Case Note

EXTENDING THE SCOPE OF LEGAL ADVICE PRIVILEGE[1]

Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd
[2007] SGCA 9

The Court of Appeal (CA) in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* rendered a thorough re-examination of legal professional privilege (LPP) at common law and statute. Problems arise when the rules of LPP (based as it were on "natural persons" as clients) are applied to corporations claiming privilege especially legal advice privilege. The CA's decision to consider extending the scope of advice privilege might be in response to modern corporate practices, but it is argued that extending the scope of the privilege following the Australian position may raise more problems than it solves. A re-making of the rules relating to corporate client privilege needs to be formulated.

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I. Introduction

1 In *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd*,[2] the Court of Appeal took the opportunity to consider the doctrine of legal professional privilege in the light of significant developments at common law, especially in England[3] and Australia.[4] In so doing the court took the bold step of effectively

1 I am most grateful to my co-teachers in Evidence, Prof J Pinsler and Assoc Prof Ho Hock Lai for reading the draft and for discussing aspects of the privilege with me without which this note could not have been written in the time given.

2 [2007] SGCA 9; hereinafter referred to as the *Skandinaviska* case.

3 The most recent decisions are: *Three Rivers DC v Bank of England (No 5)* [2003] QB 1556; *Three Rivers DC v Bank of England (No 6)* [2005] 1 AC 610; *Balabel v Air India* [1988] Ch 317.

4 The recent cases include *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357; *Mitsubishi Electric Australia Pty Ltd v Victorian Work Cover Authority* [2002] 4 VR 332.

widening the scope of advice privilege,[5] and departing from the more conservative approach found in the English case of *Three Rivers (No 5)*[6] as regards the issue whether advice privilege in a corporate environment could be successfully claimed for communications made or generated by third parties (that is, not the client directly or acting for the client as a mere conduit). This is distinct from the other branch of legal professional privilege, namely litigation privilege, where third party communications have long enjoyed the privilege provided they are produced for the dominant purpose of reasonably contemplated litigation. The nub of the issue before the court is well summarised by McCormick:[7]

> The scope of the privilege in the corporate context … has presented an exceptionally troublesome question which is even yet not fully resolved. The difficulty is basically one of extrapolating the essential operating conditions of the privilege from the paradigm case of the traditional individual client who both supplies information to, and receives counsel from, the attorney. Are both of these aspects of the relationship to be protected in the corporate setting, in which the corporate agents in a position to furnish the pertinent facts are not necessarily those empowered to take action responsive to legal advice based upon those facts?

2 The issue before the court was whether draft reports (regarding a massive fraud perpetrated by the financial officer[8] of the company[9] on four banks) prepared and produced by an accounting firm (jointly with a law firm) attracted both advice and litigation privilege. The trial judge had held that the documents were protected by both advice and litigation privilege.[10] The court reached the same conclusion, but disagreed with

5 Following Australian authority: *Pratt Holdings Pty Ltd v Commissioner of Taxation*, *op cit*.

6 *Three Rivers DC v Governor & Bank of England (No 5)* [2003] QB 1556.

7 McCormick on Evidence, (West Group, 5th Ed, 1999) ch 10 at §87.1.

8 The finance manager (now convicted of forgery and cheating) obtained credit and loan facilities from four banks, which brought the action to recover monies after the fraud came to light. The banks sought discovery of the draft reports as part of the action.

9 Asia Pacific Breweries (Singapore) Pte Ltd ("APBS"). It is a wholly owned subsidiary of Asia Pacific Breweries Limited ("APBL"), which appointed the accountant firm (PWC) and law firm (Drew and Napier) to produce a report on the fraud. A Special Committee of directors was set up to "oversee investigations and take any necessary actions" (first MASNET announcement submitted by APBL through its company secretary).

