THE LAW OF PRIVILEGE

FOURTH EDITION

EDITED BY

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The Law of Privilege

Fourth Edition

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LEGAL ADVICE PRIVILEGE

A. Introduction

2.01 It is hard to provide a definition of legal advice privilege which is completely comprehensive or which addresses all the possible nuances, but a good working definition of legal advice privilege[1] is that it attaches to all communications made in confidence between lawyers and their clients for the dominant purpose of giving or obtaining legal advice even at a stage where litigation is not in contemplation. It does not matter whether the communication is directly between the client and his legal adviser or is made through an intermediate agent of either.[2]

2.02 Legal advice privilege applies to clients who seek legal advice or assistance in all areas of legal practice, including in civil matters, criminal matters, regulatory matters, and family

[1] *Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 ('*Three Rivers 6*'); *Director of the Serious Fraud Office v Eurasian Natural Resources Corpn Ltd* [2018] EWCA Civ 2006, [2019] 1 WLR 791; *R (Jet2.com Ltd) v Civil Aviation Authority* [2020] EWCA Civ 35, [2020] QB 1027 paras 94–95.

[2] It might be said that another part of the definition of legal advice privilege is that the communication must be otherwise than for an iniquitous purpose (see eg *Addlesee v Dentons* [2019] EWCA Civ 1600, [2020] Ch 243, paras 27–28). The authors consider that the better view is that iniquity is an *exception* to privilege (albeit one which prevents privilege arising in the first place): see Chapter 4, para 4.44 below. The crime/fraud (iniquity) exception is addressed at paras 4.40–4.82.

matters.[3] Further, following *Three Rivers 6*, it is clear that, where lawyer–client communications are concerned, legal advice privilege applies to advice in the context of litigation as well as non-litigious situations.[4]

Summary These requirements can conveniently be summarized as[5]: **2.03**

- a communication (including written or oral communications)[6]
- between a client[7] and a lawyer[8] or an intermediate agent[9] of either
- made in confidence[10]
- for the dominant purpose[11] of giving or obtaining legal advice or assistance.[12]

Some of these requirements are subject to qualifications discussed below and are not as straightforward as they might at first appear. For example, an actual communication passing between lawyer and client is not in fact required in all circumstances.[13]

Third party communications are not covered by legal advice privilege unless they amount to dissemination of a lawyer–client communication or secondary evidence of a privileged communication **2.04** In this jurisdiction, legal advice privilege does not apply where the communication is between the lawyer and a *third party* or between the client and a *third party*:[14] that is the province of litigation privilege[15] and such communications will only be covered by litigation privilege if litigation is at least in contemplation.[16] In his seminal work on discovery first published in 1885, Edward Bray commented that there was no a priori reason why such communications should not be privileged if obtained to enable the lawyer to advise in relation to matters not connected with litigation, but observed that, however, 'such is the rule.'[17] This remains the rule in the twenty-first century in this jurisdiction at least. Other jurisdictions do not apply this rule and instead hold that legal advice privilege applies to communications between a third party and a client or between a third party and a lawyer

[3] *Three Rivers 6*, para 56; *R v Derby Magistrates Court ex p B* [1996] AC 487.

[4] *Three Rivers 6*, para 65 (*per* Lord Carswell) and paras 50–51 (*per* Lord Rodger). See paras 1.10–1.11 above.

[5] The four elements were identified as necessary for a claim to legal advice privilege in *R (Jet2.com Ltd) v Civil Aviation Authority* [2020] QB 1027, para 42.

[6] See Section E(1) paras 2.33-2.65 below.

[7] See Section B paras 2.06-2.26 below.

[8] See Section C para 2.27 below.

[9] See Section E(2) paras 2.66-2.71 below.

[10] See Section E(3) paras 2.72-2.79 below.

[11] See Section G para 2.135-2.147 below.

[12] See Section F para 2.83-2.134 below.

[13] See Section E(1) paras 2.31-2.65 below.

[14] Third party in this context means a person or entity who is not acting as an agent. Where the communication is with an agent of the lawyer or of the client then legal advice privilege is in principle available, as to which see para 2.03 above and para 2.66 below.

[15] *Wheeler v Le Marchant* (1881) 17 Ch D 675, 682, 683, 685 (CA) (communications between surveyors (third parties) and solicitors were not protected by legal advice privilege. They would only be protected by litigation privilege to the extent that they were written after litigation was in prospect); *Re Highgrade Traders* [1984] BCLC 151, 161, 164 (CA) (reports sent by loss adjusters, specialist fire investigators, and chartered accountants to client for purpose of client obtaining legal advice were not protected by legal advice privilege because communications were between client and third parties, but were protected by litigation privilege). See also *Ventouris v Mountain* [1991] 1 WLR 607, 618 (CA); *Hellenic Mutual War Risks Association (Bermuda) Ltd v Harrison (The Sagheera)* [1997] 1 Lloyd's Rep 160, 164. Litigation privilege is covered in Chapter 3 below. Note that the Court of Appeal in *R (Jet2.com Ltd) v Civil Aviation Authority* [2020] EWCA Civ 35, [2020] QB 1027 incorrectly suggested at para 83(iii)(b) that *Wheeler v Le Marchant* was a case about communications made other than for the purposes of receiving legal advice. In fact, the issue in *Wheeler* was whether a communication between a solicitor and a third party (but made for the purposes of obtaining legal advice) was protected by legal advice privilege.

[16] See para 3.51 below.

[17] E Bray, *Principles and Practice of Discovery* (1885), 403.

provided that the dominant purpose of the communication is the seeking or giving of legal advice.[18]

2.05 Such communications with third parties will therefore not be subject to legal advice privilege unless (i) they amount to the dissemination of privileged communications, for example within or in some cases beyond a client organization, or (ii) they otherwise constitute secondary evidence of privileged communications.[19] Moreover, as explained in the following section, in the case of companies and other legal persons, the effect of the much-criticized decision of the Court of Appeal in *Three Rivers 5* is that the boundary between client and third parties is not drawn where one might expect.[20]

B. Who is the Client?

(1) Summary

2.06 Legal advice privilege is available to the client (or his/her successor in title). It is available whether the client is a layman or a lawyer; a lawyer will have need of the services of another lawyer on occasions.[21] It is available to legal persons, such as companies, local authorities, and government departments, as well as to natural persons. In the case of individuals, difficulties do not usually arise as to whether a particular communication is with the client.[22] However, in the case of legal persons which can only act through officers or employees, there is more difficulty. The present state of English law, as laid down by *Three Rivers 5* and confirmed by two decisions of the Court of Appeal (in *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation*[23] and *R (Jet2.com Ltd) v Civil Aviation Authority*[24]) is as follows: legal advice privilege attaches *only* to communications passing between, on the one hand, a corporation's lawyers, and, on the other, an employee of the corporation who has been tasked with seeking and receiving such advice on behalf of the client.[25]

2.07 As addressed further below, that state of affairs is, as has been explicitly acknowledged by the Court of Appeal in both *ENRC* and *Jet2*, profoundly unsatisfactory. The Court of Appeal in both *ENRC* and *Jet2* made clear that, had they enjoyed the power to do so, they would have declined to follow *Three Rivers 5* on this point. However, unless and until a suitable case

[18] See para 2.82 below.

[19] See paras 2.31-2.65 below, 4.32 ff below and *Loreley Financing (Jersey) No 30 Ltd v Credit Suisse Securities (Europe) Ltd* [2023] 1 WLR 1425, para 41. Whilst *Loreley* was a case concerning litigation privilege, the principle expressed at para 41 (that privilege applies to the protected communication and to secondary evidence of such communication) applies to both sub-heads of legal professional privilege. See also *R (Jet2.com Ltd) v Civil Aviation Authority* [2020] QB 1027, para 45.

[20] See Section B below.

[21] *B v Auckland District Law Society* [2003] 2 AC 736, para 45 (PC). A more difficult question arises where a law firm advises itself, but it is suggested that such communications ought to be privileged: see *Somatra Ltd v Sinclair Roche & Temperley* [2000] 1 WLR 2453, 2467 (CA) and para 2.29 below.

[22] Issues may arise as to whether a communication with a person other than the client was with an agent of the client, as to which see para 2.66 ff below, or as to whether the original client is still able to claim the privilege or whether the privilege has vested in the successor in title to the client. As to the latter point see paras 1.38–1.39 above.

[23] [2018] EWCA Civ 2006, [2019] 1 WLR 791.

[24] [2020] EWCA Civ 35, [2020] QB 1027.

[25] *Director of Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* at para 123; *R (Jet2.com Ltd) v Civil Aviation Authority* at para 58.

reaches the Supreme Court[26] (at which point the prospects of overturning *Three Rivers 5* would appear to be very strong), English courts will be compelled to follow what one commentator has described as 'one of the most criticised decisions of the last generation', and 'pretty well universally reviled'.[27]

(2) *Three Rivers*

Factual background to the *Three Rivers* litigation In July 1991, BCCI collapsed and shortly afterwards the Chancellor of the Exchequer announced that there would be an inquiry into the supervision of BCCI under the 1979 and 1987 Banking Acts, conducted by Lord Justice Bingham.[28] 2.08

Shortly after the Bingham Inquiry had been established, the Governor of the Bank of England appointed three Bank officials to deal with all communications between the Bank and the Inquiry. These officials, and other Bank personnel appointed to assist them from time to time, became known as the Bingham Inquiry Unit ('BIU'). The BIU had no formal legal status. The Bank retained solicitors Freshfields to advise generally in relation to the Inquiry. Freshfields also retained counsel to act on behalf of the Bank. Freshfields and counsel gave advice as to the preparation and presentation of the Bank's evidence to the Inquiry and as to the submissions to be made to the Inquiry on behalf of the Bank. 2.09

The Bingham Report was published in 1992. In 1993 the Liquidators of BCCI commenced an action for misfeasance against the Bank of England on behalf of BCCI's creditors, basing their claim explicitly on the contents of the Bingham Report. During the course of the litigation, the Liquidators sought disclosure from the Bank of certain documents generated during the Inquiry. The most controversial documents were internal documents created by employees of the Bank and passed to the BIU for the purpose of enabling the Bank's lawyers to advise the Bank on how best to present its supervisory conduct to the Bingham Inquiry. Some but not all of these documents were subsequently provided by the BIU to Freshfields.[29] There were also direct communications between Bank employees who were not members of the BIU and Freshfields. 2.10

Since the Bingham Inquiry was not adversarial, the Bank was unable to claim litigation privilege.[30] Instead it claimed legal advice privilege. 2.11

[26] In *RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch), [2017] 1 WLR 1991, considered further at para 2.16 below, a 'leap frog' certificate under s 12 of the Administration of Justice Act 1969 was granted, permitting a direct application for permission to appeal to the Supreme Court. However, as a consequence of amendments to the claimants' case, the documents which were the subject of dispute were no longer relevant, and no appeal was ever heard.

