THE *THREE RIVERS DISTRICT COUNCIL* SAGA: NEW ISSUES OF PROFESSIONAL PRIVILEGE FOR A SINGAPORE COURT TO DECIDE

Recent case law in England raises deep concerns about the scope of legal professional privilege in two main respects: first, whether communications (pertaining to legal advice) between a company's employees (on behalf of the company) and its lawyers are protected in favour of the company and second, whether communications between the company and its lawyers must have a specific legal consequence (as opposed to merely broad legal advice) in order justify the operation of the privilege. These issues will also be examined in the context of s 128 of the Evidence Act which, being a vestige of the 19th century, falls short of the demands of the modern commercial environment.

Jeffrey **PINSLER**
LLB (Liverpool); LLM (Cambridge); LLD (Liverpool);
Barrister (Middle Temple); Advocate & Solicitor (Singapore);
Professor, Faculty of Law, National University of Singapore.

I. Introduction

1 Recent statements in England about the fundamental importance of the privilege which attaches to confidential communications between a client and his lawyer[1] (commonly termed as "legal advice privilege") have not been matched by the certainty one would expect for such a hallowed doctrine. Indeed, the anxiety has been such that an unsuccessful attempt was made in one recent case before the House of Lords to raise an unrelated decision of the Court of Appeal for clarification.[2] The controversy concerns the scope of legal advice privilege and, in particular, whether the involvement of employees of a company in the process of providing confidential information so that the company can be properly advised, justifies the application of the privilege. As a company can only

1 See, for example, the view of the House of Lords as expressed by Lord Taylor of Gosforth in *Regina v Derby Magistrates' Court, Ex parte B* [1996] AC 487 at 507–508.

2 See the leading judgment of Lord Scott of Foscote in *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] AC 610 ("*Three Rivers (No 6)*") at [46]–[48], where he declined to express any opinion on the issues raised by the Court of Appeal in *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2003] QB 1556 ("*Three Rivers (No 5)*") because they were not pertinent. The other Lordships concurred.

act through its employees, the view might be taken that some measure of protection of an employee's communications is necessary to ensure the company's proper operation as a commercial entity. This is also a vital issue for the Singapore courts who, if in the very likely event that the issues arise here, would have to grapple with the 19th century concept of privilege formulated in the Evidence Act[3] and relate it to the modern context of legal practice.

II. *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2003] QB 1556

A. *Facts and issues*

2 The liquidators and creditors ("the claimants") of the former Bank of Credit and Commerce International SA ("BCCI") (which had collapsed) instituted legal proceedings against the Bank of England ("BoE") for "misfeasance in public office" in respect of its supervision of BCCI before the collapse. The claimants sought discovery of a variety of documents which had been provided to a non-statutory inquiry ("the Inquiry") conducted by Bingham LJ into the collapse of BCCI. For the purpose of the Inquiry, the BoE set up a unit within itself, the Bingham Inquiry Unit ("the BIU"), in order to deal with all matters relating to the Inquiry and to receive legal advice[4] concerning its communications with the Inquiry including the preparation and presentation of the BoE's evidence and submissions to the Inquiry.[5]

3 The claimants accepted that the documents passing between the BIU (which the claimants contended, and the court accepted, was the true client in this situation[6]) and its lawyers and the documents evidencing those communications (such as the lawyers' internal memoranda and drafts) could not be disclosed because they were protected by legal advice privilege.[7] Instead, they applied for disclosure of four categories of documents emanating from the employees of the BoE:

(a) Documents intended to be sent, and which were sent, to the lawyers. These documents were prepared or commissioned

3 Cap 97, 1997 Rev Ed ("the EA").
4 *Three Rivers (No 5)*, *supra* n 2, at [5] and [31].
5 *Id* at [3].
6 *Id* at [4] and [31].
7 *Id* at [4].