10 [2006] 3 SLR 441 (for a useful discussion of this case, especially on the trial judge's approach to the relationship between the Evidence Act and common law, see Ho Hock Lai, *Legal Advice Privilege & the Corporate Client*, [2006] Sing JLS (Dec) 231 at pp 260–263 (Postscript)).

parts of the trial judge's reasoning.[11] Particularly pertinent is the disagreement on whether s 128 of the Evidence Act ("professional communications") and *Three Rivers (No 5)* are inconsistent with each other on the issue of who is the client for the purposes of advice privilege.[12]

3 The court held that there was no inconsistency between the provision and the case. It follows that if *Three Rivers (No 5)* were to apply, the advice privilege claim would fail in that the PWC draft reports would be regarded as not communications by the client to the legal adviser. PWC would on this view be regarded as a third party. The adoption of the test as propounded in *Pratt Holdings Pty Ltd v Commissioner of Taxation*[13] would on the other hand provide a different result, as the Australian Federal Court extended the advice privilege to third party (*ie*, not agents or representatives of the client) communications where these were for the dominant purpose of obtaining legal advice. The focus of discussion in this note is on the problems of the corporate client in claiming legal advice privilege and on the court's preference for the Australian position, rather than the narrower view expressed in England.[14]

4 It is accepted that the statutory provisions (ss 128 and 131) do not stand in the way of accepting either position. As was made clear in the court's opinion, the provisions are not inconsistent with the common-law and reference can therefore be made to the latter without compromising the integrity of the code.[15] Given the findings made by the trial judge and

11 CA agreed with the *finding* that the reports attracted advice privilege as the lawyers' advice was "inseparably embedded" in the reports (*ibid,* at [98]–[99]) and also that the documents were protected by litigation privilege presumably as a class (*ibid,* at [101]).

12 See Ho HL, *op cit* for an analysis of the issue of inconsistency according to the trial judge.

13 (2004) 136 FCR 357.

14 "The approach in *Pratt Holdings* is principled, logically coherent and yet practical, and is also consistent with the reality of legal practice …" *per* Andrew Phang JA in *Skandinaviska* at [63].

15 At [34] of the judgment, Andrew Phang JA opined that s 131 is wide enough to cover litigation privilege and at [67] he said that s 131 "clearly envisages the concept of litigation privilege". Although one of the theories about the evolution of legal professional privilege is that litigation privilege came first in terms of protecting counsel's brief, litigation privilege as we know it in fact germinated post 1872: see Lord Carswell, *Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)* [2005] AC 610 at [96] referring to *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, *Southwark and Vauxhall Water Co v Quick* (1878) 3 QBD 315, and *Wheeler v Le Marchant* (1881) 17 Ch D 675 as the origin for this branch of the privilege. Section 131 is in fact just the flip side of s 128 (*ie*, referring to the rights of the client re advice privilege) and is wider to include

agreed to by the Court of Appeal, it was not necessary for a decision to be made whether the draft reports were prepared for the sole or dominant purpose of obtaining legal advice. Andrew Phang JA (delivering the judgment of the court) continued:

> If as a matter of legal policy it is necessary to ensure that parties do not cloak every piece of evidence with immunity from disclosure, it would be necessary for the courts to find a *modus vivendi* between the two extremes. It will suffice for the present to observe (in a narrower area of *third party* communications) that if the approach in *Pratt Holdings* is adopted, the "dominant purpose" test might, as observed in that case itself, constitute an appropriate safeguard against an overly broad application of legal advice privilege.[16]

5 Holding that advice privilege could cover third party communications, but restricted to those communications that could be shown to be made for the dominant purpose of legal advice is the *modus vivendi* proposed by the court. Is this defensible in principle and practice?

II. Rationale of Legal Professional Privilege[17]

6 Many attempts have been made to justify the privilege, seen from the standpoint of the lawyer (protecting the lawyer's honour and his livelihood) as well as from the client's (candour, confidentiality, privacy, allowing the client to enjoy rights fully).[18] In truth, the privilege presents a paradox: in facilitating communication between client and solicitor, it promotes the administration of justice through free, full and frank disclosure so as to get the best advice, but when a claim for privilege succeeds, it hinders the administration of justice, for relevant evidence might be excluded and the truth-finding process suffers as a result. Thus

different types of legal advisers who could provide legal advice at the time, as was pointed out in the judgment. The better view therefore is that litigation privilege is directly imported from the common-law. (I am indebted to Prof Jeffrey Pinsler for pointing this out to me.) See also, J Pinsler, *The Three Rivers DC Saga: New Issues of Professional Privilege for a Singapore Court to Decide* (2005) 17 SAcLJ 596.