[27] C Hollander, *Documentary Evidence* (15th edn, 2024), para 17-10.

[28] See the judgment of Tomlinson J, [2002] EWHC (Comm) 1118, para 29; affirmed by the Court of Appeal in *Three Rivers DC v Bank of England (No 4)* [2003] 1 WLR 210, para 46; *Three Rivers 5*, para 2; *Three Rivers 6*, para 82.

[29] See *Three Rivers 6*, paras 8–9 (*per* Lord Scott).

[30] See *Re L* [1997] AC 16. In the light of *Re L*, the Bank accepted that litigation privilege did not apply because civil litigation, although anticipated by the Bank as a distinct possibility, was not the dominant purpose for which the documents came into existence. The dominant purpose was provided by the immediate prospect of the Bingham Inquiry rather than the more distant prospect of litigation. The Inquiry was obviously inquisitorial rather than adversarial: see *Three Rivers 6*, para 10 (*per* Lord Scott). The concession by the Bank has, however, been the subject of criticism: see, eg, N Andrews, 'Legal Advice Privilege's Broad Protection—The House of Lords in Three Rivers (No 6)' (2005) 24 *CJQ* 185, 191.

2.12 At first instance, Tomlinson J upheld the Bank's claim to legal advice privilege: he held that if the internal Bank employee documents had been created for the dominant purpose of obtaining legal advice (and the judge held that the Bank's evidence showed they had been), the Bank was entitled to claim legal advice privilege in respect of them.[31] Applying dicta in *Waugh v British Railways Board* [1980] AC 521 (HL) Tomlinson J held that the dominant purpose test applied across both types of legal professional privilege.

2.13 **Narrow view of corporate client by the Court of Appeal** However, Tomlinson J's judgment was overturned by the Court of Appeal.[32] The Court of Appeal held that legal advice privilege could essentially[33] only be claimed for communications *passing* between the client and his/her legal advisers and secondary evidence of the contents of such communications, that the documents in issue did not represent communications between lawyer and client, and that legal advice privilege did not attach to 'preparatory' materials, even if created by the employees for the dominant purpose of enabling Freshfields or counsel to be properly instructed so as to advise the Bank.[34] The Court of Appeal also accepted the Liquidators' submission that the evidence showed that only the BIU[35] was the client of Freshfields; the employees in question who were not part of the BIU did not equate to 'the client' and were therefore to be treated as third parties in communicating with Freshfields.[36] The Court of Appeal held[37] that information provided to a lawyer by an employee stood in the same position as information provided by an independent third party and could not attract legal advice privilege.[38] Giving the judgment of the Court of Appeal Longmore LJ stated:[39]

> [The Bank] asked what the position would be if the Governor himself had noted down what he remembered in relation to the supervision of BCCI with the intention of giving it to the BIU for transmission to Freshfields. No privilege has been claimed for any such specific document but, as it seems to us, [the Liquidators were] right to say that on the evidence before the court, the BIU, which was established to deal with inquiries and to seek and receive Freshfields' advice, is for the purpose of this application, the client rather than any single officer however eminent he or she may be.[40]

2.14 **The House of Lords** The House of Lords dismissed the Bank's petition for leave to appeal from *Three Rivers 5*.[41]

[31] [2002] EWHC 2730 (Comm).
[32] Lord Phillips MR, Sedley and Longmore LJJ.
[33] For the exception recognized by the Court of Appeal, see paras 2.44–2.45 below.
[34] *Three Rivers 5*, paras 19–21.
[35] See para 2.09 above for an explanation of the role of the BIU.
[36] *Three Rivers 5*, para 31. See also *Three Rivers 6*, para 14 (*per* Lord Scott).
[37] *Three Rivers 5*, para 18.
[38] As to which it is clear (and was common ground) that legal advice privilege does not apply: see *Wheeler v Le Marchant* (1881) 17 Ch D 675.
[39] *Three Rivers 5*, para 31.
[40] The Court of Appeal's suggestion that the Governor of the Bank of England himself would not be the client in this scenario is decidedly odd. On this basis, communications between Freshfields and the Governor or the Bank's Head of Banking Supervision would be treated as communications with a third party and would not be privileged, even if made for the dominant purpose of enabling the Bank to obtain legal advice. On the other hand, communications with the Governor's Private Secretary (who was a member of the BIU) would be treated as communications with the client. However, it may be that the Court of Appeal was focusing on the narrower question, ie that the postulated communication in this passage was a communication internal to the client entity and therefore not a lawyer–client communication at all.
[41] *Three Rivers 5*, 1583. The reasons given by the Appellate Committee (Lord Steyn, Lord Hope, and Lord Hobhouse) were that the matter was interlocutory, the risk of interfering with the trial date, and the fact that the case had already been the subject of two hearings in the House of Lords (in relation to the Bank's application to strike out the claim). All these reasons later appeared strange, in the light of the House of Lords' subsequent grant of leave to hear the appeal in *Three Rivers 6* during the actual trial of the action.

2.15 Subsequently, the House of Lords heard the Bank's appeal from the later decision of the Court of Appeal in *Three Rivers 6*. On that occasion the House of Lords was invited to clarify the approach that should be adopted to determine whether a communication between an employee and his or her employer's lawyers should be treated for the purposes of legal advice privilege as a communication between client and lawyer. Although the House of Lords had granted permission to the Attorney-General, the Bar Council, and the Law Society to make written submissions, which focused in large measure on the Court of Appeal's judgment in *Three Rivers 5*, it ultimately declined to comment on the correctness of *Three Rivers 5*.[42] This was primarily on the basis that it did not directly arise for consideration and anything that the House of Lords said would be strictly *obiter*. Lord Scott emphasized that *Three Rivers 5* remained a guiding precedent and that there were eminently arguable views for and against the Court of Appeal's view that the only qualifying communications were between Freshfields and the BIU.[43] Lord Scott stated that nothing he said in his speech should be construed as approval or disapproval of *Three Rivers 5*,[44] while Lord Carswell said, perhaps more pointedly, that he saw great force in the judgment of Tomlinson J which the Court of Appeal had overturned and that nothing he had said should be taken as *approval* of *Three Rivers 5*.[45]

2.16 **The *ratio* of *Three Rivers 5*** Given the difficulties caused by the decision in *Three Rivers 5* (addressed in further detail below), attempts were made in subsequent cases to distinguish the decision and to confine its *ratio* as narrowly as possible. For example, the Singapore Court of Appeal in *Skandinaviska Enskilda Banken v Asia Pacific Breweries*[46] sought to limit the effect of *Three Rivers 5* by interpreting the decision as one based on the particular fact that *only* the members of the BIU had been authorized to *communicate* with the Bank's lawyers. The effect of this interpretation—which was advocated for strongly by previous editions of this work—would be to allow privilege to be claimed over communications between lawyers and any employee authorized to act for the company in the process of obtaining legal advice (and not merely those who were tasked with seeking or receiving such advice). However, this argument was rejected as a permissible interpretation of *Three Rivers 5* in *RBS Rights Issue Litigation*,[47] where Hildyard J held that notes of interviews with employees and former employees of the defendant bank taken by the defendant's lawyers were not protected by legal advice privilege. In particular, Hildyard J held that to fall within the scope of legal advice privilege, the employee communicating with the lawyer had to be authorized to *provide instructions* to the lawyers and/or to *receive the legal advice* on behalf of the client; it was insufficient if the employee was only authorized by the client to *provide information* to the client's lawyers.[48] A similar argument was advanced again in *ENRC*, where the Court of Appeal concluded as follows:[49]

> We can fully accept that the Court of Appeal *could* have decided [*Three Rivers 5*] on the simple basis that Freshfields' client was the BIU (not the Bank), and the documents had been prepared by the Bank (not the BIU), so that the position of the particular Bank

[42] *Three Rivers 6*, para 22 (*per* Lord Scott).
[43] Ibid, para 47.
[44] Ibid, para 48.
[45] Ibid, para 118.
[46] [2007] SLR (R) 367.
[47] [2016] EWHC 3161 (Ch), [2017] 1 WLR 1991. See also *L v Serious Fraud Office* [2018] 1 WLR 4557, para 106.
[48] Paras 45, 54, 60, 64, 89, 91–93.
[49] [2019] 1 WLR 791, para 81.

employee who had prepared them was irrelevant to the question of legal advice privilege. We do not, however, think that, fairly read, that was the Court of Appeal's reasoning. As we have explained, it seems to us that Longmore LJ reasoned that, because agents[50] and employees, on authority, stood in the same position in relation to legal professional privilege, once it was established that only communications between the lawyer and the client, and not between the lawyer and an agent of the client, could attract legal advice privilege, communications between a lawyer and an employee of the client (other than employees specifically tasked with seeking and receiving legal advice) could also not be privileged. As we have said, we are not sure that it is necessary for us to determine whether this reasoning was the ratio decidendi, but if that did have to be decided, we would hold that it was.