> for the dominant purpose of obtaining legal advice from the lawyers, (or pursuant to the retainer between the BoE and its lawyers).[8]
>
> (b) Documents prepared or commissioned for the dominant purpose of obtaining legal advice (or pursuant to the retainer between the BoE and its lawyers) but which were not sent to the lawyers.[9]
>
> (c) Documents sent to the lawyers although there was no indication that they were prepared or commissioned for the dominant purpose of obtaining legal advice (or pursuant to the retainer between the BoE and its lawyers).[10]
>
> (d) Documents within the first three categories sent by employees at the time but who had since left their employment.[11]

The BoE contended that these documents were protected by legal advice privilege and, consequently, not disclosable.[12]

B. Decision of the High Court and Court of Appeal

4 In the High Court,[13] Tomlinson J ruled that all the documents were privileged on the basis that they were brought into existence for the purpose of obtaining legal advice in relation to the Inquiry:[14]

> In my judgment an internal confidential document, not being a communication with a third party, which was produced or brought into existence with the dominant purpose that it or its contents be used to obtain legal advice is privileged from production. The purpose must be that of the author, or of the person or authority under whose direction,

8 According to Tomlinson J in the High Court ([2002] EWHC 2730) at [12] and the Court of Appeal, *supra* n 4, at [4]. The words in brackets are found in the judgment of Tomlinson J (at [12]) but not in the judgment of the Court of Appeal.

9 Tomlinson J, *supra* n 8, at [13], and the Court of Appeal, *supra* n 2, at [4]. The words in brackets are found in the judgment of Tomlinson J (at [13]) but not that of the Court of Appeal.

10 Tomlinson J, *supra* n 8, at [14], and the Court of Appeal, *supra* n 2, at [4]. The words in brackets are found in the judgment of Tomlinson J (at [14]) but not that of the Court of Appeal.

11 Judgment of the Court of Appeal, *supra* n 2, at [4].

12 BoE did not rely on litigation privilege because, as it conceded, the Inquiry was a non-adversarial process. See [2] of the judgment of the Court of Appeal, *supra* n 2, and [16] of Tomlinson J's judgment, *supra* n 8.

13 *Supra* n 8.

14 *Id* at [30].

> whether particular or general, it was produced or brought into existence.

5 Applying the terminology of the Court of Appeal in *Balabel v Air India*[15] (a leading case on the scope of communications protected by legal advice privilege), Tomlinson J was of the view that the documents were prepared or commissioned pursuant to the retainer between the BoE and the legal advisers as part of the necessary "exchange of information" of which the object was the giving of legal advice.[16]

6 The Court of Appeal disagreed with the High Court and held that legal advice privilege only applied to communications between a client and his lawyer, documents evidencing such communications and to documents intended to be such communications (but which are not in fact communicated).[17] As the BIU was regarded as the client by the court,[18] none of the documents within the four categories[19] were communications for the purpose of legal advice privilege. The Court of Appeal in *Three Rivers (No 5)* considered a series of authorities and also emphasised Taylor LJ's judgment in *Balabel*, but to different effect. The Court of Appeal accepted that for legal advice privilege to apply, a document must be, in Taylor LJ's words in *Balabel*, "part of that necessary exchange of information of which the object is the giving of legal advice as and when appropriate".[20] It ruled that the documents within the four categories could not be regarded as coming within this definition.[21]

7 In reaching its conclusion in *Three Rivers (No 5)* that legal advice privilege did not apply to the four categories of documents, the Court of

15 [1988] Ch 317 ("*Balabel*") at [332].

16 See *supra* n 8, at [32]:

> In my judgment the Bank [BoE] has properly identified as the dominant purpose for which much of the material was brought into existence by the BIU the obtaining or recording of legal advice. More broadly, the Bank has established that the material was prepared or commissioned pursuant to the retainer between the Bank and the legal advisers as part of the necessary exchange of information of which the object was the giving of legal advice.

His Honour distinguished *Price Waterhouse v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583 at 591, where Millett J had said of the investigating committee's terms of reference (*ie*, a committee set up by the client to act on its behalf in that case) that the situation was "manifestly contrived for the specific purpose of attracting legal professional privilege". In Tomlinson J's view, there was no such contrivance on the part of the BoE in *Three Rivers (No 5)* (*ibid*).