16 *Ibid*, at [65].

17 Quite apart from *dicta* to be found in numerous judgments, see also, B Thanki (ed), *The Law of Privilege* (Oxford University Press, 2006) at paras 1.13–1.23; A Zuckerman, *Civil Procedure* (Sweet & Maxwell, 2nd Ed, 2006) at paras 15.6–15.20; HL Ho, "*Legal Professional Privilege and the Integrity of Legal Representation*" *Legal Ethics* (forthcoming). I am particularly grateful to Dr Ho HL for an advance copy of his article in which he critically examines the various rationales commonly found to justify legal professional privilege. See also Wigmore, *Evidence* (McNaughton, 1961) at §2291, p 554 where the great scholar said of the privilege: "Its benefits are all indirect and speculative; its obstruction is plain and concrete."

18 For a succinct yet detailed analysis of all the rationales, see Ho HL, *op cit.*

the contours of the privilege must be carefully sculpted to strike the right balance in the face of competing interests – and one of the areas in which there appears to be some uncertainty in recent years is that of legal professional privilege in the corporate environment.[19] One of the concerns is that in the corporate environment, advice privilege might be used as a means to cover up corporate misgovernance from seeing the light of day, *ie*, from ever getting to court. If it has that tendency, then the administration of justice would suffer just as much as not having it, if not more.

7 Any extension of the privilege, therefore, should be cautiously attempted, if at all, if the profession is not to be seen as self-interested and self-serving. This is particularly so in an era where the lawyer is required to multi-task and renders advice not strictly on legal matters all the time. A detailed analysis of all these matters lies elsewhere. Suffice it to say that in *Skandinaviska*, the court seems to have accepted the candour rationale for advice privilege. The candour rationale has been criticised as being more gut-feel (or as McCormick puts it "compelling common sense appeal"[20]) than capable of demonstrable proof.[21] Also, the candour argument does not work for lawyers alone; even financial advisers might profit from a dose of candour from their clients as to their wealth position, let alone more obvious professionals like doctors and priests. So it is not immediately apparent why lawyers should enjoy the privilege to the exclusion of others.

8 On occasions, the forthrightness with which judges and counsel declare the durability and strength of the privilege (as a fundamental right, an essential part of the 'rule of law') contrasts sharply with the privilege as seen by others such as doctors, accountants and financial advisers. For example, it was observed by the Director of Fair Trading (UK) that in areas where there are overlaps between professions, such as tax lawyers or financial lawyers and accountants, the privilege provides an unfair advantage to lawyers.[22]

19 See J Sexton, "A Post *Upjohn* consideration of the corporate attorney-client privilege" (1982) NYU L Rev 443.

20 See McCormick on Evidence, (West Group, 5th Ed, 1999), §87 *et seq*.

21 See J Auburn, *Legal Professional Privilege: Law and Theory* (Hart Publishing, 2000) at pp 65–77. See also, Lord Phillips MR in *Three Rivers DC v Bank of England (No 6)* [2004] QB 916 at [39] doubting the advice privilege. This was disapproved by Lord Carswell in *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] AC 610 at [55].