2.17 This view of the *ratio* of *Three Rivers 5* was again confirmed by the Court of Appeal in *Jet2*, where Hickinbottom LJ held that the Court of Appeal was bound by the decision in *Three Rivers 5* that legal advice privilege covered only communications between the corporation's lawyers and the 'particular employee... tasked with seeking and receiving such advice on behalf of the client'.[51] It therefore appears clear that, as a matter of authority, a narrower reading of *Three Rivers 5* is no longer available as a means of escaping the unsatisfactory consequences of the decision.

(3) Criticism of the test for client set out in *Three Rivers 5*

2.18 Prior editions of this work have devoted significant analysis to the manner in which *Three Rivers 5* misunderstood or misapplied prior authority and to the rejection of *Three Rivers 5* by other courts in the common law world.[52] That analysis was presented on the basis that 'the authority of *Three Rivers 5* [was] ... far from unimpeachable'[53] and that there remained a prospect that the broad reading of *Three Rivers 5* would not be followed. However, in light of the decisions of the Court of Appeal in *ENRC* and *Jet2* that confirm a wider reading of the *ratio* of *Three Rivers 5*, it is accepted that unless and until an opportunity is afforded to persuade the Supreme Court to reset English law, those arguments will now be of limited practical utility. What follows is therefore a briefer summary of the main criticisms of *Three Rivers 5*, along with further consideration of some of the practical problems it causes.[54]

[50] In this passage, the Court of Appeal must have being using 'agent' in the sense of third party and not in the sense of agent of communication, because it is well established that a communication between a client's agent and the client's lawyer can be protected by legal advice privilege. See paras 2.03 above and 2.66 below.

[51] Para 58. An argument had been advanced in *RBS Rights Issue Litigation* that the only employees who could be found to have such authority were those who were part of the directing mind and will of the corporation. Although Hildyard J did not need to decide the point, he stated that he was 'inclined to the view' that the argument was correct. It is submitted that the argument is plainly incorrect: it formed no part of the reasoning in *Three Rivers 5* and is inconsistent with the reasoning in subsequent cases such as *AB v Ministry of Justice* [2014] EWHC 1847 at paras 41–43 and *Menon v Herefordshire Council* [2015] EWHC 2165 at paras 36–42. Such a limitation was notably not mentioned by the Court of Appeal in either *ENRC* or *Jet2*.

[52] See, eg, paras 2.26–2.36 and Section G in the third edition of this work.

[53] See the third edition of this work, para 2.140.

[54] For a different view, see Zuckerman, *Civil Procedure* (4th edn, 2021) paras 16.65–16.75, whose view is that extending who constitutes 'the client' for the purposes of legal advice privilege 'creates the potential for pulling a blanket of privilege over an ever-increasing range of internal company records and memoranda' and has the potential for undermining public confidence in the administration of justice. Zuckerman also questions the assumption that in the corporate context, in the absence of privilege clients would be deterred from making a full and frank disclosure of all the facts to their lawyers (although his basis for doing so is unclear). Zuckerman also notes that *Three Rivers 5* was concerned with a government entity and suggests that the applicability of legal advice privilege to public bodies may be different (although he concedes the contrary is assumed without debate). In particular, he argued that the justification for privilege is 'far from obvious' as public servants 'are, or could be, placed under a statutory duty to disclose information to other government officials and lawyers' such that there is no need for privilege in order to encourage candour between lawyer and client. The authors of this work disagree. Legal advice privilege plainly applies to public bodies just as it applies to private bodies and to individuals; the encouragement of candour between lawyer and client is just as important in this context and indeed it might be observed that the decisions made by public bodies can often be more significant than decisions made by private entities.

2.19 In *ENRC*, Sir Geoffrey Vos C (delivering the judgment of the court), cited the explanation of the purpose of legal advice privilege in the speech of Lord Scott in *Three Rivers 6*, with its emphasis on the need for clients (be they 'individuals, whether humble or powerful, or corporations whether large or small') to be able to seek the advice or assistance they need from lawyers, safe in the knowledge that what they tell their lawyers will not be disclosed without their consent. The Chancellor then proceeded to explain why *Three Rivers 5* posed an obstacle to that policy, with acute effects on large corporations[55]:

> This last passage makes clear that large corporations need, as much as small corporations and individuals, to seek and obtain legal advice without fear of intrusion. If legal advice privilege is confined to communications passing between the lawyer and the 'client' (in the sense of the instructing individual or those employees of a company authorised to seek and receive legal advice on its behalf), this presents no problem for individuals and many small businesses, since the information about the case will normally be obtained by the lawyer from the individual or board members of the small corporation. That was the position in most of the 19th century cases. In the modern world, however, we have to cater for legal advice sought by large national corporations and indeed multinational ones. In such cases, the information upon which legal advice is sought is unlikely to be in the hands of the main board or those it appoints to seek and receive legal advice. If a multinational corporation cannot ask its lawyers to obtain the information it needs to advise that corporation from the corporation's employees with relevant first-hand knowledge under the protection of legal advice privilege, that corporation will be in a less advantageous position than a smaller entity seeking such advice. In our view, at least, whatever the rule is, it should be equally applicable to all clients, whatever their size or reach.

2.20 In addition to endorsing this passage from *ENRC*, the Court of Appeal in *Jet2* made observations concerning the particular scenario where internal communications take place within a corporation for the purposes of settling instructions to lawyers, which may require input from more junior employees with knowledge of the relevant issues; Hickinbottom LJ observed that 'Internal communications settling instructions must be covered by LAP. It is unclear to me how the proposition in [*Three Rivers 5*] quite allows for that'.[56] More generally, Hickinbottom LJ noted that the effect of *Three Rivers 5* was to create a contrast between steps taken to collect information for the instruction of lawyers (which will not generally be covered) and the dissemination or consideration of that advice once obtained (which, as explained below, *will* be covered). He fairly observed that there was 'no obvious reason' why such a distinction would be drawn.

2.21 As already noted, other common law jurisdictions have rejected the approach to identifying the client in *Three Rivers 5*:

[55] [2018] EWCA Civ 2006, [2019] 1 WLR 791, para 127. For similar criticism, see the third edition of this work at para 2.13.

[56] [2020] EWCA Civ 35, [2020] QB 1027, para 56. See to similar effect *Citic Pacific Ltd v Secretary for Justice* [2016] 1 HKC 157, para 55.

- Singapore: The Singapore Court of Appeal in *Skandinaviska Enskilda Banken v Asia Pacific Breweries* observed that the decision in *Three Rivers 5* had been 'almost universally criticised—and often trenchantly', one of the central criticisms being that the decision was restrictive, impractical, and unworkable in circumstances where companies can only act through their officers and employees.[57] As already noted, the Singapore Court of Appeal effectively sought to confine *Three Rivers 5* to its own facts.
- Hong Kong: the correctness of *Three Rivers 5* came before the Court of Appeal of Hong Court in *Citic Pacific Ltd v Secretary for Justice*.[58] That court also declined to follow the Court of Appeal in *Three Rivers 5* and instead endorsed the first instance judgment of Tomlinson J. In doing so, it referred to *Skandinaviska*, as well as to the decision of the US Supreme Court in *Upjohn v United States*[59] and pointed to the need for 'meaningful protection for confidentiality in the process of obtaining legal advice'. It found that the dominant purpose test (and not an artificially narrow view of the 'client') was the appropriate control mechanism.[60] As such, all communications between employees of the corporation who were authorized to act for the company in the process of obtaining legal advice and external lawyers which were for the dominant purpose of obtaining legal advice were protected by legal advice privilege.
- Australia: the narrow view of the client in *Three Rivers 5* has also been rejected in Australia.[61] As further addressed below, that rejection has been more fundamental than simply a disagreement about which employees of a company may have communications with lawyers falling within the scope of legal advice privilege. In *Kennedy v Wallace*[62] the Full Federal Court of Australia rejected the suggestion that a document prepared with the dominant purpose of obtaining legal advice, but not constituting a *communication*, fell outside the scope of legal advice privilege. In *Pratt Holdings Pty Ltd v Commissioner of Taxation*[63] the Full Federal Court of Australia suggested a broader and more flexible approach which would also extend protection to communications from *third parties* in the context of legal advice privilege, with (once again) a dominant purpose test serving as the appropriate control mechanism.

(4) Practical difficulties caused by the present law

2.22 The criticisms in subsequent cases of the narrow test for client in *Three Rivers 5* referred to above have highlighted a number of the practical problems caused by English law's current approach.

2.23 **Taking and preparing instructions** Given that it is now established (unless and until the Supreme Court overrules *Three Rivers 5*) that only communications between lawyers and the particular employees 'tasked' with seeking such advice on behalf of the client can be

[57] [2007] 2 SLR 367, citing, amongst others, an earlier edition of this work.
[58] *Citic Pacific Ltd v Secretary for Justice* [2016] 1 HKC 157.
[59] In *Three Rivers 6* Lord Scott observed at para 47 that the decision in *Upjohn* constituted a valuable authority, but left open the question of whether it should be followed in this jurisdiction.
[60] [2016] 1 HKC 157, paras 39–63.
[61] In Australia, Commonwealth legislation defines the client as including 'an employee or agent of the client': see Evidence Act 1995, s 117(1)(b). This provision is said to mirror the common law: see R Desiatnik, *Legal Professional Privilege in Australia* (3rd edn, 2017), 290.
[62] (2004) 213 ALR 108.
[63] (2004) 207 ALR 217.

protected by legal advice privilege, great importance now attaches to the factual question of which particular employees fall within that category. Whilst it is clear from the rejection of the attempts to narrow the *ratio* of *Three Rivers 5* that the question of who is 'tasked' with seeking advice will involve a narrower category than those simply authorized to speak to or provide information to the lawyers, there remains scope for corporations to manage and structure how instructions are provided in order to maximize the prospect of a successful claim to legal advice privilege, at least in those (perhaps less common) cases where careful thought is given *at the time* to this issue. For example, it may be possible to include within the group of persons authorized to provide instructions those who have direct factual knowledge of the matters in question, thereby obviating the need for the corporation or the lawyer to seek instruction from 'non-client' employees, which would not be protected. Similarly, to the extent that the question of authority to provide instructions to the lawyers can be addressed explicitly and recorded contemporaneously, that is likely to assist in any future dispute as to which employees fall within the relevant category. Conversely, parties later seeking to challenge claims to privilege would be well advised to seek an explanation from the party claiming privilege as to who has been treated as within the 'client' group and on what basis. The courts will no doubt be astute to preclude artificial designations of client status without any basis in the underlying business rationale for seeking legal advice and assistance.