17 *Supra* n 4, at [19] and [21].

18 *Id* at [4] and [31].

19 See paras 3(a) to 3(d) of the main text above.

20 *Supra* n 15, at 332.

21 *Supra* n 4, at [30]. *Balabel* was distinguished.

Appeal distinguished between information provided to a lawyer for the purpose of obtaining legal advice and information provided to a lawyer so that he can present the client's case in "the most favourable light" (*ie*, for the purpose of presentation).[22] In the court's view, all four categories of documents – whether supplied at the outset by the employees and ex-employees to the BIU or subsequently supplied to the BIU in response to the Inquiry's requests for information – were provided for the purpose of presentation to the Inquiry rather than for the purpose of legal advice. Accordingly, they were not privileged.[23] In the case of documents supplied from the outset of the Inquiry, such information, in the view of the Court of Appeal, was merely "raw material for presentation to the [I]nquiry".[24] Pointing to Taylor LJ's words in *Balabel*, the Court of Appeal in *Three Rivers (No 5)* determined that the "continuum of communication … as to what should prudently and sensibly be done in the relevant legal context" had not yet begun at that stage.[25] Although the Court of Appeal was of the view that there was such a "continuum of communication" at the time that information was provided in response to requests from the Inquiry, again the dominant purpose was not to obtain legal advice but to put "relevant factual material before the [I]nquiry in an orderly and attractive fashion".[26] It will be argued that this approach of separating legal advice from presentational advice is contrary to the *Balabel* principle and the purport of s 128 of the EA.[27]

III. Legal position in Singapore

A. Applicable law

8 In order to determine how a Singapore court would resolve the issues raised in *Three Rivers (No 5)*, it is necessary to consider the approach of the EA towards communications between a client and his lawyer. Sections 128 and 131 are the principal provisions in this respect.

22 *Id* at [32]. In this case, proper presentation of the facts to the Inquiry. Also see [35] and [36] of the judgment.
23 *Id* at [37].
24 *Id* at [35].
25 *Ibid*.
26 *Id* at [37].
27 See Section IV of the main text below: "Approach of section 128(1) to the four categories of documents in *Three Rivers (No 5)*".

Section 128(1) imposes the obligation of non-disclosure of privileged communications in judicial proceedings[28] on the advocate and solicitor:[29]

> No advocate or solicitor shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate or solicitor by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.

9 Section 131, the counterpart of s 128, entitles the client (whose privilege it is) to refuse to answer questions which elicit privileged communications:

> No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

10 It is clear that s 128 sets out the legal elements of the privilege (because it is this section which creates the legal obligation of non-disclosure), while s 131 embraces those elements with the more generic terminology of "any confidential communication". Therefore, where an issue of whether the client can refuse to answer a question on the basis of privilege arises, the court would make its determination by considering the requirements of s 128, just as it would where a lawyer is questioned about communications with his client.[30]

11 Although a Singapore court is not constrained by the intention behind the statutory codification of law (particularly one which emerged two centuries ago), and is entitled to interpret the provisions of such a

28 Section 2(1) of the EA provides that Parts I, II and III (which Part includes the provisions concerning privilege) of the statute apply to judicial proceedings.

29 Subject to certain qualifications such as when disclosure is permitted by the client (in the main body of s 128(1)) and when the exceptions in ss 128(2)(*a*) and 128(*b*) operate.

30 The two sections must mirror each other because a different interpretation would lead to major uncertainty in the scope of the privilege. That having been said, it should be pointed out that s 128(1) imposes the obligation of non-disclosure on an advocate and solicitor and not just any legal professional adviser contemplated by s 131. For a discussion of this problem, see Jeffrey Pinsler, *Evidence, Advocacy and the Litigation Process* (LexisNexis, 2nd Ed, 2003) at p 275.