22 Cited by Ho HL, *op cit*: *Competition in Professions* Mar 2001, OFT 328.

9 Candour alone cannot justify the advice privilege – it must also be tied closely to the administration of justice, or as put by Taylor LJ (as he then was) in *Balabel v Air India*[23] there must be a 'relevant legal context' for the privilege to operate. Taylor LJ was particularly perturbed that "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 [would be] too wide".[24] It might be said that the further one moves away from the core of legal representation – *ie*, litigation or dispute settlement, and into the penumbra of seeking advice, the more necessary it is to find the "relevant legal context". Lord Scott in *Three Rivers DC v Bank of England (No 6)* adopted the language of Taylor LJ and went on to say,

> If a solicitor becomes the client's "man of business", and some solicitors do, responsible for advising the client on all matters of business, including investment policy, finance policy and other business matters, the advice may lack a relevant legal context. There is, in my opinion, no way of avoiding difficulty in deciding in marginal cases whether the seeking of advice from or the giving of advice by lawyers does or does not take place in a relevant legal context so as to attract legal advice privilege. In cases of doubt the judge called upon to make the decision should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law. If it does not, then, in my opinion, legal advice privilege would not apply. If it does so relate then, in my opinion, the judge should ask himself whether the communication falls within the policy underlying the justification for legal advice privilege in our law. Is the occasion on which the communication takes place and is the purpose for which it takes place such as to make it reasonable to expect the privilege to apply? The criterion must, in my opinion, be an objective one.[25]

23 [1988] 1 Ch 317.

24 *Ibid.*, at 331. At 330, Taylor LJ said, "legal advice is not confined to telling the client the law; it must include advice as to what should prudently be done in the relevant legal context." The House of Lords in *Three Rivers 6* universally approved this dictum.

25 *Ibid*, at [38]. *Cf* Thanki, *op cit*, at 2.115–2.116 attempts to define "legal" widely and would include giving advice on the commercial wisdom of entering into a transaction, so long as it involves analysing the case through "legal spectacles" (*per* Lord Rodger in *Three Rivers 6*.) This, it is submitted, is a flexible approach that would cater to different types of legal advisers and advice. For example, it is understandable that a commercial or tax lawyer might advise on the suitability or otherwise of investments *etc* – his expertise and experience might be invaluable and might be the very reason he was appointed. It would be wrong to tie his expertise up to satisfy strict tests of what is meant by "legal advice". It would depend on the "relevant legal context" and most probably, the nature of his expertise and the terms of his retainer.

10 If advice privilege is to be extended in the way advocated by the court in *Skandinaviska*, it is imperative that we must not lose sight of the "relevant legal context" in the way as described by Taylor LJ and as explained by Lord Scott.

III. Advice privilege: extension to "third parties" in the corporate environment[26]

11 The traditional rule at common law in advice privilege is that any communication between a client (or his agent authorised solely to communicate) and his lawyer for the purpose of seeking legal advice is immune from disclosure. Under English law,[27] the agent must be so for the purpose of communication and nothing else. So in *Skandinaviska*, applying the English test would mean that the draft reports were not privileged as PWC, in addition to being the conduit, had actively engaged in preparing the reports.[28] As aptly put by Thanki, "Intellectual input by the agent will generally preclude him acting as a mere intermediary and will turn him into a third party for the purposes of the privilege".[29]

12 At first sight, this restrictive nature of the rule seems odd, especially in the light of the modern commercial world, where corporate structures and the conduct of business have become considerably more complex. The complexity of the modern corporation and its businesses may require preparatory work by "third parties" before seeking legal advice especially in complex financial fraud cases.[30] To deprive the client of privilege for this preparatory work done by employees or other independent agents would be inimical to the administration of justice in that the lawyer would not therefore be able to give advice with the full facts before him. From the client's viewpoint, it also does not make

26 See Ho HL *Legal Advice Privilege & the Corporate Client*, [2006] Sing JLS (Dec) 231 for a detailed analysis of this issue. Also, J Pinsler, *The Three Rivers DC Saga: New Issues of Professional Privilege for a Singapore Court to Decide* (2005) 17 SAcLJ 596; A Zuckerman, *op cit* ch 15, esp paras 15.37–15.51. B Thanki, *op cit* ch 2.

27 In particular, *Three Rivers 5*, as to which see Ho HL, *Legal Advice Privilege & the Corporate Client*, [2006] Sing JLS (Dec) 231 for possible reasons as to why the privilege was defined so narrowly in *Three Rivers 5*.

28 *Ibid,* at [52].