In-house counsel communications The difficulties above may be particularly acute when it comes to communications between employees and in-house lawyers. In-house lawyers will often give advice on an entirely ad hoc basis; it may not be at all clear which employees are formally designated to seek and/or receive their advice. A pragmatic approach to that question was adopted by the courts in *AB v Ministry of Justice*[64] and *Menon v Herefordshire Council*,[65] permitting a broad view of which employees impliedly had such authority. In the latter case, Lewis J found that all officers and staff in a local authority were entitled to use the services of the in-house legal department and were therefore implicitly authorized to obtain legal advice from them. Although a question of fact in any particular case, particular difficulties are likely to arise in cases where relevant *factual* information is not in the possession of those employees formally or even informally charged with giving instructions to the lawyer, a situation addressed further below. 2.24

Former employees The problems created by *Three Rivers 5* as regards communications with former employees (ie who have left the client organization at the time of the communication) are particularly acute. While a former employee may well be authorized to provide *information* to his/her former employer's lawyers, it is difficult to think that a former employee would ever be authorized by its former employer to seek legal advice or receive legal advice on the former employer's behalf. Therefore, the practical effect of *Three Rivers 5* is that a communication between (i) a former employee and (ii) a legal person's lawyers will never be protected by legal advice privilege. As a matter of policy and principle, this is extremely difficult to justify. If the rationale for legal advice privilege is to encourage complete candour in imparting relevant facts to the lawyer, then a corporate client does this by whichever of its employees imparts facts to the lawyer, and there is a strong argument that this principle ought logically to extend to former employees of the corporation or other legal 2.25

[64] [2014] EWHC 1847, paras 41–43.
[65] [2015] EWHC 2165, at paras 36–42.

person who are in possession of material facts relating to the advice sought, provided they acquired the relevant knowledge during the course of their employment.[66]

2.26 **Impact of the current approach to the definition of 'client' in the context of regulatory or criminal investigations or proceedings** As addressed above, the problems caused by *Three Rivers 5* are particularly stark in a situation where a corporate entity needs to gather factual material from a range of employees as part of the process of seeking advice. One situation where that commonly arises is where a corporate entity is subject to investigation or prosecution (or a fear of investigation or prosecution) by a regulatory/prosecuting authority, or needs to determine whether it is under a duty to report itself to such an authority. It is often the case that the corporate entity needs to undertake extensive internal enquiries in order to collate the information necessary to provide full instructions to its lawyers. In the early stages of certain investigations or potentially in advance of an investigation if a corporate is considering whether there is a need to self-report to its regulator, litigation privilege may not apply[67] and its communications will in such cases only be privileged if they fall within the bounds of legal advice privilege. In light of the cases referred to at paragraph 2.06 and 2.13-2.17 above, it appears that as a matter of English law these communications, to the extent that they involve employees other than those authorized to provide instructions to the lawyers or receive legal advice, and whether or not the enquiries are made by the lawyers or internally, would not be able to be withheld from disclosure from the regulator or prosecutor during the course of the investigation or proceedings on the grounds of privilege (unless litigation privilege applies).[68] This may have the effect of deterring corporations from making (or recording) the extensive internal enquiries which are necessary in order for them to obtain comprehensive legal advice; it thereby undercuts the very rationale for legal advice privilege.

[66] This proposition was upheld by Tomlinson J in an addendum to his judgment in *Three Rivers 5*, but was not decided by the Court of Appeal—on the basis of the facts of the case before it the Court of Appeal simply stated that an ex-employee of the Bank could not be in any better position than a current employee: see para 31. Tomlinson J's approach was consistent with the view of Chief Justice Burger in the US Supreme Court in *Upjohn Co v United States* 449 US 383, 402–3 (1981) and is plainly more in line with the policy behind legal advice privilege; the present law means that legal persons, whose personnel come and go, face a random lottery as to which employees happen still to be in its employment when a legal issue arises.

[67] Either because the investigation or regulatory proceeding is insufficiently adversarial for litigation privilege to be engaged at all (see in this regard the discussion in *Tesco Stores Ltd v Office of Fair Trading* [2012] CAT 6), or, even if the investigation/proceeding has the potential to become adversarial, because the corporation is unable at that early stage to establish reasonable contemplation of adversarial proceedings. See para 3.58 below.

[68] To the extent that communications take place between (i) those authorized to provide instructions to the lawyers and (ii) the lawyers, they will be protected by legal advice privilege. So, for example, if the corporate sets up an internal committee to conduct the investigation and to instruct the lawyers, the communications between the members of the committee and the lawyers would be protected by legal advice privilege—see, by way of analogy, *Comptroller of Income Tax v ARW* [2017] SGHC 16 (High Court of Singapore). It seems doubtful that this would in practice assist in many cases, because the communications between such committee of the client and the employees/former employees would not themselves be covered by legal advice privilege. However, contrary to the impression which may be created by *R (L) v Serious Fraud Office* [2018] EWHC 856, [2018] 1 WLR 4557, para 105, there is no particular legal rule which states that 'first interview notes' are never privileged; each case must be examined on its own facts, according to the principles governing legal advice and litigation privilege.

C. Who is a Lawyer?

2.27 Legal advice privilege only applies to communications with lawyers. It therefore does not apply when a client obtains skilled legal advice from someone other than a lawyer (for example, advice on tax law from an accountant).[69] A lawyer will include a duly qualified solicitor or a barrister in independent practice, a duly qualified solicitor or barrister working at a law firm or at an alternative business structure authorized by a legal regulator,[70] as well as non-qualified personnel acting under the direction of solicitors or barristers. For most purposes employed lawyers are included within the ambit of the privilege. Communications with foreign lawyers also attract legal advice privilege. In essence, the lawyer must be acting in a professional capacity as a lawyer (or at least appearing to the client so to act), although there does not need to be any formal retainer. This topic is addressed in more detail at paragraphs 1.46-1.63 above.

D. Acting in Person

2.28 Where the client acts in person there is no lawyer–client relationship and therefore no legal advice privilege applies, even if the client is himself a lawyer. It could not be said that the person concerned is acting in a professional capacity as a lawyer.[71] In *Lyell v Kennedy (No 3)*[72] Cotton LJ held that '[i]f a man does not employ a solicitor, he cannot protect that which, if he had employed a solicitor, would be protected'. Thus, if a person seeks to undertake his/her own legal research, the notes or research materials obtained for that purpose will not be privileged under the sub-head of legal advice privilege.

2.29 However, if a firm of solicitors were to undertake legal research into its own legal position, it is suggested that the common law is adaptable enough to extend legal advice privilege to such a situation.[73] The lawyer giving the advice, albeit to his/her own firm, would be regarded as acting in a professional capacity as a lawyer—even if the firm did not make a payment for such services and the client–lawyer relationship would be internal to the firm. Indeed, it is suggested that such a case is analogous to the case of any in-house lawyer advising his/her employer. Logic suggests that this principle should extend to a sole practitioner, provided he/she is advising his practice rather than him/herself, although this may involve some fine distinctions.

2.30 The position is different so far as litigation privilege is concerned, where it is suggested that a litigant in person does enjoy litigation privilege for communications with third parties and material assembled for the purposes of his/her case (see paragraph 3.114 below).

[69] See *R (on the application of Prudential) v Special Commissioners* [2013] 2 AC 185 (majority of Supreme Court (Lords Neuberger, Hope, Walker, Mance, and Reed; Lords Clarke and Sumption dissenting) held that legal advice on tax law from accountants not subject to legal advice privilege); *Walter Lilly & Company v Mackay* [2012] 6 Costs LO 809, [2012] EWHC 649, para 17 (legal advice from claims consultants company not subject to legal advice privilege even though the advice happened to have been given by two employees of the claims consultants who the client understood to be qualified solicitors or barristers).

[70] As to ABSs, see further paras 1.48–1.51 and 1.62-1.63 above, 2.66 below and 2.145-2.147 below.

[71] See para 1.54 above.

[72] (1884) 27 Ch D 1, 18.

[73] Cf *Somatra Ltd v Sinclair Roche & Temperley* [2000] 1 WLR 2453, 2467 (CA). For a discussion of the position that applies in criminal cases to the position of prosecutor (public or private), see paras 4.110–4.130 below.

