *Three Rivers (No. 6)*.⁸³ Lord Scott, in the same case, found *Upjohn* "a valuable authority". However, the judge added that, "whether (or to what extent) the principles there expressed should be accepted and applied in this jurisdiction is debatable".⁸⁴ The caution is understandable. For example, there is in the United States no exact equivalent to litigation privilege and this may well have influenced the shape of her attorney-client privilege.⁸⁵ Be that as it may, broad principles can be usefully extracted from solutions that have emerged in the United States and the solutions will be assessed on their respective shortcomings and merits.

A. Position in England

1. Approach Taken by the Court of Appeal in *Three Rivers (No. 5)*

One approach that we might adopt is simply to follow the Court of Appeal decision in the *Three Rivers (No. 5)*. Various factors weigh against this option. First, it has been pointed out that the decision lacks guidance,⁸⁶ leaving us in the dark as to who

⁸² (1981) 449 U.S. 383 [*Upjohn*].

⁸³ *Supra* note 3 at 636-637.

⁸⁴ *Ibid.* at 653.

⁸⁵ See e.g., Eagles, *supra* note 21 at 303 and Loughrey, *supra* note 1 at 184. There are substantial differences between the American "work product" doctrine and the litigation privilege available in Commonwealth jurisdictions. (The former is codified in r. 26(b)(3) of the U.S. *Federal Rule of Civil Procedure*, online: Cornell University <<http://www.law.cornell.edu/rules/frcp/Rule26.htm>>). Litigation privilege offers stronger protection than the work-product doctrine. Documents that constitutes work product may yet be discoverable where "the other side has a real need for the information ... and has no other way of getting it": Richard D. Friedman, *The Elements of Evidence*, 3rd ed. (St. Paul, MN: West Group, 2004) at 409.

⁸⁶ Hirt, *supra* note 47 at 220 criticised the Court of Appeal for doing "little to clarify the underlying principles outside the narrow context of the circumstances in the *Three Rivers* litigation. Many issues remain unresolved. As a result, it has become very difficult for practitioners to advise clients on the scope of legal advice privilege in certain circumstances".

amongst the company's employees and how many of them may be authorised by the company to communicate with its lawyer.⁸⁷ An editor of *Phipson on Evidence* observes that "[t]here was no argument as to how in any given case 'the client' is defined"; the court "appear[s] to have envisaged that the client would be the person or persons charged with the obtaining of legal advice within the entity".⁸⁸ Another commentator reads *Three Rivers (No. 5)* to mean that "employees are to be treated as third parties unless they are personally responsible for the formal process of instructing the lawyer and receiving his advice".⁸⁹

It is true that the Court of Appeal did not spell out the circumstances under which an employee or officer of a company is able to conduct privileged communications with the company's lawyer. This, however, is unsurprising since the issue strictly speaking did not arise. All material communications between Freshfields and the BOE were made through the BIU. It was accepted by all parties that, for purposes of the privilege, the BIU personified the BOE.⁹⁰ Therefore it was not in dispute that the communications made between the BIU and Freshfields were communications made between the client and its solicitors. No employee of the BOE other than members of the BIU communicated directly with Freshfields.

It is submitted that had any of the employees who wrote the internal reports communicated directly with Freshfields, the communication would not be privileged unless (i) in making the communication, the employee was authorised by the BOE to do so,⁹¹ and (ii) the dominant purpose of the communication was to enable the BOE to seek legal advice. Requirement (ii) is discussed below; it was proposed by Tomlinson J. at first instance as the proper way of limiting the scope of the privilege.

Requirement (i) is consistent with *Three Rivers (No. 5)*. Although the BOE gave the officers in the BIU the power to seek and receive legal advice from Freshfields, one could view the facts more broadly. The broader reason why the officers in the BIU could speak for the BOE vis-à-vis Freshfields was simply because the BOE had authorised them to do exactly that. The Court of Appeal did not say that the BOE could not, in law, authorise any *other* employee or officer to communicate with

⁸⁷ See Preston-Jones & Paterson, *supra* note 48.

⁸⁸ *Supra* note 4 at 623. This passage is repeated in Hollander, *supra* note 1 at 261 and 263. The New Zealand Law Commission disagreed with the Australian approach of including every employee of the corporate client as the client for the purpose of the privilege as "such a rule would risk unduly broadening the absolute protection ... which would be conferred on lawyer-client communications". It decided, rather unhelpfully, that the term "client" should not be defined and recommended that the "court should determine in each case whether the communication is sufficiently analogous to a statement made by a client to a private solicitor to come within the absolute [legal advice] privilege. Tests based on seniority or degree of control, divert attention from the more important issue of the purpose of the communication": New Zealand Law Commission, *Evidence Law: Privilege*, Preliminary Paper No. 23 (Wellington, 1994) [New Zealand Law Commission, *Evidence Law: Privilege*] at paras. 79-80, online: New Zealand Law Commission <<http://www.lawcom.govt.nz>>.

⁸⁹ Thanki *et al.*, *supra* note 1 at 40:

⁹⁰ See Zuckerman, *supra* note 1 at 626-627.

⁹¹ Thanki *et al.*, *supra* note 1 at 43: "If a cleaner employed by the Bank of England decided that he knew something interesting about BCCI and wrote to Freshfields he would clearly not be communicating as the client simply because he was employed by the Bank. To communicate in this capacity he would at least have to be authorized by or on behalf of the Governors to do so".