29 Thanki, *op cit* at para 2.81.

30 The *Three Rivers* cases and the *Skandinaviska* case itself are illustrative of the modern corporate environment within which the advice privilege has to operate sensibly.

economic or commercial sense to pay for a person or persons to be merely conduits to legal advisers.[31]

13 While it seems apparent to the court in *Skandinaviska* and to many others that the *Three Rivers 5* approach is unduly restrictive, especially in the corporate environment, and creates artificial distinctions as to who is the client in the corporation and who is not,[32] there is a downside in extending the privilege to third parties acting in support of the client and that is, "it creates the potential for pulling a blanket of privilege over an ever-increasing range of internal records and memoranda."[33] The adage, 'hire a lawyer to rent privilege' comes to the fore and it would not do for an accusation to be made that corporations can conceal operations through the simple expediency of sending documents and memoranda to legal counsel "for advice". Furthermore the point is made that the candour rationale does not work in corporate environments in the sense that corporations work in a regulated regime, where it is not privilege that encourages full disclosure but statutory obligations and even possibly individual risks of liability and penalty imposed on company staff.[34] Sexton, in his useful work on the privilege in a corporate environment, puts the case as follows:[35]

> A corporation's activities undeniably tend to involve many more legal questions, larger sums of money, and greater potential liability than do the activities of most individuals. Citing these facts, critics of the corporate privilege argue that corporate clients are candid with their attorneys not because of the privilege but because they realize that the costs of withholding information are likely to be far greater than the disadvantages flowing from the risk that the communication will later be divulged. According to this theory, modern corporations are "ineluctable bedfellows" of lawyers because they have "no choice but to communicate with attorneys." The result, the critics say, is that the extension of the privilege to corporations induces little additional information for the attorney.

31 It seems absurd to accept a situation such as that given by Zuckerman, *op cit*, at para 15.42: "Suppose that a company's chief executive officer (CEO) seeks advice on the company's behalf. If the CEO himself compiles a file of information from the company's records, the file will be privileged (though of course not the records). But if an assistant compiles the material, the assistant's document would not be privileged even if it was compiled in order to enable the CEO to inform the company's legal advisers."

32 See further, Ho HL *Legal Advice Privilege & the Corporate Client*, [2006] Sing JLS (Dec) 231 for a more thorough discussion of these problems.

33 Zuckerman, *op cit*, at para 15.43.

34 A point made forcefully by Zuckerman, *op cit.*

35 Sexton, "*A Post-Upjohn Consideration of the Corporate-Client Privilege*" (1982) 57 NYU LR 442 at p 463. (footnotes omitted).

14 Be that as it may, in this area where advice privilege is accorded to corporations, the extent to which privilege should be allowed to operate may well depend on how we expect corporations to behave[36] – in the "voluntary compliance model" where corporations can self-regulate and provide good governance, protection from the privilege is desirable, as the corporation itself would be self-governing and would have to rely on its lawyers to inform them of the compliance requirements. A stronger privilege is required to provide the lawyers with the necessary information so as to advise on compliance standards and practices. On the other hand, where the expectation is that men of business running corporations are more likely to "push the law to its limits" and shelter under the protection of privilege in whatever they do, a weaker advice privilege is required so that regulatory bodies and individuals can seek discovery of the corporate activities to investigate wrong-doings or pursue their private claims.[37]

15 Of course these are "models" and the actuality is likely to be very different and to lie somewhere in between. That is perhaps why the court in *Skandinaviska* took pains to emphasise that in the event that this extension of the privilege be seen to provide corporations with too strong a "cloaking" device, it must be shown that the dominant purpose for which the document or report is prepared is for seeking legal advice.

IV. The dominant purpose test[38]

16 The test has been applied in the other branch of privilege – namely litigation privilege. At first sight, the use of the dominant purpose test to advice privilege seems logical. But even in *Pratt* itself, the judges were constrained to warn of the difficulty in applying the test to advice privilege, and were concerned about the potential for abuse for in identifying the dominant purpose, one has to enquire into the state of mind, either of the creator of the document for which privilege is claimed, or the mind of the person who instructed the creator. In corporate situations, the problem is exacerbated by the fact that it may be a joint effort, both in terms of the creators of the document, or in terms of instruction. It is said that this issue is a question of fact, to be

36 Sexton, *op cit*.

37 Could this explain the reticence of the House of Lords in *Three Rivers 6* in refusing to deal with the issue whether *Three Rivers 5* defined the rule concerning "client" too narrowly?