E. Communications

2.31 The focus of legal advice privilege is on communications between lawyer and client. However, although expressions of principle derived from the cases such as that set out at paragraph 2.01 above, refer to 'communications', it is clear that what is covered by legal advice privilege is broader than actual communications which cross the line between lawyer and client, with the law treating certain other categories of document as equivalent to communications.[74]

2.32 **Communications distinguished from facts** Legal advice privilege is therefore essentially confined to communications passing between lawyer and client, or documents which the law treats as the equivalent of such communications. However, the position of the client may need to be considered separately from the position of his/her lawyer:

- With regard to clients, the emphasis on communications is for a readily understandable reason. Broadly speaking, a *client* can only assert privilege in respect of oral or written communications—not the underlying facts which may be adverted to in such communications. Were this not the case a client could effectively 'hide' relevant information by communicating it to his/her lawyer. A client is unable to do this.[75] It is different if the client's relevant knowledge is solely derived from a privileged communication.[76] So, for example, a client can be cross-examined as to what happened at a meeting, but he/she cannot be asked what he/she told his/her lawyer about the meeting.[77] This distinction is important and was summarized by Wood V-C in *Manser v Dix*:

> You can, of course, extract from the client everything that he knows; the circumstance that he has communicated it to his solicitor is not a reason for refusing this kind of discovery. You would be able to discover every fact in the client's knowledge; but you must get them from him upon oath, and as you could not call his solicitor to contradict anything which he may say by disclosing what may have passed between them in consultation, I should have thought, independently of authority, that the true rule would be that as you could not shew that in conversation with his solicitor he had made such and such statements, of course everything which he wrote to his solicitor should be equally privileged.[78]

[74] *Ainsworth v Wilding* [1900] 2 Ch 315, 323 (*per* Stirling J).

[75] This approach also underlies the reason why privilege does not extend to pre-existing documents, that is documents which do not come into existence for the purpose of lawyer–client communications. See para 4.08 ff below.

[76] *Lyell v Kennedy (No 2)* (1883) 9 App Cas 81 (HL).

[77] Perhaps surprisingly, it appears that the position may be different if the communication to the lawyer takes the form of emailing the lawyer a non-privileged document (such as a note of the meeting). Although what the client told the lawyer about the meeting, or even whether they discussed the meeting at all, would be protected by legal advice privilege, the effect of the Court of Appeal's decision in *Sports Direct International v Financial Reporting Council* [2020] EWCA Civ 177, [2021] Ch 457 (paras 54–55 and 61) is that the *fact* that the client provided the note to the lawyer is not privileged. It is not easy to understand why privilege would allow a client to refuse to say whether they discussed the meeting with the lawyer, but not protect the fact that the client provided the lawyer with the note, which would effectively reveal the same fact. The circumstances in which this issue arose in *Sports Direct International* were unusual (a regulatory notice which required production of specific documents only, there being no wider disclosure obligation: see para 57) such that in practice, the point may very rarely arise: in most cases the non-privileged note would be disclosed and produced as an independent document, and *both* the privileged email *and* its attachment would be withheld from production (there being no obligation to produce multiple copies of the same document).

[78] *Manser v Dix* (1855) 1 K & J 451, 454–5.

- As for the position of the lawyer, there is nineteenth-century authority which suggests that the privilege which the legal adviser is able to assert on behalf of his client covers *wider* ground than that which the client himself can assert—ie on the basis that the lawyer (in the rare case where he might be required to give evidence) would not be free to divulge any confidential facts he has learnt as a consequence of the retainer, *whether or not* such information derives from a privileged communication.[79] This authority, the (different) way in which a Court today is likely to analyse this issue, and other authorities which fall on the other side of the line where facts the solicitors learns are not covered by legal advice privilege—are addressed further below.[80]

(1) Extent of the need for actual communications after *Three Rivers 5*

2.33 **The basic position** In *Three Rivers 5*, the Court of Appeal held[81] that legal advice privilege only applies to:

- communications passing between client and lawyer (whether directly or through an intermediary) for the purpose of seeking or obtaining legal advice; and
- any document (including part of a document) or other material[82] which evidences the substance of such communications.

2.34 **Communications passing between lawyer and client** Communication requires little explanation. The term will clearly include oral as well as written communications.[83] Written communications will include emails, letters, memoranda, and notes exchanged between lawyer and client, although privilege does not extend to pre-existing documents.[84] The intention to communicate with the lawyer or the client for the dominant purpose of obtaining or giving legal advice must account for the existence of the document. The privilege is not intended to apply to documents which would have been created independently of the relevant lawyer–client communications in any event.

2.35 **Documents or other material evidencing lawyer–client communications** The most obvious of the categories of documents or other material (such as oral discussions) which are not, strictly speaking, actual lawyer–client communications but still fall within legal advice privilege are those which disseminate privileged communications or constitute secondary evidence of privileged communications. As set out above, it was accepted by the Court of Appeal in *Three Rivers 5* that legal advice privilege will apply to documents or parts of

[79] See *Greenough v Gaskell* (1833) 1 M&K 98, 104–5; E Bray, *The Principles and Practice of Discovery* (1885), 358, 429.

[80] See paras 2.53–2.65 below.

[81] *Three Rivers 5*, paras 19, 26. See also *National Westminster Bank plc v Rabobank Nederland* [2006] EWHC 2332 (Comm), paras 22–32, where Simon J applied the test of communications as set out in *Three Rivers 5*, stating that although the decision in *Three Rivers 5* has been criticized 'there can be little doubt that it represents the present state of the law'.

[82] The actual wording of the order made by the Court of Appeal in *Three Rivers 5*, the full text of which is set out in *Three Rivers 6*, para 14, only referred to *documents* which evidence the substance of such communications. However, anything which evidences the substance of lawyer–client communications (eg an oral discussion) must be equally privileged.

[83] *McE v Prison Service of Northern Ireland* [2009] 1 AC 908, para 3 (HL) (*per* Lord Phillips).

[84] *Vivian Imerman v Robert Tchenguiz and others* [2009] EWHC 2902 (QB); [2010] Lloyd's Rep PN 221, para 14. See also para 4.08 below.

communications passing for the purpose of getting or giving professional advice, and it is understood that the profession is the legal profession, the nature of the protection is I think correctly defined'.[260]

2.85 In 1988, the Court of Appeal laid down a more detailed and nuanced test for what constitutes legal advice or assistance in *Balabel v Air India*[261] which effectively guided a whole generation of lawyers. Taylor LJ stated:

> ... the test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes must be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with the words 'please advise me what I should do'. But even if it does not, there will usually be implied into the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice 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.
>
> It may be that applying this test to any series of communications might isolate occasional letters or notes which could not be said to enjoy privilege. But to be disclosable such documents must be not only privilege-free but also material and relevant. Usually a letter which does no more than acknowledge receipt of a document or suggest a date for a meeting will be irrelevant and so non-disclosable. In effect, therefore, the 'purpose of legal advice' test will result in most communications between solicitor and client in, for example, a conveyancing transaction being exempt from disclosure, either because they are privileged or because they are immaterial or irrelevant.[262]

2.86 The effect of *Balabel* was succinctly summarized by Lord Bingham CJ in *R v Manchester Crown Court, ex p Rogers*:

> ... in cases such as *Balabel v Air India* [1988] Ch. 317, the court has discountenanced a narrow or nit-picking approach to documents and has ruled out an approach which takes a record of a communication sentence by sentence and extends the cloak of privilege to one and withholds it from another. It is none the less true that legal professional privilege applies, and applies only, to communications made for the purpose of seeking and receiving legal advice.[263]

2.87 Perhaps understandably, after *Balabel* lawyers tended to focus on the injunction to avoid a nit-picking or narrow approach so as to treat all lawyer–client communications as privileged or irrelevant. This was an incorrect reading of *Balabel*. While the case undoubtedly

[260] Ibid, 581.
[261] [1988] 1 Ch 317.
[262] Ibid, 330–1.
[263] [1999] 1 WLR 832, 839 (DC).

laid down a broad test, suggesting that many communications would impliedly be related to the seeking or giving of legal advice even if they did not expressly so provide, it nonetheless required documents to be considered individually and carefully before privilege could be asserted. In particular, it should be noted that the Court of Appeal did not regard itself as bound by the decision of the House of Lords and Court of Appeal in *Minter v Priest*[264] because the statements of principle on the scope of legal advice privilege were not essential to the actual decision.[265] This is of significance in the light of Lord Carswell's subsequent approach to *Minter* in *Three Rivers 6* (see paragraph 2.105 below). Taylor LJ concluded:

> It follows from this analysis that those dicta in the decided cases which appear to extend privilege without limit to all solicitor and client communication upon matters within the ordinary business of a solicitor and referable to that relationship are too wide. It may be that the broad terms used in the earlier cases reflect the restricted range of solicitors' activities at the time. Their role then would have been confined for the most part to that of lawyer and would not have extended to business adviser or man of affairs. To speak therefore of matters 'within the ordinary business of a solicitor' would in practice usually have meant the giving of advice and assistance of a specifically legal nature. But the range of assistance given by solicitors to their clients and of activities carried out on their behalf has greatly broadened in recent times and is still developing. Hence the need to re-examine the scope of legal professional privilege and keep it within justifiable bounds.[266]

2.88 In *Three Rivers 5*, in addition to finding that the employee documents[267] over which privilege was claimed were not privileged as they were not lawyer–client communications (as to which see paragraphs 2.13 and 2.33 above), the Court of Appeal reached a subsidiary but distinct conclusion[268] that legal advice privilege did not apply because the dominant purpose of the preparation of the employee documents in issue was not to obtain legal advice but to put all relevant factual material before the Inquiry in an orderly and attractive fashion.[269] As regards lawyer–client communications it confirmed[270] that the law was as stated in *Balabel*, which it held was a perfectly appropriate test to apply to communications between the client and his/her solicitor but that authority did not support its wider application to memoranda supplied by employees for the purpose of being sent to the client's solicitor.[271] As stated at paragraph 2.14 above, the House of Lords dismissed the Bank's petition for leave to appeal from *Three Rivers 5*.