statute (whether literally or purposively) in a modern context,[31] an understanding of the law as it stood at the time of codification must be the starting point for ascertaining its scope and making the necessary contrast with the position in England. Singapore's EA was introduced in 1893[32] (when Singapore was part of the Straits Settlements) to consolidate the law.[33] Apart from limited changes such as those which were necessitated by differences in legal culture between Singapore and India in the 19th century, the EA was essentially a re-enactment of the Indian Evidence Act of 1872[34]. Sections 126 and 129 of the 1893 EA mirrored in substance the same provisions of the Indian EA,[35] and are identical to the current ss 128 and 131. Although there were English case law developments relating to the privilege between 1872 and 1893, these did not appear to have been factored into the provisions of the 1893 EA.[36]

B. The three limbs of section 128(1)

12 It is immediately apparent that s 128(1) consists of three limbs. The first limb ("communication made to him in the course and for the purpose of his employment as such advocate or solicitor by or on behalf of his client") and the third limb ("to disclose any advice given by him to his client in the course and for the purpose of such employment") are specifically limited to communications between the client and his lawyer. The second limb ("to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment") is more problematic. Literally construed, it entitles a lawyer to keep silent about any document which he becomes aware of in the course of acting for his client, including documents emanating from persons other than the client. Unlike the first and third limbs, the second limb does not appear to be restricted to confidential communications between lawyer and client. It is submitted that such an interpretation would be incorrect and that the proper approach would be to regard the first limb as a general limb prohibiting

31 As was done in such cases as *Lee Kwang Peng v PP* [1997] 3 SLR 278 at [44]–[46] (concerning s 11 of the EA); *PP v Knight Glenn Jeyasingam* [1999] 2 SLR 499 at [56]–[60] (concerning s 23 of the EA).
32 Ord No 3 of 1893 ("the 1893 EA").
33 Sir James Fitzjames Stephen, *Digest of the Law of Evidence* (Macmillan and Co, Limited, 5th Ed, 1899) ("*Digest*"), p v.
34 Act 1 of 1872 ("the Indian EA").
35 The only difference being that s 126 of the Indian EA referred to "barrister, attorney, pleader, or vakil" instead of "advocate and solicitor" in s 126 of the 1893 EA.
36 These developments will be discussed more specifically in relation to litigation privilege at paras 12 to 14 of the main text below.

the disclosure of communications between lawyer and client which arise in the course of their professional relationship. The second and third limbs are specific types of communications which emerge from the first limb, including documents he receives from the client (the second limb) and the advice he gives (the third limb).

13 This more restrictive interpretation of the second limb may be justified as follows. In the first place, the second limb is illogical when construed independently of the first limb and may even lead to injustice. The lawyer cannot state the contents or condition of the document but there is nothing in the second limb which prevents him from disclosing the document itself. The purpose of the first limb is to prevent the disclosure of the document (if it is a communication between the client and his lawyer). The second limb adds to the first limb by saying that not only is the lawyer barred from disclosing the document which is a communication from the client (the first limb); he is also barred from stating its contents and condition (the second limb). Injustice may arise if the second limb is interpreted as extending beyond client and lawyer communications to communications with third parties. A party could shut out highly relevant commercial documents on the basis that they are within the scope of the second limb and have been communicated to the lawyer.[37] A broad reading of the second limb might also encourage a client to hide a relevant but incriminating or adverse document by communicating it to his lawyer and then to claim that the lawyer, having become "acquainted" with the document, is prohibited from disclosing it (first limb) or revealing its contents (second limb).[38]

14 Secondly, the view could be put forward that the second limb endorses "litigation privilege", a privilege which attaches to third party communications made for the sole or dominant purpose of litigation.[39] This argument has serious shortcomings. As already mentioned, the second limb does not protect documents from disclosure; it merely

37 It was held in *Wheeler v Le Marchant* (1881) 17 Ch D 675 that a document prepared by a third party did not become protected by legal advice privilege merely because it was presented by the client to his lawyer. Litigation privilege might apply if the document was prepared by the third party for the sole or dominant purpose of litigation but this type of privilege is not within the compass of s 128 (as argued in para 14 of the main text below).

38 Such an outcome would also be contrary to the common law rule. See *Regina v Peterborough Justice, Ex parte Hicks* [1977] 1 WLR 1371; *R v King* [1983] 1 All ER 929.