38 See in particular, JD Heydon, Cross on Evidence, Australian (LexisNexis, 7th Ed, 2004), ch 13, sect 4, para 25240.

ascertained on the available evidence at the time the document is either commissioned or produced. As succinctly put by Heydon,[39] referring to ascertaining the purpose of a corporation or government department and where several employees or independent contractors might have prepared the report:

> In such a case the court must endeavour to construct from the available material some idea of the corporate purpose. The purpose will be that of the 'person under whose direction, whether particular or general, the relevant document was produced or brought into existence.

17 The difficulty of this task is evident even in *Skandinaviska* itself. For instance, if we were to look at the two MASNET announcements (which is evidence as good as any on the corporate purpose), the first one did not explicitly make clear that PWC and D&N were appointed with the dominant purpose of getting legal advice.[40] If the dominant purpose was for obtaining legal advice, why was it not mentioned explicitly in the public announcement? By the time the second one was announced, it was patently clear that litigation was contemplated and the reports could, and did, fall under that branch of privilege. But if one were to say that the relevant time for ascertaining the purpose is when the appointment was made, then it could not be said that obtaining legal advice was a dominant purpose, although it certainly could have been a purpose.[41]

18 Apart from difficulties in ascertaining the corporate purpose, there are also other difficulties with the dominant purpose test. One is in defining what is "dominant" – again to cite Heydon, summarising from authorities in Australia and England,

39 *Op cit*, at p 810 (footnotes omitted). See also, Tomlinson J in *Three Rivers 5* [2002] EWHC 2739 (Comm) at [30].

40 The tasks of PWC and D&N were stated to be: Identify the nature, circumstances and extent of any unauthorized transactions; Quantify the financial impact of such unauthorized transactions; Assist the company in taking the necessary action to prevent such unauthorized transactions; Subsequently, to conduct a review of the system of internal control and procedures to prevent the occurrence of such unauthorized transactions in the future.

41 See also, Ho HL *Legal Advice Privilege & the Corporate Client*, [2006] Sing JLS (Dec) 231 at 262–263: "It seems fairly clear, all things considered, that the interviews were conducted and draft reports were prepared for at least the equally important purposes of checking the accounts and making suggestions for improving the company's financial system."

> A "dominant" purpose is that which is the ruling, prevailing or most influential purpose. It is more than the primary or a substantial purpose. It must be clearly paramount.[42]

19 Attaching weight to one purpose or the other might be difficult and in some cases maybe impossible.[43] To "attach" weight to one or other purpose and to say that one is dominant and not the other contains an element of artificiality, which could be worse than the artificiality in the original rule distinguishing agents as "conduits" and agents who also provide information or intellectual inputs. Worse still, it could be argued that the use of the "dominant" test here would not really promote candour, as it could be uncertain at the start of the making of the report, for instance, what was paramount in the mind of the person authorising or authoring the report. The client-principal might be considering all his duties in his position as head of the corporation, and certainly seeking legal advice could be one of them, but it might not be uppermost in his mind. If he or his agent creating the report were uncertain, could it actually motivate them to be full, frank and free in their views? If not, extending the privilege would not be defensible.

20 In the search for "objective" criteria in determining the "dominant" purpose of obtaining legal advice, Finn J in *Pratt*[44] identified the following:

> (a) The nature of the function the third party agent performed for the client-principal: "If that function was to enable the principal to make the communication *necessary* to obtain legal advice it required, I can see no reason for withholding the privilege from the documentary communication authored by the third party. That party has been so implicated in the communication made by the client to its legal adviser as to bring its work product within the rationale of legal advice privilege." (at [41]) [emphasis added]

42 *Op cit.* Applying this to the *Skandinaviska* case, it would be difficult to say the draft reports are prepared with the dominant purpose of obtaining legal advice. Indeed the draft reports could have been drafted with the benefit of legal advice and drafting. *Quaere*: should the test be better referred to as 'the paramount purpose' test? Or the test could be named the 'overwhelming purpose' test?