Freshfields by providing the latter with relevant information;⁹² it was merely the case that, as a matter of fact, the BOE had not done so. Indeed, we could put it even more strongly: the BOE intended that no one else within the BOE should communicate directly with Freshfields. After all, the BIU was specially created “to deal with all communications between the Bank and the [I]nquiry”.⁹³ There were obvious benefits in directing all communications concerning the Inquiry to pass through the BIU. This arrangement ensured that the BIU knew everything that was going on in connection with the Inquiry. It gave the BIU complete control and placed it in an effective position to co-ordinate actions that needed to be taken within the BOE in preparation of its case before the Inquiry.

In *Three Rivers (No. 5)*, the Court of Appeal accepted, as it was by all parties, that the three officers appointed by the BOE counted as “the client”. It would be too quick to infer from this that the Court of Appeal meant to endorse as a general principle that it is entirely up to the company to decide who amongst its employees, and how many of them, can hold privileged communication with its lawyer. If the law were as simple as that, the company can achieve maximum protection by identifying all of its employees as the client. Surely it is for the court to decide how wide a privilege the company is entitled to claim. Who the company appoints as the person in charge of making communication with its lawyer is relevant but cannot be determinative. It should be material not only *who* made the communication, but *why* the communication was made. The privilege ought to be reined in by imposing the “dominant purpose” requirement discussed below.

What is problematic about the Court of Appeal decision is its support for a different principle. On a wide reading, it appears that legal advice privilege cannot be claimed by an organisation over reports created internally by its employees for the purpose of allowing the organisation to receive legal advice from its lawyers. This view has rightly attracted strong criticisms in England for an alleged failure to reflect the practical realities of corporate life. Apparently, it took many legal practitioners by surprise.⁹⁴ Complaints are made that the decision “caused considerable concern and practical difficulty to clients and solicitors”.⁹⁵ Indeed, the Court of Appeal decisions in *Three Rivers (No. 5)* and *Three Rivers (No. 6)* produced so much disquiet that in *Three Rivers (No. 6)*, the Law Society, the Bar Council and the Attorney-General took the unusual step of intervening in the appeal in an attempt to get the House of Lords to restate or clarify the scope of legal professional privilege.⁹⁶ Although the House of Lords declined to revisit the “who is the client?” problem, primarily because the appeal did not turn on the question but also for a number of other reasons,⁹⁷ the law lords took care to avoid expressing neither approval nor disapproval of the Court of

⁹² If this is right, the following view advocated by Thanki *et al.*, *supra* note 1 at 45-46 is, *pace* the authors, actually consistent with *Three Rivers (No. 5)*: “any person employed by the corporation who is expressly or impliedly authorized to provide information or instructions to lawyers ... for the purposes of the corporation receiving legal advice should be regarded as acting *qua* client”.

⁹³ *Three Rivers (No. 5)*, *supra* note 1 at 1562 [emphasis added].

⁹⁴ As reported by Hirt, *supra* note 47 at 222 and 226; Amanda Wadey & Guy Pendell, “Three Rivers—Storm in a Teacup?” [2004] J. Intl. Banking L. & Reg. 516 at 517.

⁹⁵ As Counsel for the Law Society told the House of Lords in *Three Rivers (No. 6)*, *supra* note 3 at 630.

⁹⁶ See the powerful submissions made by Sir Sydney Kentridge Q.C. on behalf of the Law Society reported *ibid.* at 629-632.

⁹⁷ *Ibid.* at para. 47.

Appeal's decision in *Three Rivers (No. 5)*.⁹⁸ Thus, the House of Lords deliberately left the point open for future consideration.⁹⁹ Some commentators predict that it will not be long before the point is re-contested in the English courts¹⁰⁰ while others believe that the Court of Appeal judgment will "be the subject of adverse judicial comment in the future".¹⁰¹ That the judgment on this point may soon be overruled in England is a further reason for caution against following it in Singapore.

2. Approach Taken at First Instance in *Three Rivers (No. 5)*

We should instead adopt the test laid down at first instance by Tomlinson J. in *Three Rivers (No. 5)*.¹⁰² Briefly, under that test, an internal document is privileged if it is created by an employee or officer of the organisation for the dominant purpose of the organisation seeking legal advice. Since the judgment of Tomlinson J. is unreported, it is worthwhile quoting at some length from the passage in which he explained and defined his approach:

If the principle is that a person should not be in any way fettered in communicating with his solicitor, and must not be fettered in preparing documents to be communicated to his solicitor, it must be axiomatic that it is the confidentiality of the whole process of communication which requires protection, not just those documents which can be recognised as comprising the actual or final communication. This becomes particularly obvious when one considers the case of a corporation which can only act through individuals, perhaps needing to act through many.... Of course, there needs to be a control mechanism which prevents privilege attaching to documents which would have been brought into existence for other purposes in any event or to those which are brought into existence for a dual or multiple purpose. The necessary control mechanism is supplied by the dominant purpose test, which must be applied at the time of creation. In my judgment *an internal confidential document, not being a communication with a third party, which was produced or brought into existence with the dominant purpose that it or its contents be used to obtain legal advice is privileged from production. The purpose*

⁹⁸ *Ibid.* at paras. 48 and 118.