(3) The broad test following *Three Rivers 6*

2.89 **The background to *Three Rivers 6*** During the course of the hearings in *Three Rivers 5* the Liquidators had expressly disavowed any intention to seek disclosure of communications between the BIU and the Bank's lawyers.[272] In light of the Court of Appeal's subsidiary conclusion in *Three Rivers 5* referred to at paragraph 2.88 above, the Liquidators brought a

[264] [1929] 1 KB 655 (CA), [1930] AC 558 (HL).
[265] *Balabel v Air India* [1988] Ch 317, 325–6.
[266] Ibid, 331–2.
[267] *Three Rivers 5*, para 37.
[268] See *Three Rivers 6*, para 73 (*per* Lord Carswell).
[269] *Three Rivers 5*, para 35.
[270] Ibid, para 30.
[271] Ibid.
[272] Ibid, para 4.

further application, namely *Three Rivers 6*, seeking permission to withdraw their concession that legal advice privilege applied to communications between the lawyers and the Bank, seeking disclosure of communications between Freshfields and the BIU where such communications gave only 'presentational' advice on how matters could best be put before the Inquiry.

2.90 **Tomlinson J's judgment** In *Three Rivers 6* Tomlinson J granted the Liquidators' application,[273] holding that legal advice given to the Bank as to how it should best present its case before the Inquiry was not legal advice for the purposes of legal advice privilege. He considered himself bound by the rationale of the Court of Appeal's judgment in *Three Rivers 5* overturning his own previous decision to the effect that lawyers' advice sought or given for presentational purposes should not in general be categorized as legal advice of the kind which attracted legal advice privilege because it was not advice concerning the Bank's legal rights and obligations.'[274]

2.91 **The Court of Appeal's judgment** The Court of Appeal[275] affirmed Tomlinson J's judgment in *Three Rivers 6*.[276] For privilege to attach it held that the starting point is that the services of a solicitor must be sought for the purpose of providing professional advice of a kind properly sought from lawyers. Communications ancillary to that purpose would be privileged. It stated that there was no case in which legal advice privilege has been established where the relationship of client and solicitor had not arisen in relation to transactions involving the client's rights and obligations capable of becoming the subject matter of litigation and held that the true rationale of legal advice privilege was as 'a privilege in aid of litigation'.[278]

2.92 The Court of Appeal stated that the authorities showed that, where a solicitor-client relationship is formed for the purpose of obtaining advice or assistance in relation to the client's rights and liabilities, 'broad protection' would be given to communications passing between solicitor and client in the course of that relationship. In all such cases, however, the primary object of the relationship had to be to obtain assistance that required knowledge of the client's rights. The same principle did not apply to communications between solicitor and client where the dominant purpose was not the obtaining of advice and assistance in relation to rights and obligations.[279] The appeal fell to be determined on the basis of the judge's finding that the advice and assistance sought was primarily in relation to the presentation of evidence to the Bingham Inquiry in the way least likely to attract criticism of the Bank by the Inquiry rather than in relation to the Bank's rights and obligations.[280]

2.93 The Court of Appeal suggested that in circumstances where the traditional role of the solicitor has expanded, it was necessary to keep legal advice privilege within justifiable bounds. The question raised by the appeal was the scope of those justifiable bounds.

[273] [2003] EWHC 2565 (Comm).
[274] Ibid, para 13.
[275] Lord Phillips MR, Longmore and Thomas LJJ.
[276] It should be noted that, contrary to Tomlinson J's conclusion, the Court of Appeal did not consider that had in fact answered the question in *Three Rivers 5* as to whether advice about how the Bank should present its material to the Bingham Inquiry constituted legal advice for the purposes of legal advice privilege: *Three Rivers 6*, para 7.
[277] *Three Rivers 6*, CA, para 21.
[278] Ibid, para 25, relying on para 18 of the Sixteenth Report of the Law Reform Committee—*Privilege in Proceedings* (1967) (Cmnd 3472). For Lord Carswell's criticism of this part of the Report, see *Three Rivers 6*, paras 103–105.
[279] *Three Rivers 6*, CA, para 26.
[280] Ibid, para 28.
[281] Ibid, para 30.

commonplace for witnesses to be represented at inquiries, both statutory and non-statutory. Where witnesses at inquiries are exposed to, or concerned about, the risk of legal liability as a consequence of their role in the matter under enquiry, their communications with their lawyers will plainly be subject to legal advice privilege.[282] However, in contradistinction to litigation, a typical inquiry is not necessarily or even primarily concerned with legal rights and liabilities. Where legal rights and liabilities are not 'in play' in a particular inquiry (and the Court considered that the Bank's principal consideration was avoiding *mere* reputational damage),[283] advice provided by a solicitor to a client in relation to the inquiry did not automatically attract legal advice privilege and the facts of this case did not justify an 'extension' to the law of privilege.[284] The Bank's primary concern was, or should have been, to ascertain whether the collapse of BCCI was attributable to any regulatory shortcomings in this country and, in those circumstances, communications between the Bank and its lawyers assisting in the obtaining, preparation, and presentation of evidence and submissions to the Inquiry should not attract privilege, even if the Bank was anxious that this assistance should enable the Bank's role to be presented in the best possible light.[285] It would be fair to say that the Court of Appeal's decision came as a surprise to most lawyers.[286]

2.94 None of this is at all easy to square with *Balabel*. Although bound by *Balabel*, the Court of Appeal plainly did not apply it. If it had done so, given the terms of reference of the Bingham Inquiry which explicitly called for consideration of the Banking Acts,[287] it is very difficult to see how the Court of Appeal could have concluded that the Bingham Inquiry did not provide a legal context for Freshfields' advice. The answer seems obvious. The Liquidators suggested in argument that a publicist could have advised the Bank on presentation. But a publicist would not have any knowledge of the Banking Acts.

2.95 **The decision of the House of Lords** The decision of the Court of Appeal in *Three Rivers 6* was unanimously reversed on appeal by the House of Lords. The House of Lords, broadly affirming *Balabel*, held that legal advice covers what should prudently and sensibly be done in a relevant legal context, which included the presentation of a case to an inquiry by someone whose conduct might be criticized by it.[288] While it is therefore clear that legal advice is not confined to telling the client the law or advice relating to the client's legal rights and obligations, no unambiguously clear test emerges from the speeches in the House of Lords as to how a legal context is to be identified or how legal advice is to be defined. However, the following logical approach can be identified from them:

- The first and foremost question is whether there is a legal context to the lawyer's retainer.
- If there is not, legal advice privilege will not be available.
- If there is a legal context, the court will have to consider which communications between lawyer and client fall within the privilege.

[282] Ibid, para 31.
[283] Ibid, para 33.
[284] Ibid, paras 34–37.
[285] Ibid, para 37.
[286] See 'Lawyers' relief at legal advice ruling', Financial Times 12 November 2004; C Passmore, *Privilege* (5th edn, 2024), para 1.056.
[287] See para 2.08 above.
[288] The House of Lords' decision in *Three Rivers 6* has been followed by the Federal Court of Australia: *AWB Limited v Honourable Terence Rhoderic Hudson Cole* [2006] FCA 571, para 100.

whether multi-addressee communications should be treated as separate communications is an unnecessary distraction, and not one which needs to be addressed in order to analyse whether a multi-addressee communication is protected in whole or in part by legal advice privilege.

2.144 The question of whether the dominant purpose test is met is likely to be most contentious in situations where in-house counsel are involved, because (i) in-house counsel will frequently be recipients alongside other executives or employees (as in *Jet2.com*); and (ii) in-house counsel may often have a non-legal role, in addition to their legal role (and it will therefore be necessary to consider in what capacity the lawyer is receiving or sending his/her communication).

2.145 Another situation where difficult issues may arise in connection with application of the test is where a client instructs an alternative business structure (ABS) authorized by a legal regulator under the Legal Services Act 2007. Some ABSs only perform legal work and are simply an ABS because they have at least one non-lawyer who is an owner and/or manager. Communications with such ABSs are likely to be analysed in the same way as communications with traditional law firms. However, other ABSs, in addition, have owners and employees who specialize in different disciplines, eg lawyers, accountants, insolvency practitioners, who are all working at the same entity carrying out different types of work under one roof. If the latter type of ABS sends a report to a client which includes legal advice but also non-legal advice, it will be interesting to see how the courts apply the dominant purpose test to determine whether the report is covered by legal advice privilege. For example will a court find that the whole report is protected by legal advice privilege if the dominant purpose of the client in obtaining the report is obtaining legal advice, and conversely find that none of the report is covered by legal advice privilege if the dominant purpose is some other purpose? It is suggested that the courts are unlikely to take that approach but would instead simply find that the sections of the report whose dominant purpose is to provide legal advice are covered by legal advice privilege and can be redacted, with the remainder of the report not protected by legal advice privilege.

2.146 While there does not appear to be any reported case in which the English Courts have grappled with that issue, it has been considered by the Federal Court of Australia in *Commissioner of Taxation v PricewaterhouseCoopers*.[412] In that case, the question arose as to whether documents sent between a client and a multi-disciplinary partnership (PwC Australia) were subject to legal advice privilege. As with some ABSs in this jurisdiction, PwC Australia provides legal services but also other services, such as accountancy advice, and some of its partners are Australian legal practitioners and some are not. The Statement of Work between PwC Australia and the client stated that the services to be provided were 'legal services'. Moshinsky J held that such wording was not determinative and that:

> It is … necessary to consider, on a document-by-document basis, whether each Sample Document is subject to legal professional privilege. This requires consideration of whether the Sample Documents are, or record, communications made for the dominant purpose

If the communication in question simply formed part of the *Balabel* continuum of communication, it might be very difficult to say that it realistically disclosed the nature of any legal advice being sought.