43 *Skandinaviska* seems to be a difficult case in this respect: there were conceivably other equally important purposes for which the draft reports were created.

44 (2004) 136 FCR 357.

> (b) Where a client-principal amasses advices from several sources (such as an accountant, financial planner and merchant banker, such advices "will rarely be capable of attracting privilege for the reason that they will almost invariably have the character of *discrete* advices to the principal as such, and with each advice, along with the lawyer's advice having a distinctive function and purpose in the principal's decision making." (at [46]) [emphasis added][45]
>
> (c) The conduct of the principal on receiving the "documentary communication": "The less the principal performs the function of a conduit of the documentary information to the legal adviser, the more he or she filters, adapts or exercises independent judgment in relation to what of the third party's document is to be communicated to the legal adviser, the less likely it is that that document will be found to be privileged in the third party's hands. This will be because the intended use of the document is more likely to be found to be to advise and inform the principal in making the principal's communication to the lawyer … and not to record the communication to be made." (at [47])

21 Stone J in the same case (at [106]) pointed to the difficulty of proving the relevant purpose, the burden of which rests squarely on the party asserting privilege: "Courts would need to take into account exactly what function was served by the expert advice and whether it was really required in order to instruct the legal advisers fully." Despite having these criteria, which seems to be based on the idea that for proper legal advice to be obtained, the information must really be *necessary* – that is, it must be communicated to the lawyer before he can give proper advice. But necessity of the communication and information contained in it for proper legal advice is just one factor, though an important one. What the test boils down to, when it comes to ascertaining dominant purpose, is whether on the evidence, the client has uppermost in his mind the seeking of legal advice when he made the communication or cause it to be made, and that is not an easy fact to ascertain even in the best of circumstances.

45 See below for a discussion of the court's view in *Skandinaviska* that under s 164 of the Evidence Act, the judge can inspect the documents, and where possible, edit or redact the parts that are privileged from the parts that are not.

22 Although the "dominant" purpose test is difficult to apply, the court in *Skandinaviska* is enamoured with it, and it seems that it would in future expect courts to operate along these lines insofar as advice privilege applies to third party communications. The court also usefully affirmed the applicability of s 164 in relation to inspecting documents for which privilege is claimed. The relevant subsection reads: "(3) The court, if it sees fit, may inspect the document unless it refers to affairs of State, or take other evidence to enable it to determine on its admissibility." In claims of privilege other than those under s 125 (affairs of state) the court has the discretion to inspect the document and the affidavit evidence claiming legal professional privilege. Where there is a dispute as to what "true factual position is", an inspection by the judge would quickly solve the dispute between the parties saving time and money for the parties."[46] Another instance where inspection could be useful is "where there is a *real doubt* about the claim of the party seeking to resist discovery on the ground of legal professional privilege."[47]

23 Further, given the possibility of inspection and redaction of such third party communications, the claims for privilege may be thoroughly examined, and if needed, the non-privilege parts of such communications might be disclosed. This is clearly a much-needed affirmation of the power to inspect documents that are subject to a privilege claim and might make parties more careful about asserting claims of privilege, knowing that the documents at issue would be subject to judicial inspection.[48]

V. Conclusion

24 It has been observed by no less than an eminent judge of the English Court of Appeal, Lord Justice Henry Brooke, that some judgments "are clearly designed to give authoritative guidance" and that these ought to be distinguished from those in which the court "is simply concerned to try and find a just solution to a particular factual problem".[49] Without a doubt, the Court of Appeal decision in *Skandinaviska* is intended to belong to the first category. It is an important judgment on a vital topic – legal professional privilege – that affects the conduct of each