⁹⁹ While it is true that "we are still in the dark as to the House of Lords' thinking on" this point (Preston-Jones & Paterson, *supra* note 48), the Law Lords did take notice of the wide-spread opposition to the Court of Appeal judgment in *Three Rivers (No. 5)*. For example, Lord Scott observed: "The written submissions from the interveners, and particularly that from the Law Society, make clear their concern that the *Three Rivers (No. 5)* Court of Appeal judgment may have gone too far" (*supra* note 3 at para. 21); and Lord Carswell found the reasoning of Tomlinson J. "to have considerable force" (*supra* note 3 at para. 70; but compare *ibid.* at para. 118 where Lord Carswell expressly reserved his opinion on the correctness of the Court of Appeal judgment in *Three Rivers (No. 5)*). Roderick Munday finds it significant that the House of Lords "went out of its way" not to express approval of the Court of Appeal's decision: Roderick Munday, *Evidence*, 3rd ed. (Oxford: Oxford University Press, 2005) at 145.

¹⁰⁰ Neil Andrews, "Legal Advice Privilege's Broad Protection—The House of Lords in *Three Rivers (No. 6)*" (2005) 24 C.J.Q. 185 at 192; Munday, *ibid.* at 145.

¹⁰¹ Guy Pendell & Amanda Wadey, "Three Rivers—Storm in a Teacup? Part Two" [2005] J. Intl. Banking L. & Reg. 237 at 238. See also Jilliane Seymour, "Legal Advice Privilege and Presentational Advice" [2005] Cambridge L.J. 54 at 56, observing that "the weight of opinion is against this restrictive approach to who is the "client" and it seems likely that this issue will also come to the House of Lords". For an opposite view, see Zuckerman, *supra* note 1 at 632.

¹⁰² *Supra* note 12.

*must be that of the author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence.*¹⁰³

This dominant purpose test strikes a sensible balance, as Lord Carswell puts it (albeit not with the passage above in mind), “between two opposing imperatives, making maximum relevant material available to the court of trial and avoiding unfairness to individuals by revealing confidential communications between their lawyers and themselves”.¹⁰⁴ The test is attractive because it is relatively simple and relies on a criterion that is, as it were, already “tried and tested”; the “dominant purpose” requirement has a well-established counterpart in litigation privilege.¹⁰⁵

Controversies can arise, as it did in the series of *Three Rivers* litigation, on the meaning of legal advice. At first instance, Tomlinson J. characterised as legal the advice that Freshfields had given to the BIU.¹⁰⁶ But the Court of Appeal disagreed. Although it did not, strictly speaking, have to rule on the point, it expressed the view that the documents in question were not created “for the dominant purpose of taking legal advice upon” them. According to the Court of Appeal, the advice was predominantly non-legal, relating merely to the matter of “putting relevant factual material before the [I]nquiry in an orderly and attractive fashion”.¹⁰⁷

The same issue arose in the parallel set of litigation regarding the extent to which privilege applies to communication between the BIU and Freshfields. In *Three Rivers (No. 6)*, the Court of Appeal held that even though Freshfields gave some advice to the BOE on their legal rights and obligations, their “dominant role ... was to advise on preparation and presentation of evidence for the ... [I]nquiry”,¹⁰⁸ and “presentation advice” did not qualify as legal advice for the purposes of the privilege. The Court of Appeal’s judgment was reversed on further appeal. The House of Lords reasserted the broader view first taken in *Balabel v. Air India*.¹⁰⁹ The privilege “is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context”. In *Three Rivers*, the Inquiry provided the legal context. As Lord Rodger puts it, the advice that Freshfields gave was legal in the “broader sense” that “the BIU was asking them to put on legal spectacles when reading, considering and commenting on the drafts [I]t was asking them to consider, as lawyers, how the Bank’s evidence could be most effectively presented to Bingham L.J., given that he was inquiring into the Bank’s discharge of their legal responsibilities under the Banking Acts”.¹¹⁰ Lord Brown

¹⁰³ *Ibid.* at para. 30 [emphasis added].

¹⁰⁴ *Supra* note 3 at para. 86.

¹⁰⁵ In the case of litigation privilege, the communication with a third party must be made for the “dominant purpose”, not of seeking legal advice in general, but of actual or anticipated litigation. See *e.g.*, *Brink’s Inc.*, *supra* note 61.

¹⁰⁶ *Supra* note 12 at para. 32.

¹⁰⁷ *Supra* note 1 at para. 37.

¹⁰⁸ *Three Rivers (No. 6)*, *supra* note 3 at para. 28.

¹⁰⁹ *Supra* note 31.

¹¹⁰ *Supra* note 3 at para. 60. See also *ibid.* at para. 61 where Baroness Hale acknowledged that there will be borderline cases but added that “much will depend upon whether it is ... reasonable for the client to consult the special professional knowledge and skills of a lawyer”. Lord Scott suggested that in “cases of doubt the judge ... should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law. If it does not, then ... legal advice privilege would not apply”: *ibid.* at para. 38.

went even further. He would allow the privilege to be claimed over consultation with lawyers in connection with *any* formal inquiry.¹¹¹

Although it can be controversial whether an advice is of a legal nature, this should not be taken against the dominant purpose test enunciated by Tomlinson J. This is because the controversy is not *generated* by his test. In any event, with the House of Lords' decision in *Three Rivers (No. 6)*, the English position in this controversy is brought back to square one, so to speak; it reaffirms the old principle set out *Balabel v. Air India*, that the scope of the privilege extends to "advice as to what should prudently and sensibly be done in the relevant legal context".