[412] [2022] FCA 278.
[413] Ibid, para 18.

of giving or receiving legal advice. This question is to be determined by reference to the content of the document, its context, and the relevant evidence relating to the document. A critical part of the context in the present case is that the services were provided by a multidisciplinary partnership and that the team carrying out the work comprised both lawyers and non-lawyers. Another contextual matter is the involvement of overseas firms in many of the same projects (under separate engagements). At least in the case of PwC Brazil and PwC USA, the overseas firms were not able to provide legal advice and made clear that they were not doing so.[414]

Having considered the claim for legal advice privilege on a document-by-document basis, the Court held that (i) many of the documents for which legal advice privilege had been claimed were covered by legal advice privilege but also that (ii) many of the documents for which legal advice privilege had been claimed were not so covered as they had not been brought into existence for the dominant purpose of obtaining/providing legal advice.

In principle, the same sort of analysis that would be required in considering whether an in-house lawyer was communicating *qua* lawyer would apply when considering whether a communication from a representative of the ABS could be said to be privileged. In addition, where the communication was made by or to a non-legally qualified representative of the ABS, it might be necessary to consider whether he/she was at any time acting as agent of, or under the direction and control of, the relevant legal adviser. 2.147

H. The Future of Legal Advice Privilege

'The client' The Court of Appeal's approach in *Three Rivers 5* to corporate clients is dealt with in Section B above. As set out at paragraphs 2.07 and 2.16-2.26 above, it is suggested that when it has the opportunity to do so, the Supreme Court should overturn *Three Rivers 5* and hold that *Three Rivers 5* wrongly conflated two separate issues, namely (i) who is the client and (ii) who acts on behalf of the client. As regards (i) who is the client, the client is simply the corporate body. As regards (ii) who acts on behalf of the client, it is suggested that any employee or officer or former employee or officer of a corporate client who has the authority of the corporation to give instructions or information to the lawyer or to seek or receive legal advice acts on behalf of the client and therefore that person's communications or documents are capable of being covered by the corporate body's legal advice privilege if the other requirements for legal advice privilege are met. The present state of the law unjustifiably places corporate clients at a disadvantage; whereas in the case of an individual the person who has the relevant factual knowledge is ordinarily one and the same as the person receiving and acting upon the advice, this is not necessarily the case with corporations. Yet corporations ought also to be permitted an appropriate private internal sphere for a preparatory process of collating relevant factual information from its employees to allow them to obtain fully informed legal advice. The decision in *Three Rivers 5* leaves little or no room for this to occur. 2.148

Requirement for a communication The Court of Appeal's approach in *Three Rivers 5* to communications (see Section E above) is also problematic. As set out at paragraphs 2.33-2.46 2.149

[414] Ibid, para 21

above, the Court of Appeal in *Three Rivers 5* essentially confined legal advice privilege to communications actually passing between lawyer and client (subject to a narrow exception in the case of inchoate communications) and to secondary evidence of, or dissemination of, such communications. The consequence is that most internal client documents will not be capable of being subject to legal advice privilege even if prepared for the dominant purpose of seeking legal advice.

2.150 The authors of this work consider that the law took a wrong turn in *Three Rivers 5*. It suggested that in the early case law the courts referred to a communication for three reasons: first, expansively (to make clear that it is not only documents that can be protected by legal advice privilege, but also oral communications); secondly to make clear that legal advice privilege does not apply to pre-existing documents or to pre-existing facts known to the client; and thirdly to limit legal advice privilege to client or lawyer documents and to exclude third-party communications. However, none of these reasons necessitates a requirement for a communication in all cases; rather, all can be dealt with by a test that legal advice privilege covers (i) all communications between lawyer and client or the agent of either made with the dominant purpose of seeking or giving legal advice, (ii) all internal documents prepared by the client or lawyer or the agent of either with the dominant purpose of seeking or giving legal advice, and (iii) any secondary evidence or dissemination of such communication or documents (subject to issues of confidentiality and waiver). Up to and including the Court of Appeal, the courts are bound to apply *Three Rivers 5*. However, when legal advice privilege is next considered by the Supreme Court, it is hoped that the Supreme Court will recognize that *Three Rivers 5* was wrong in finding that there is a requirement for a communication in all cases and that the true test is as set out earlier in this paragraph.

2.151 A sounder starting point when considering this issue is the decision at first instance of Tomlinson J in *Three Rivers 5*,[415] which upheld the Bank's claim to legal advice privilege, holding that internal bank documents, not being communications with a lawyer, would be covered by legal advice privilege provided that they were produced or brought into existence for the dominant purpose that they or their contents would be used to obtain legal advice. Tomlinson J's decision was overturned by the Court of Appeal but was, with respect, more logical and more in accordance with the rationale for legal advice privilege than was the decision of the Court of Appeal. In *Three Rivers 6* in the House of Lords Lord Carswell, with whose speech the other law lords agreed,[416] stated that Tomlinson J's decision in *Three Rivers 5* had 'considerable force'[417] and expressly stated that he was not to be taken as having approved the Court of Appeal's decision in *Three Rivers 5*, reserving his position as to its correctness.[418] Tomlinson J did not dismiss as irrelevant, as the Court of Appeal wrongly did in *Three Rivers 5*,[419] cases or dicta such as *Southwark and Vauxhall Water Company v Quick*,[420] *Grant v Downs*,[421] *Waugh v British Railways Board*,[422] and *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership*[423] which were clearly applicable to legal professional privilege generally including legal advice privilege. Whilst the Court of Appeal has recently confirmed

[415] [2002] EWHC 2730 (Comm).
[416] *Three Rivers 6*, paras 45, 49, 61, and 122.
[417] *Three Rivers 6*, para 69.
[418] Ibid, para 16.
[419] *Three Rivers 5*, para 15–16, 24, 25, and 28.
[420] (1878) 3 QBD 315.
[421] (1976) 135 CLR 674.
[422] [1980] AC 521.
[423] [1987] 1 WLR 1027.

in *Jet2* that (as Tomlinson J had held) the dominant purpose test applies to legal advice privilege, it plainly felt constrained by authority from going further. If and when the Supreme Court has the opportunity to consider the issue (free from the constraints of precedent), it is hoped that Tomlinson J's impressive judgment will be revisited, including as regards the lack of a need for a communication in every case of legal advice privilege.

There are a number of reasons why it is considered that the law on legal advice privilege should be developed as described in the previous two paragraphs and not as described by the Court of Appeal in *Three Rivers 5*. 2.152

First, given the number of exceptions to the requirement for a communication, as summarized at paragraphs 2.35- 2.56 above, it is unhelpful for the law to specify that a communication is a requirement when in reality—even on the basis of the law as it stands—it is not. 2.153

Second, the test set out at paragraph 2.150 above is consistent with the rationale for legal advice privilege, namely to encourage complete candour between lawyer and client so that the client can obtain fully informed legal advice and provides a practical framework for corporations to seek and obtain legal advice in the modern world. If a client cannot prepare internal documents which enable it to obtain complete and accurate legal advice then the policy reasons behind legal advice privilege are not met. As Tomlinson J put it in *Three Rivers 5*, the policy is intended to preserve the 'confidentiality of the process pursuant to which legal advice is sought and obtained' and not merely of the communication with the lawyer itself.[424] 2.154

Third, the test proposed is consistent with legal certainty in that the question as to whether a document is covered by legal advice privilege will be capable of being determined at the moment the document is created and will not depend on the use to which the document is subsequently put. 2.155

Fourth, the analysis at paragraph 2.150 above is consistent with the law of other countries, whereas the Court of Appeal's judgment in *Three Rivers 5* is on any view now an outlier. See paragraphs 2.80-2.82 above. 2.156

If the analysis at paragraph 2.150 were accepted by the Supreme Court to be correct, would it follow that legal advice privilege would also be extended to cover communications with third parties? The answer is likely to be no. Whilst that further step has been taken in Australia, this may well be regarded as a step too far for the law in this jurisdiction, and would require the overruling of a great deal of English authority.[425] 2.157

[424] [2002] EWHC 2730 (Comm), para 4.
[425] There are nevertheless good arguments in favour of the Australian position and for the view that the rationale for legal advice privilege justifies extending protection to communications with third parties, particularly where the third parties in question are ex-employees of the client.

3

LITIGATION PRIVILEGE

A. Introduction

3.01 The distinctions between legal advice privilege and litigation privilege[1] were summarized by Lord Edmund-Davies in *Waugh v British Railways Board*[2] in the following terms:

> It may well be that in some cases where that right has in the past been upheld the courts have failed to keep clear the distinction between (a) communications between client and legal adviser, and (b) communications between the client and third parties, made (as the Law Reform Committee put it) '... for the purpose of obtaining information to be submitted to the client's professional legal advisers for the purpose of obtaining advice upon pending or contemplated litigation.' (Sixteenth Report, para. 17 (c).) In cases falling within (a), privilege from disclosure attaches to communications for the purpose of obtaining legal advice and it is immaterial whether or not the possibility of litigation were even contemplated.... But in cases falling within (b) the position is quite otherwise. Litigation, apprehended or actual, is its hallmark.

3.02 Like most shorthand descriptions, this does not tell the full story so far as litigation privilege is concerned. There are, as one would expect, a number of other conditions or exceptions which the summary does not embrace, such as the type of litigation qualifying for the privilege.[3] The starting point, however, is to emphasize that although communications with

[1] As noted at para 1.11 above, terminology is not always used consistently by the courts.
[2] [1980] AC 521, 541–2.
[3] *In re L (a Minor) (Police Investigation: Privilege)* [1997] AC 16; *Three Rivers 6*, para 101 (*per* Lord Carswell). See para 3.66 below.

third parties might well be the paradigm situation to which litigation privilege applies, the privilege is not strictly limited in this way. It extends to any document generated for the dominant purpose—whether of its author or of the person or authority under whose direction it was produced or brought into existence—of actual or anticipated litigation.[4]

3.03 Historically, two strands to litigation privilege were established by the end of the nineteenth century. Apart from communications with third parties, there was also the widely recognized privilege applying to 'materials for the brief' or 'materials for evidence'. This category was already being treated in 1885 by Bray in his seminal work on discovery[5] as a category distinct from communications, with its own rationale,[6] but under the general head of litigation privilege. It appears to have been reasonably well established by the end of the nineteenth century and was spelt out in the well-known passage in the judgment of James LJ in *Anderson v Bank of British Columbia*:[7]

> ... as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as materials for the brief.[8]

3.04 A number of further statements to similar effect can be found in important cases in the last quarter of the nineteenth century, including that of Brett LJ in *Southwark and Vauxhall Water Company v Quick*:[9]

> ... if a party seeks to inspect a document which comes into existence merely as the materials for the brief, or that which is equivalent to the brief, then the document cannot be seen, for it is privileged.