46 Skandinaviska, *supra*, at [102].
47 *Ibid*, at [104].
48 In *Skandinaviska*, the court held that the trial judge was right to refuse inspection because she was satisfied with the other evidence that the dominant purpose for which those draft reports were prepared was litigation.
49 Foreword to Zuckerman on Civil Procedure, *supra*.

and every legal practitioner. The judgment is a model of thoroughness and thoughtfulness – it certainly would be an authoritative guide to the perplexing area of legal professional privilege especially when applied to the corporate environment. That it sought to adopt the Australian position in extending the legal advice privilege to cope with the ever growing complexity of modern corporations and the way they conduct business can be said to be a bold move particularly when the House of Lords in *Three Rivers 6* refrained from overruling the narrow orthodox view expressed in by the Court of Appeal in *Three Rivers 5*.[50]

25 There is however the nagging thought that this decision might not be the last word on the subject simply because legal professional privilege as it has developed over the centuries is based on natural persons and not corporations.[51] While there is no difficulty identifying a natural person as a client, there is no end of difficulty trying to identify "the client" in a corporate environment, and the reason, as pointed out by Zuckerman, is in the lack of rules of attribution. There are no rules enacted or developed to point clearly to persons in a corporation from whom communications to the corporation's lawyers, and *vice versa*, would be privileged. Further, it might not be right to derive such rules through extrapolation from the rules applicable to natural persons.

26 A fresh approach may be necessary to re-sculpt the contours of privilege as it applies to corporations. If Wigmore's utilitarian principle – that full, frank and free communication is the only justification for the privilege – holds good, there seems not to be a need to extend the privilege in the way envisaged by the court. It has given rise to much uncertainty, and an uncertain privilege is no better than having no privilege as the parties (whether employees, agents or independent contractors) will not know how to act, and given that the financial and economic stakes may be much higher, they might be more reticent in disclosing information – a situation that would deprive the privilege of its value. Further, Ho Hock Lai has ably argued that there should be a fundamental shift away from the traditional rationales for the privilege, and that a more principled approach requires a narrowing, not an extending, of the advice privilege, coupled with a larger role for the law of confidentiality. The candour rationale should give way to a more

50 Zuckerman, *op cit*, declared (somewhat boldly) at 15.51 that "those who believe that the House of Lords' refusal to express support for the Court of Appeal's view in *Three Rivers (No 5)* offers the hope that the Lords would in future overturn it may well be deluding themselves."

51 See Sexton, *supra.*

sustainable rationale applicable only to lawyers, namely protecting the integrity of legal representation.[52]

27 If one were to look for a new set of rules or principles to govern this problem of the corporate client – legal adviser privilege, one might think of having, for example, a but-for test to increase certainty. The principle could be that the claimant should show that but for the purpose of obtaining legal advice, the document would not have been produced, whether by the claimant himself, or a third party authorised to produce such a document. This might look suspiciously like a *sole* purpose test, but it is not and is flexible enough to include information and other work products intended for other purposes. If it is coupled with a finding of the lawyer or legal adviser acting in the relevant legal context,[53] that is, advising on rights and liabilities and not on other matters such as investment opportunities or the like, it would be possible to restrict the scope of the advice privilege as well as making it more certain. Finally, more liberal use of the powers of inspection and redaction is called for, particularly where the claims of privilege in the circumstances appear overblown or exaggerated.

28 The problem of legal professional privilege in a corporate environment is a difficult one, and often underestimated.[54] The decision in *Skandinaviska* can be said to be a valiant attempt to resolve this problem, but it might need more refining and indeed, intervention from the legislature might not be such a bad move.

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52 See Ho Hock Lai, "Legal Professional Privilege and the Integrity of Legal Representation", *Legal Ethics* (forthcoming). My summary is a simplification of his views, and a detailed analysis of this new rationale will not be apposite in a case note.

53 See discussion *supra* for this point.

54 See Sexton, *op cit.* Ho Hock Lai, *Legal Advice Privilege & the Corporate Client*, [2006] Sing JLS (Dec) 231 for a more in-depth analysis particularly of the US position which seems to be equally if not more unsuccessful in resolving the problem.