B. Position in the United States

The problem of determining who among the corporation's employees speaks on its behalf for purposes of the privilege is most extensively studied in the United States. Rule 501 of the United States *Federal Rules of Evidence* leaves the privilege to be governed by the common law.¹¹² Different states have adopted different tests.¹¹³ Although there is no uniformity in approach, the judiciary in the United States have followed, more or less, one of two tests. They are the "control group" test and the "subject matter" test. These two tests (especially the second) come in various versions, and, sometimes, a "synthesis" of the two is applied.¹¹⁴

1. Control Group Test

On one approach, the attorney-client privilege covers only communication between the lawyer and those of the corporation's employees who are authorised to take decisions on its behalf upon receipt of the legal advice that is sought. Only those employees count as the "client" for the purposes of the attorney-client privilege. This so-called control group test was first applied in *City of Philadelphia v. Westinghouse Electric Corp.* where Kirkpatrick J. held:

Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that *if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which*

¹¹¹ *Ibid.* at para. 120.

¹¹² The rule states: "[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience".

¹¹³ According to one survey: "Among the fifty states, there are a number of competing tests for determining the applicability of the attorney-client privilege in the corporate context, and the issue ... is far from settled ... In most states ... it is unclear which employee communications to corporate counsel will be protected by the attorney-client privilege": Brian E. Hamilton, "Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney-Client Privilege" (1997) *Ann. Surv. Am. L.* 629 at 629.

¹¹⁴ For useful discussion on this topic in the United States, see Sexton, *supra* note 60; Note, "The Attorney-Client Privilege and the Corporate Client: Where Do We Go After *Upjohn*?" (1983) 81 *Mich. L. Rev.* 665; Waldman, *supra* note 54; Eagles, *supra* note 21 at 303-306.

has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.¹¹⁵

In effect, the control group test “essentially limits the application of the privilege to communications between a member of senior management and an attorney”.¹¹⁶ Intra-corporate communications, such as documents created by one department and circulated to another, are not privileged under this test.¹¹⁷ Hence, on this approach, the documents in contention in *Three Rivers (No. 5)* would not be privileged.

The control group test has been much criticised.¹¹⁸ In *Upjohn*,¹¹⁹ the United States Supreme Court was asked to choose between the control group test and the subject-matter test (the latter is discussed below). Although the court declined “to lay down a broad rule or series of rules to govern all conceivable future questions in this area”,¹²⁰ it found the control group test to be unsatisfactory in at least three respects.

First, the control group test is uncertain and “difficult to apply in practice”.¹²¹ Membership of the control group is often not easy to determine. Secondly, “[i]n the corporate context ... it will frequently be employees beyond the control group ... who will possess the information needed by the corporation’s lawyers”.¹²² The lawyer often needs to communicate with those middle or lower-level employees in order to put himself in an adequate position to advise the corporation. And yet such communication is not protected under the “control group” test. The test therefore “makes it difficult for corporate attorneys to formulate sound advice”.¹²³ It “overlooks the fact that the privilege exists to protect not only the giving of professional advice to

¹¹⁵ (1962) 210 F. Supp. 483, 485 (E.D. Pa.) (a decision of the United States District Court For The Eastern District Of Pennsylvania) [emphasis added].

¹¹⁶ Douglas R. Richmond, “The Attorney-Client Privilege and the Associated Confidentiality Concerns in the Post-Enron Era” (2005) 110 Penn. St. L. Rev. 381 at 387-388.

¹¹⁷ Weinstein *et al.*, *supra* note 8 at para. 503-65.

¹¹⁸ Richmond, *supra* note 116 at 388: “The control group test has been severely criticized because (1) it has a chilling effect on corporate communications, (2) it frustrates the very purpose of the privilege by discouraging subordinate employees from communicating important information to corporate counsel, (3) it makes it difficult for corporate counsel to properly advise their clients and to ensure their clients’ compliance with the law, and (4) it yields unpredictable results”.

¹¹⁹ *Supra* note 82.

¹²⁰ *Ibid.* at 386. Although the Supreme Court explicitly declined to lay down any general test in *Upjohn*, one commentator has argued that it is an authority for the functionalist approach. On his reading, the Supreme Court in *Upjohn* “utilized a functional mode of analysis to determine whether the privilege should apply in the situation before it, that is, it asked whether the application of the privilege in circumstances of the kind at issue would enhance the flow of information to corporate counsel regarding issues about which corporations seek legal advice”. Sexton, *supra* note 60 at 462. This would seem too general to be of much use. To say that we should be guided directly by the aim of the privilege is merely to side-step the difficulty of having to define the legal rule that will best serve that aim. There is excessive uncertainty in an approach that leaves individual cases to be guided by the rationale of the privilege alone.

¹²¹ *Supra* note 82 at 393.

¹²² *Ibid.* at 391.

¹²³ *Ibid.* at 392.

those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice".¹²⁴

This is related to the third criticism, according to which, the "control group" test "threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law".¹²⁵ It is said that the corporation needs to "constantly go to lawyers to find out how to obey the law".¹²⁶ Where, as is usually the case, this requires the lawyer to communicate with employees outside of the control group, the corporation, in its quest for knowledge of the laws by which it is bound, puts itself at risk of having sensitive and confidential information exposed in subsequent discovery applications. We encountered this line of argument in Part IV. It has an intuitive appeal. However, as previously cautioned, its strength should not be exaggerated.