Further in *Lyell v Kennedy (No 2)*, Cotton LJ stated:

> There is also another principle, that no one is to be fettered in obtaining materials for his defence, and if he for the purpose of his defence obtains evidence, the adverse party cannot ask to see it before the trial. I do not think that this principle applies here, but I mention it that I may not be supposed to limit protection to the simple professional privilege which arises where information has been obtained through a solicitor.[10]

3.05 In fact both third party communications and the 'materials for the brief' category can now be regarded as subsumed within the modern test for litigation privilege, so far as it applies to documents, laid down by the House of Lords in *Waugh*'s case, which is conveniently set out in the following well-known passage in Lord Edmund-Davies' speech:

[4] The precise focus of that dominant purpose is discussed at paras 3.87–3.91 below.
[5] E Bray, *Principles and Practice of Discovery* (1885), 406 ff. This is Section X of Book II, dealing with litigation privilege.
[6] Ibid, 406–8; cf 413–16.
[7] (1876) 2 Ch D 644, 656 (CA); cf *Re Saxton* [1962] 1 WLR 968, 972 (CA). P Matthews and H Malek, *Disclosure* (6th edn, 2023), paras 11.67–11.73, argue convincingly that the 'materials for evidence' privilege is not the same as the right to withhold disclosure of documents relating solely to a party's own case and in no way tending to impeach that case or support the case of any opposing party, which was abolished by statute in s 16(2) of the Civil Evidence Act 1968. See now, for example, CPR 31.6 or (in the Business and Property Courts) CPR Practice Direction 57AD.
[8] See also at 658–9 (*per* Mellish LJ).
[9] (1878) 3 QBD 315, 320.
[10] (1883) 23 Ch D 387, 404 (CA). This passage is important because it shows that the 'materials for the brief' category is broader than communications made to the client's solicitor for the preparation of the brief: cf the earlier case of *Wheeler v Le Marchant* (1881) 17 Ch D 675, 684–5 (CA), where the two categories are conflated.

> After considerable deliberation, I have finally come down in favour of the test propounded by Barwick C.J. in *Grant v. Downs*, 135 C.L.R. 674, in the following words, at p 677:
>
> Having considered the decisions, the writings and the various aspects of the public interest which claim attention, I have come to the conclusion that the court should state the relevant principle as follows: a document which was produced or brought into existence either with the *dominant* purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection. (Italics added)
>
> *Dominant* purpose, then, in my judgment, should now be declared by this House to be the touchstone.[11]

3.06 The 'materials for the brief' category was specifically approved by Lord Edmund-Davies in *Waugh*'s case, for as he also said, speaking with approval of the passage set out above from the judgment of James LJ in *Anderson*'s case:[12]

> And in the Court of Appeal James L.J. summed up the position, at p. 656, by speaking succinctly of '... an intelligible principle, that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief'.[13]

3.07 **Summary of litigation privilege** In an oft-cited passage from *Starbev GP Ltd v Interbrew Central European Holding BV*,[14] Hamblen J said:

> The legal requirements of a claim to litigation privilege may be summarized as follows:
>
> (1) The burden of proof is on the party claiming privilege to establish it—see, for example, *West London Pipeline and Storage v Total UK* [2008] 2 CLC 258 at [50].
> (2) An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in a witness statement are not determinative and are evidence of a fact which may require to be independently proved. The court will scrutinize carefully how the claim to privilege is made out and the witness statements should be as specific as possible—see, for example, *Sumitomo Corporation v Credit Lyonnais Rouse Ltd* (14 February 2001) at [30] and [39] (Andrew Smith J); *West London Pipeline and Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm) at [52], [53], [86] (Beatson J); *Tchenguiz v Director of the SFO* [2013] EWHC 2297 (QB) at [52] (Eder J).
> (3) The party claiming privilege must establish that litigation was reasonably contemplated or anticipated. It is not sufficient to show that there is a mere possibility of litigation, or that there was a distinct possibility that someone might at some stage bring proceedings, or a general apprehension of future litigation—see, for example, *United States of America v Philip Morris Inc* [2004] EWCA Civ 330 at [68]; *Westminster International v Dornoch Ltd* [2009] EWCA Civ 1323 at paras [19]–[20]. As Eder J stated in *Tchenguiz* at [48(iii)]: 'Where litigation has not been commenced at the time of the communication, it has to be "reasonably in prospect"; this does not require the prospect of litigation to be greater than 50% but it must be more than a mere possibility'.
> (4) It is not enough for a party to show that proceedings were reasonably anticipated or in contemplation; the party must also show that the relevant communications were for the dominant purpose of either (i) enabling legal advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings. Where communications may have taken place for a number of purposes, it is incumbent on the party claiming privilege to establish that the dominant purpose was litigation. If there is another purpose, this test will not be satisfied: *Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583, 589–590 (cited in *Tchenguiz* at [54]–[55]); *West London Pipeline and Storage Ltd v Total UK Ltd* at [52].

[11] [1980] AC 521, 543–4 (*per* Lord Edmund-Davies). See also 532–3 (*per* Lord Wilberforce), 534 and 537 (*per* Lord Simon).
[12] Ibid, 542. See also *per* Lord Simon, ibid, 537.
[13] This passage, as well as the passage cited in para 3.01 above from Lord Edmund-Davies' speech in *Waugh*, was applied to the facts of the case by the Court of Appeal in *Re Highgrade Traders Ltd* [1984] BCLC151, 164-5 (*per* Oliver LJ); see also *Sumitomo Corporation v Credit Lyonnais Rouse Ltd* [2002] 1 WLR 479, para 46 (CA) (*per* Jonathan Parker LJ). The argument that 'materials for the brief' was a distinct category was recognized, but not commented upon, by the Irish High Court in *Woori Bank v KDB Ireland Ltd* [2005] IEHC 451.
[14] [2013] EWHC 4038 (Comm), para 11. This summary has been quoted or relied on in, among other cases: *Al Sadeq v Dechert LLP* [2024] EWCA Civ 28, [2024] 3 WLR 403; *Município de Mariana v BHP Group (UK) Ltd* [2024] EWHC 23 (TCC); *Northumbria Healthcare NHS Foundation Trust v Lendlease Construction (Europe) Ltd* [2022] EWHC 1266 (TCC); *Kyla Shipping v Freight Trading* [2022] EWHC 376 (Comm); *Victorygame Ltd v Ahuja Investments Ltd* [2021] EWCA Civ 993; *TBD (Owen Holland) Ltd v Simons* [2020] EWCA Civ 1182, [2021] 1 WLR 992; *BGC Brokers LP v Tradition (UK) Ltd* [2019] EWCA Civ 193; *Skymist Holdings Ltd v Grandiare Developments Ltd* [2018] EWHC 3504 (TCC), 183 Con LR 78; and *Sotheby's v Mark Weiss Ltd* [2018] EWHC 3179 (Comm), [2019] Lloyd's Rep FC 191.

Litigation privilege can therefore, in general terms, be described as the privilege of a client[15] to withhold from disclosure:

- oral or written communications between that client or their lawyer (on the one hand) and *third parties* (on the other) or other documents created by or on behalf of the client or their lawyer;
- which come into existence once adversarial litigation is reasonably contemplated[16] or has commenced;
- which come into existence for the *dominant purpose* of obtaining information or advice in connection with, or of conducting or aiding in the conduct of, such adversarial litigation (for example, obtaining evidence to be used in litigation or information which might lead to such evidence).[17]

3.08 **Differentiation from legal advice privilege** Although courts and commentators frequently refer to lawyer–client communications made for the dominant purpose of litigation as being within litigation privilege[18] or covered by litigation privilege as well as legal advice

[15] As discussed at para 1.35 above, the privilege belongs to the client, even in the case of privileged communications between the client's lawyer and third parties.
[16] See para 3.51 below. Also see paras 3.148–3.150 below, where the requirement for litigation to be adversarial is questioned.
[17] *Three Rivers 6*, para 102 *per* Lord Carswell; *Grant v Downs* (1976) 135 CLR 674, 677 (*per* Barwick CJ); *Wheeler v Le Marchant* (1881) 17 Ch D 675, 680–1 (*per* Sir George Jessell MR; cited by Lord Carswell in *Three Rivers 6* at para 99). See also Police and Criminal Evidence Act 1984, s 10(1)(b), which is said to reproduce the common law: *R v Central Criminal Court, ex p Francis and Francis* [1989] AC 346, 392 (*per* Lord Goff). Section 413 of the Financial Services and Markets Act 2000 creates a form of legal professional privilege in relation to 'protected items' which do not have to be disclosed to the FCA (it does not require any element of confidentiality).
[18] See eg *Winterthur Swiss Insurance Company v AG (Manchester) Ltd (In Liquidation)* [2006] EWHC 839 (Comm), at paras 71, 83 (*per* Aikens J); *West London Pipeline and Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm), [2008] 2 CLC 258, para 55 (*per* Beatson J); *Barr v Biffa Waste Services Ltd* [2009] EWHC 1033 (TCC),