39 See *Waugh v British Railways Board* [1980] AC 521; *Ventouris v Mountain (The Italia Express)* [1991] 1 WLR 607 at 621–622.

prohibits the lawyer from speaking about such documents. A vital aspect of litigation privilege, in contrast to the second limb, is that it protects documents from physical disclosure. Furthermore, the second limb does not formulate a principle for litigation privilege. It merely refers to any document which the lawyer becomes acquainted with irrespective of whether litigation is pending, anticipated or even foreseen. The general scope of the second limb characterises it as an element of the privilege which protects communications between client and lawyer,[40] not litigation privilege. Even if the second limb could be construed to incorporate litigation privilege, this would be inconsistent with s 131 which, as has already been seen,[41] is solely concerned with communications between the client and his legal adviser and not between the client and a third party who is instructed by the former to prepare a document for the purpose of litigation. It is also significant that whenever the Singapore courts have considered litigation privilege, they have done so in the context of common law authorities and have never referred to the Evidence Act for this purpose.[42] Finally, the point should be made that as litigation privilege only became established after the introduction of the Indian EA in 1872, it could not have been contemplated at that time. *A fortiori*, as that provision was re-enacted in Singapore by s 126 of the 1893 EA and subsequently re-expressed without variation as s 128 of that statute, the same point can made about the position here.[43]

C. "Communications"

15 If, as has been submitted, s 128 is solely concerned with communications between the client and his lawyer and not communications from other sources, the next question to consider, for the purpose of determining how a Singapore court would decide the

40 It was established early on in *Greenough v Gaskell* (1833) 1 My & K 98 at 101–103; 39 ER 618 at 620–621; and *Reece v Trye* (1846) 9 Beav 316 at 318–319; 50 ER 365 at 366 that the privilege which protects such communications operates even if there is no contemplation of litigation.

41 This section is set out at para 9 of the main text above.

42 See *Brink's Inc v Singapore Airlines Ltd* [1998] 2 SLR 657 at [6]–[7]; *Wee Keng Hong Mark v ABN Amro Bank NV* [1997] 2 SLR 629; *The Patraikos 2* [2001] 4 SLR 308.

43 Litigation privilege emerged as a separate doctrine after 1876. See *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, at 656 (James LJ), 658–659 (Mellish LJ). Also see *Three Rivers (No 5)*, from [12] for a consideration of *Anderson v Bank of British Columbia* and other cases. Although the EA was enacted in 1893, s 126 of that statute (the current s 128) was not altered to take into account the common law developments from 1876 onwards. Indeed, even J F Stephen, who drafted the Indian EA in 1872, did not amend his *Digest* (which was published in 1876: see *supra* n 32) for this purpose. Interestingly, Stephen deleted the second limb from this work probably because of the confusion it caused (see Art 115 of the *Digest*).

issues faced by the English Court of Appeal in *Three Rivers (No 5),* is the coverage of this protection. On a literal construction, s 128 renders every communication between the client and his lawyer privileged if the communication was "in the course and for the purpose of [the latter's] employment". Put another way, anything said between them about the case regardless of the purpose of the communication (*ie*, whether it is to obtain specific legal advice on rights and liability or legal advice in a broader sense) is privileged. This more flexible approach to privilege is clearly evident in the case of *Greenough v Gaskell*,[44] the authority upon which s 126 of the Indian EA was constructed.[45] According to Lord Brougham LC in that case, the privilege extends to any communication "within the ordinary scope of [the lawyer's] professional employment" or which he receives in his "professional capacity".[46]

16 However, more recent English authorities indicate that the scope of the privilege has narrowed. According to Taylor LJ in *Balabel*, the application of the broad approach in past cases may have reflected the "restricted range of the solicitor's activities at the time", in the sense that his "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".[47] Taylor LJ expressed the view that as the "purpose and scope of the privilege is … to enable legal advice to be sought and given in confidence … the test is whether the communication or other document was made confidentially for the purposes of legal advice".[48] According to the court, these purposes had to be construed "broadly".[49] The scope of the privilege is not limited to communications between client and solicitor which request and convey legal advice. It also applies to those communications which do not specifically seek and convey legal advice but which "are part of that necessary exchange of information of which the object is the giving of legal advice as and when appropriate".[50] The

44 *Supra* n 40.