2. Subject-Matter Test and Modified Subject-Matter Test

In the face of these criticisms, the control group test fell out of favour. That test, as we may remember, focuses on the authority of the employee who communicates with the lawyer; for the privilege to bite, the employee needs to be authorised by the corporation to take decisions on its behalf upon the legal advice that is sought. A different approach focuses on the *subject-matter* of the communication over which privilege is claimed rather than the *authority of the person* who is assigned to handle the matter on which the lawyer is consulted. The case that laid down this alternative approach, the so-called "subject-matter" test, was *Harper & Row Publishers v. Decker*,¹²⁷ a decision of the United States Court Of Appeals for the Seventh Circuit. The Court held:

[A]n employee at a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged [1] where *the employee makes the communication at the direction of his superiors* in the corporation and [2] where *the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment*.¹²⁸

This test was an improvement over the control group test. But it was soon found to be unsatisfactory too. It was considered overly wide and open to abuse. In theory it permitted the corporation to gain privilege over all sorts of routine reports by instructing their employees to send their reports directly to the lawyer. It has been argued that the rationale of the privilege does not call for protection of such reports:¹²⁹ "application of the attorney-client privilege will do little to further encourage this type of communication since they will continue to be made for independent business reasons".¹³⁰

¹²⁴ *Ibid.* at 390.

¹²⁵ *Ibid.* at 392.

¹²⁶ *Ibid.*

¹²⁷ (1970) 423 F.2d. 487 [*Harper & Row*].

¹²⁸ *Ibid.* at 491-492 [emphasis added].

¹²⁹ Weinstein *et al.*, *supra* note 8 at para. 503-566.

¹³⁰ *Diversified Industries, Inc. v. Meredith* (1978) 572 F.2d. 596 [*Diversified Industries*] at 609.

Thus, the original subject-matter test (or, as it is sometimes called, the *Harper & Row* test) later came to be modified in *Diversified Industries, Inc. v. Meredith*,¹³¹ a decision of the United States Court Of Appeals for the Eighth Circuit. The Court added further restrictions to the scope of the privilege, the most significant of which is the new requirement that the communication must be made for the purpose of securing legal advice. The full statement of the test is as follows:

[T]he attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.¹³²

The Supreme Court's decision in *Upjohn* was consistent with this test since each of the five elements was satisfied on the facts in that case.¹³³ Element (2) essentially stipulates that the employee must have been authorised by the company to make the communication that he did with the attorney. This squares with the identification of the BIU as "the client" in *Three Rivers (No. 5)*. The officers in the BIU were specifically authorised by the BOE to liaise with Freshfields. Element (1) is repeated in element (3): the privilege applies only to communication made between corporate counsel and corporate employee for the purpose of legal consultation.¹³⁴ This is in line with and fortifies the earlier suggestion to adopt the approach taken by Tomlinson J. at first instance in the *Three Rivers (No. 5)*. Element (4) adds a further valid restriction. Should an employee speak with his employer's lawyer on matters unrelated to his employment, it is difficult to see why the employer should have the right to claim privilege over that communication.

It should be noted that the United States cases were mainly concerned with the privilege status of communications carried out between corporate lawyers and employees of their clients. In *Three Rivers (No. 5)*, the communications contained in the documents sought to be discovered were made *between* employees of the BOE, that is to say, between those who did not belong to the BIU and those who did. In the United States, while the common law attorney-client privilege applies to lawyer-client communication, it is unclear whether it extends to intra-corporate documents of the sort contested in *Three Rivers (No. 5)*.¹³⁵ The position is however different

¹³¹ *Ibid.*

¹³² *Ibid.* at 609. This modified subject-matter owes its origin to Jack B. Weinstein. For detailed discussion of each element of the test, see Weinstein *et al.*, *supra* note 8 at paras. 503-67 to 503-71.

¹³³ As noted by Sexton, *supra* note 60 at 461-462, although, as he rightly added, the Supreme Court held back from endorsing the modified subject-matter test.

¹³⁴ The New Zealand Law Commission similarly thought that the applicability of the privilege should turn on the purpose of the communication rather than the seniority of the employee who made the communication. However, the Commission also considered it to be of relevance whether the employee was entrusted with the task of liaising with the lawyer: New Zealand Law Commission, *Evidence Law: Privilege*, *supra* note 88 at 26.

¹³⁵ See John W. Strong *et al.*, *supra* note 79 at 385; *Wigmore on Evidence*, John T. McNaughton rev. ed. (Boston: Little, Brown & Co, 1961) vol. 8, at 594-595.

under rule 502(b) of the United States' *Revised Uniform Evidence Rule*¹³⁶ which has been adopted in a number of States.¹³⁷ Under that rule, attorney-client privilege reaches communication made between "representatives of the client" "for the purpose of facilitating the rendition of professional legal services to the client". Given the wide definition of "representative of the client",¹³⁸ rule 502(b) is broad enough to cover the intra-corporate communications. This rule is consistent with the decision of Tomlinson J. to uphold the claim of legal advice privilege in *Three Rivers (No. 5)*.

VII. CONCLUSION

It is generally agreed, and the position is taken in every jurisdiction considered in this article, that legal advice privilege should be made available to the corporate client. However, doubts have been raised from time to time as to whether corporations ought to be allowed to claim privilege at all or whether they should have as much protection under the privilege as individuals enjoy when seeking legal advice.¹³⁹ The right of an individual to claim privilege is often justified in terms of protecting privacy or as a fundamental human right.¹⁴⁰ The New Zealand Law Commission has taken the view, as have others, that it is not easy to extend this justification to a "monolithic corporation".¹⁴¹ Even so, the Law Commission was ultimately not persuaded that this consideration is sufficient to deprive companies of the privilege.

A different doubt is raised by some writers. It is not obvious to them that conferring the privilege on a corporate client would increase the flow of information to the lawyer. According to one author, "corporate clients are candid with their attorneys not because of the privilege but because they realize that the costs of withholding information are likely to be far greater than the disadvantages flowing from the risk that the communication will later be divulged".¹⁴² But the same author is quick to add that this argument "must be tempered".¹⁴³ Employees, as individuals, may hold back from complete candour, for reasons of their own, without the guarantee of privilege. The hitch to this reasoning is that the privilege is held by the company;

¹³⁶ Available online: University of Pennsylvania <<http://www.law.upenn.edu/bll/ulc/ure/evid1200.htm>>.

¹³⁷ For a list of the States, see online: University of Cornell <<http://www.law.cornell.edu/uniform/evidence.html>>.

¹³⁸ Under r. 502(a)(4), "representative of the client" includes "a person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client".

¹³⁹ See Charles Alan Wright & Kenneth W. Graham, *Federal Practice and Procedure* (West Publishing) vol. 24, §5476 (available on Westlaw); Jonathan Auburn, *Legal Professional Privilege: Law and Theory* (Oxford: Hart, 2000) at 32-33. Contrast Waye, *supra* note 59 at 32-34.

¹⁴⁰ For a theory that defends the privilege as fundamental to the administration of justice, see H.L. Ho, "Legal Professional Privilege and the Integrity of Legal Representation", forthcoming in *Legal Ethics*.

¹⁴¹ Waldman, *supra* note 54 at 481, and see also at 475; New Zealand Law Commission, *Evidence Law: Privilege*, *supra* note 88 at 25. Tapper, *supra* note 46 at 184, echoes this point. He finds that the policy of preserving privacy has an archaic ring when applied to a large public body such as the BOE where transparency is a matter of great public concern. Luban, *supra* note 6 at 217 has argued against conferring the privilege on corporations because they lack the "characteristic moral feature of natural persons", namely, "autonomy in decision-making".

¹⁴² Sexton, *supra* note 60 at 464. Similarly, see *supra* note 6 at 218.

¹⁴³ Sexton, *supra* note 60 at 464.

the privilege does not belong to its employees as individuals, and is not designed to promote candour on their part.¹⁴⁴

Recently, major corporate scandals have attracted intense media coverage. In such a climate, there is naturally pressure for greater transparency in, and stronger supervision of, corporate affairs.¹⁴⁵ There is a lot to be said for more circumspection in defining the scope of the privilege that is available to a company. A sensible compromise must be struck between our interests for transparency in corporate management and the practical demands for confidentiality in legal consultation on commercial affairs.¹⁴⁶ The English Court of Appeal took too narrow an approach in *Three Rivers (No. 5)* in denying protection to intra-corporate documents. The dominant purpose test proposed by Tomlinson J. is the best option. Experience in the United States supports the approach taken by his Honour.

The principal contentions of this article may be summarised in three propositions:¹⁴⁷

- (i) In the corporate context and for the purposes of the privilege, the client is the company which employed the lawyer.
- (ii) Legal advice privilege applies to a communication between the lawyer and the employee or officer of the company only when at least three conditions are satisfied. *First*, the employee or officer was authorized by the company to make that communication.¹⁴⁸ *Secondly*, the communication was made by the employee or officer in his role as such and was of information acquired in that role.¹⁴⁹ *Thirdly*, the communication was made for the dominant purpose of enabling the company to seek legal advice.¹⁵⁰
- (iii) A report or memorandum prepared by an employee or officer of the company is protected by legal advice privilege if it was prepared at the instruction of the company for the dominant purpose of enabling it to secure legal advice.¹⁵¹

¹⁴⁴ Luban, *supra* note 6 at 220-228.

¹⁴⁵ Such pressures have led to statutory inroads into the privilege. For *e.g.*, in England and Wales, see s. 93A(3)(a) of the *Criminal Justice Act 1993*, Sir Mark Potter, "The Ethical Challenges Facing Lawyers in the Twenty-first Century" (2001) 4 *Legal Ethics* 23 at 33-34; and on the impact of the *Sarbanes-Oxley Act* in the United States, see Eli Wald, "Lawyers and Corporate Scandals" (2004) 7 *Legal Ethics* 54.

¹⁴⁶ Loughrey, *supra* note 1 at 184 claims that the outcome "cannot be made on principle but is a policy choice based upon the weight attached to the competing public interests underpinning legal advice privilege and the requirement to disclose":

¹⁴⁷ See also the approach advocated by counsel for the Law Society before the House of Lords in *Three Rivers (No. 6)*, *supra* note 3 at 631: "Where a solicitor is retained by a company, "the client" is simply the company. Any communication from any employee of the company should therefore be privileged provided that (a) the communication is made with the purpose of enabling the company to take legal advice and (b) the company authorises the employee to communicate his knowledge to the solicitor, whether directly or indirectly".

¹⁴⁸ This proposition is consistent with the result of the Court of Appeal judgment in *Three Rivers (No. 5)*, *supra* note 1. It is also captured in the second element of the test set out in *Diversified Industries*, *supra* note 132.

¹⁴⁹ This principle is based on the fourth requirement under the test in *Diversified Industries*, *supra* note 132.

¹⁵⁰ The requirement of "dominant purpose" was introduced by Tomlinson J. in *Three Rivers (No. 5)*, *supra* note 12, and appears in the first and third elements of the test formulated in *Diversified Industries*, *supra* note 132.

¹⁵¹ This proposition is based directly on the judgment of Tomlinson J. in *Three Rivers (No. 5)*, *supra* note 12, and goes against the Court of Appeal judgment which overturned his decision.

Sections 128 and 131 of the Act do not expressly provide clear answers to the problems addressed in this article. Those sections do not, as such, prevent us from adopting the above three principles. The principles merely supplement the sections, filling in gaps that are not directly addressed in the Act. Section 2(2) allows this to be done since it produces no real inconsistency between the Act and the common law.