45 This is obvious from the connection between the terminology of s 128 and Lord Brougham LC's judgment in *Greenough v Gaskell*, *id* at 101–103. Stephen, *supra* n 33, referred to this case as the principal authority underlying s 126 of the Indian EA (see *Digest*, Note XLIII, at p 193).

46 *Greenough v Gaskell*, *supra* n 40, at 102.

47 *Supra* n 15, at 331–332. Although Lord Rodger of Elsferry doubted this view in *Three Rivers (No 6)*, *supra* n 2, at [58]:

> [W]hat Taylor LJ says in that passage is, at best, an over-simplification. Especially in the nineteenth century, many solicitors or attorneys acted as 'men of business'.

48 *Supra* n 15, at 330.

49 *Ibid*.

50 *Id* at 332.

following extract from the judgment of Taylor LJ expresses the flavour of this principle:[51]

> 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 such words as "please advise me what I should do." But, even if it does not, there will usually be implied in 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.

Balabel has yet to be applied in Singapore for the purpose of construing s 128 of the EA. Unfortunately, the High Court and Court of Appeal in *Three Rivers (No 5)* were not consistent about the scope of the principles laid down by that case.[52]

D. Who is the client ?

17 Fundamental to the question of whether legal advice privilege applies to a communication – in a situation involving a company or other institution which makes internal arrangements among its employees for the purpose of communicating with lawyers – is the initial determination of the identity of the client. It would seem obvious that the client must be the person whom the privilege seeks to protect by enabling him to obtain legal advice in full confidence that the information he discloses to his lawyer for this purpose is protected from disclosure. If this view is correct, the BoE, not the BIU, was the true client in *Three Rivers (No 5)*. As the BoE was the party facing potential liability, it must have been the person who needed protection through legal advice. The BIU was merely set up as a practical measure, a temporary arrangement necessary to ensure that the BoE was properly advised and represented in relation to the BCCI matter.

51 *Id* at 330.
52 This is further discussed below at Section IV of the main text: "Approach of section 128(1) to the four categories of documents in *Three Rivers (No 5)*".

18 By deciding that the BIU was the client,[53] the Court of Appeal in *Three Rivers (No 5)* effectively introduced the concept of the "notional client" for the purpose of lawyer-client privilege, a development which (a) fails to take into account the fact that a company can only act through its employees and (b) creates artificial and illogical distinctions between employees who communicate with the lawyers and those who provide information which is passed on to the lawyers for the purpose of legal advice. In reality, all of BoE's employees were acting on behalf of it (albeit in different capacities). To the extent that the employees were communicating any confidential information to the BIU for its re-transmission to the lawyers, the BIU was merely acting as a conduit. In such circumstances, it is artificial to distinguish between information communicated through the BIU to the lawyers and information directly communicated by the BIU to the lawyers.

19 The approach of s 128(1) is to extend the privilege to all communications made "on behalf" of the client for the purpose of the matter on which the lawyers have been instructed. Accordingly, it is submitted that a Singapore court would identify the BoE as the client and would consider whether any of its employees (whether in or outside the BIU) had provided information on behalf of the client for the purpose of obtaining legal advice. As the Court of Appeal in *Three Rivers (No 5)* considered the BIU to be the client, it could not classify the BoE's employees who provided information (including internal memoranda and working papers) to the BIU as employees providing information on behalf of the BIU. To emphasise its point, the court stated that even if information had been provided by the Governor of the BoE to the BIU for the purpose of obtaining legal advice, it would not have been protected by the privilege.[54] Indeed, the Court of Appeal equated the BoE's employees with persons external to the BoE:[55]

> It may, moreover, be a mere matter of chance whether a solicitor, in a legal advice privilege case, gets his information from an employee or an agent or other third party.

The issue of whether an employee is acting "on behalf of" his employer

53 *Supra* n 2, at [4] and [31].
54 *Id* at [31].
55 *Id* at [18].