POSTSCRIPT

After submission of this article for publication, the High Court rendered a relevant judgment in *Skandinaviska Enskilda Banken A.B. (Publ.), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte. Ltd.*¹⁵² A senior employee of the defendant company ('ABPS') cheated a number of banks by taking up false loans under the latter's name. ABPS knew about the matter only when their parent company ('ABPL') was informed of it by the Commercial Affairs Department. APBL appointed a "Special Committee", comprising a group of directors of APBL,¹⁵³ "to oversee the investigations and to take any necessary actions in relation to [the] fraud in order to protect the interests of ABPS and ABPL".¹⁵⁴ The Special Committee in turn appointed an accounting firm ('PWC') and a law firm ('D&N') to look into the unauthorized transactions and issues arising therefrom.

In the course of their investigation, PWC and D&N jointly interviewed various employees of APBS. Information obtained from those interviews was incorporated into a number of draft reports.¹⁵⁵ The draft reports were "sent to the Special Committee in PWC's sole name".¹⁵⁶ However, PWC and D&N "jointly worked on the drafts prepared by PWC before they were sent to the Special Committee".¹⁵⁷ For reasons not revealed in the judgment, no final engrossed report was issued.

The defrauded banks subsequently brought actions against APBS. They applied for inspection of the draft reports. APBS resisted the application on grounds of legal advice privilege and litigation privilege. Belinda Ang J. upheld both grounds. Many issues arose for consideration. Some of the issues fall outside the scope of this article; they will not be discussed in this postscript. The judgment is silent on the topic dealt with in proposition (iii) of the Conclusion, which was also the main point of contention in *Three Rivers (No. 5)*: in *Skandinaviska*, and unlike in *Three Rivers (No. 5)*, the dispute was not over the applicants' right to inspect reports or memoranda prepared by employees of the defendant.

The High Court noted that "legal advice privilege in Singapore is basically governed by ss 128 and 131" of the Act.¹⁵⁸ Those provisions operate not just at the trial stage but also in pre-trial discovery proceedings. It is unclear whether it is the one or the other, or both sections, which governed the present case; sometimes the two provisions were treated as a complementary set and at other times, the analysis turned only on section 128.¹⁵⁹

¹⁵² [2006] S.G.H.C. 91, [2006] 3 S.L.R. 441.

¹⁵³ *Ibid.* at para. 30.

¹⁵⁴ *Ibid.* at para. 9.

¹⁵⁵ *Ibid.* at para. 36.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.* at para. 14.

¹⁵⁸ *Ibid.* at para. 17.

¹⁵⁹ Accordingly, not much light was shed on the issues discussed in Part V above.

Ang J. considered the English Court of Appeal judgment in *Three Rivers (No. 5)* to be inconsistent with section 128. The decision was therefore inapplicable in Singapore under section 2(2). But where exactly is the inconsistency? The judge took as her “starting point ... that legal advice privilege only covers communications between the legal adviser and his client”.¹⁶⁰ This was also the view taken in *Three Rivers (No. 5)*. The inconsistency was perhaps thought to lie in the identity of the client. According to Ang J., D&N was acting for ABPS and APBL.¹⁶¹ It seems therefore that the judge identified D&N’s clients as ABPS and APBL and not the Special Committee. This view is consistent with point (i) of the Conclusion. On the judge’s reading of *Three Rivers (No. 5)*, the clients were the three officers in the BIU and not the BOE.¹⁶² While this is the standard interpretation of *Three Rivers (No. 5)*, it is, as this article has argued, not entirely accurate. As suggested earlier, the better view is that the BOE were the clients but, in the circumstances of the case, only the BIU was authorized to communicate with Freshfields for or on behalf of BOE on all matters related to the Inquiry. If this is right, it is not inconsistent with *Three Rivers (No. 5)* to identify ABPS and ABPL as the clients in *Skandinaviska*.

After noting that section 128 applies to communications made to the lawyer “by or on behalf of the client”, Ang J. went on to observe that the section:

makes no distinction between communications made by an individual and those made by his employee or agent. Neither is there a distinction made between communications made by a corporate client and those made by the corporate client’s employees or agents. This view is the same as the common law position, which is that both the client and the solicitor may act through the medium of an agent.¹⁶³

This passage points to similarities rather than differences between section 128 and the common law. Yet, immediately after this passage, the judge stated: “From this perspective, the decision in *Three Rivers (No. 5)* is inconsistent with ... s 128”. It could be that, in the judge’s view, *Three Rivers (No. 5)* brought about a change in the common law. Of course, this was not how Court of Appeal saw its judgment; it took pains to ground its decision on previous common law authorities. However, *Three Rivers (No. 5)* did bring about a change in the sense that it broke from views popularly held by practitioners on the scope of the privilege available to their corporate clients. *Three Rivers (No. 5)* did not say that communications between lawyers and their corporate clients’ employees are no longer privileged. It was accepted in *Three Rivers (No. 5)* that communications between the BIU, who were employees of the BOE, and Freshfields were privileged. That case therefore stood for the narrower proposition that, at common law, only communications made by *some* of the employees to the lawyer are protected. In claiming that section 128 is inconsistent with *Three Rivers (No. 5)*, Ang J. could have meant that, under that section, communications between a lawyer and *any* of his corporate client’s employees or agents are privileged.

¹⁶⁰ *Supra* note 152 at para. 28.

¹⁶¹ *Ibid.* at para. 30.

¹⁶² *Ibid.* at para. 29.

¹⁶³ *Ibid.* at para. 30.

According to the judge, there was “no question that the communications between APBS and D&N *prima facie* fell within the ambit of legal advice privilege”.¹⁶⁴ The “communications” referred to in the last sentence probably referred to the draft reports. We are told that the reports were sent to the Special Committee. It is certainly arguable that the Special Committee received the written communications as the alter ego, or on behalf, of APBS. But it is less clear that the reports were communications made by D&N since it must be remembered that they were sent in the sole name of PWC. According to APBS, D&N helped to prepare the reports. If it is the case that APBS knew about this or had even asked D&N to co-author the reports, it is reasonable to treat D&N as effectively co-makers of the reports despite the fact that they were not sent in their name. It would then be right to treat the reports as communications between APBS and D&N.

Even if the reports did not in themselves *constitute* privileged communications between D&N and APBS, they may still be privileged if they *recorded* previous privileged communications. The reports apparently incorporated communications made by various employees of APBS during interviews conducted jointly by PWC and D&N. The judge held that those communications were privileged as well; and so far as they were referred to in the draft reports, the draft reports became privileged too.¹⁶⁵ The perceived inconsistency with *Three Rivers (No. 5)* has in likelihood to do with this aspect of the decision. In *Three Rivers (No. 5)*, it was held that no employee who did not belong to the BIU could represent the client (the BOE) for purposes of the privilege. On the other hand, in *Skandinaviska*, all communications made by employees of ABPS in the course of the interviews were treated as communications made “by or on behalf of” the client, that is, ABPS.

It follows from the arguments presented on point (ii) of the Conclusion that this result is defensible only if three conditions were satisfied. First, the employees must have been authorized by ABPS to make the communications which they did make at the interviews. *Secondly*, the employees must have been interviewed in their role as employees and on knowledge acquired in that capacity. There does not appear to be any problem with either of these requirements on the facts of the case. *Thirdly*, the interviews must have been conducted for the dominant purpose of enabling ABPS to seek legal advice. There is no indication by Ang J. that a company must satisfy this requirement in order to succeed in claiming legal advice privilege. It is likely however that her Honour would have found this condition to be satisfied. The “dominant purpose” test was applied to the claim of litigation privilege and the judge concluded that the draft reports had been “prepared predominantly for the purpose of prospective litigation against APBS” and that the making of recommendations “on improving internal controls in APBS [was] merely a subsidiary purpose”.¹⁶⁶

The finding of “dominant purpose” is ultimately one of fact. It must be based on an objective evaluation of the evidence considered as a whole. The weight of the evidence does not justify easily the conclusion reached by the judge. It seems fairly clear, all things considered, that the interviews were conducted and draft reports were

¹⁶⁴ *Ibid.* at para. 31.

¹⁶⁵ *Ibid.* at para. 37: “For privilege purposes, each draft report was a record of the privileged communication [made in the interviews] and had the same sort of quality as the communication itself”.

¹⁶⁶ *Ibid.* at para. 48.

prepared for at least the equally important purposes of checking the accounts and making suggestions for improving the company's financial system.

Apparently, lawyers advising their corporate clients commonly employ a particular strategy for protecting their clients' interests. They advise their clients not to "instruct third parties such as accountants to commence an inquiry"; the clients should instead ask their "lawyers to direct the inquiry and to obtain documentation from their clients or third parties on the basis that litigation is pending or anticipated".¹⁶⁷ The intention behind this arrangement is to make it easier to convince the court that the dominant purpose of commissioning the third party report was to obtain legal advice. Interestingly, the New Zealand Law Commission has observed that advice given by accountants "tends to be channeled through a lawyer so as to gain the benefit of the privilege".¹⁶⁸ While these arrangements are by no means "colourable devices",¹⁶⁹ the existence of such practices highlights the need for the court to be more critical of the alleged dominance of the lawyer's role in the conduct of internal corporate inquiry.¹⁷⁰

Another finding with which one might reasonably disagree is the finding that PWC was merely acting as APBS's agent in conducting communications with D&N. As traditionally understood, and as discussed in Part V.B above, the agency argument can succeed only where the person in question had acted merely as a medium of communication between lawyer and client. In the present case, PWC had a much more active role. On the principles discussed in Part V.B, PWC should have been considered a third party for purposes of the privilege.¹⁷¹

¹⁶⁷ Yim, *supra* note 1 at 22.

¹⁶⁸ New Zealand Law Commission, *Evidence Law: Privilege*, *supra* note 88 at 23. Although the Law Commission was initially in favour of extending the privilege to all persons giving legal advice about a case, regardless of whether they were legally qualified, this proposal was later abandoned as overly controversial: New Zealand Law Commission, *Evidence*, Report No. 55 (Wellington, 1999) vol. 1 at para. 253.

¹⁶⁹ *Supra* note 152 at para. 36.

¹⁷⁰ Zuckerman, *supra* note 1 at 628, cites Wright & Graham, *supra* note 139 at fn 140: "for the phenomenon of hiring lawyer in order to rent privilege [T]he writers comment that, while it is commonly stated that a corporation cannot make its affairs privileged by hiring lawyers to conduct them, the cases suggest that this is more an aspiration than an achievement".

¹⁷¹ The more expansive a conception of "agency" we take in the law of privilege, the nearer we get to dwindling the category of "third party communication" out of existence. On this risk, see the application of *Skandinaviska* in *Ser Kim Koi v. Metalform Asia Pte. Ltd.* [2006] S.G.H.C. 178.