(the client) pursuant to s 128(1) is a question of fact and must depend on the nature of the instructions given to him and his role in the matter.[56]

20 The effect of the Court of Appeal's position in *Three Rivers (No 5)* is that a company director cannot assume that if he instructs an employee to communicate with lawyers in respect of a certain matter, that employee's communications would be privileged from disclosure. Litigation privilege might apply in such circumstances (if the employee is considered to be a third party who creates information for the dominant purpose of litigation)[57] but not in a non-adversarial setting such as in *Three Rivers (No 5)*.[58] The position may be exacerbated in Singapore because of uncertainty concerning the application of legal advice privilege to communications between a company's employees and its in-house legal counsel who are not advocates and solicitors within the meaning of s 128(1).[59] A corporate entity which is not permitted to communicate through its employees in confidence to its in-house counsel and lawyers for the purpose of being properly advised is effectively deprived of its constitutional right to be treated as "equal before the law and entitled to the equal protection of the law".[60]

IV. Approach of section 128(1) to the four categories of documents in *Three Rivers (No 5)*

21 A Singapore court may construe s 128(1) literally or may prefer to superimpose the more precise scope of legal advice privilege established in *Balabel*.[61] Both approaches will be considered in the context of the four categories of documents (Parts A to D below).[62]

56 For a case in which the reports of an outside agency, which had apparently acted for a client, were not regarded as privileged, see *Price Waterhouse v BCCI Holdings (Luxembourg) SA*, *supra* n 16 (considered and explained by Tomlinson J in *Three Rivers (No 5)*, *supra* n 8, at [21] onwards and cited by the Court of Appeal, *supra* n 2, in the same case at [27]).

57 As pointed out by the Court of Appeal, *supra* n 2, at [1] and [2].

58 See *supra* n 8.

59 This is because s 128(1) imposes the obligation of non-disclosure on the advocate and solicitor who is in practice. For a discussion of this problem, see *Evidence, Advocacy and the Litigation Process supra* n 30, at p 275.

60 Article 12(1) of the Constitution of the Republic of Singapore (1999 Rev Ed) provides: "All persons are equal before the law and entitled to the equal protection of the law."

61 *Supra* n 15.

62 These are itemised at paras 3(a) to 3(d) of the main text above.

A. *Documents intended to be sent, and were sent, to the lawyers. These documents were prepared or commissioned for the dominant purpose of obtaining legal advice from the lawyers, (or pursuant to the retainer between the BoE and its lawyers)*[63]

(1) Literal application of s 128(1)

22 If, as has been argued, the client in *Three Rivers (No 5)* was the BoE (rather than the BIU), the documents supplied by its employees through the BIU to the lawyers – so that the BoE could be properly advised – would have been protected from disclosure by s 128(1). The question arises as whether the Court of Appeal's distinction between strict legal advice and advice on how to present the information to the Inquiry is justifiable. It is submitted that s 128(1) does not recognise this distinction. The words "any communication made to him in the course and for the purpose of his employment as such advocate or solicitor" indicate a broader context than the mere provision of strict legal advice on rights and liability. The manner in which a case is presented has legal ramifications because it can affect the conclusion of the adjudicator which may ultimately lead to court action. It is submitted that information provided to a lawyer for the purpose of presentational advice is within the scope of s 128(1) if such advice safeguards the client's legal rights. This is within the lawyer's scope of responsibility as envisaged by this provision.[64]

(2) Application of s 128(1) construed in the light of Balabel

23 Reference has already been made to Taylor LJ's statements concerning privilege in *Balabel*.[65] The Court of Appeal in *Three Rivers (No 5)* endorsed the *Balabel* test but concluded that it did not confer privilege on any of the documents. The decision (the court's interpretation of *Balabel*) is not easy to justify. To the extent that the internal documents were provided to the lawyers so that they could assist in preparing and presenting the BoE's statement to the Inquiry, this was within the "continuum of communications" necessary to enable the lawyers to ensure that the BoE's rights were protected:

63 See *supra* n 8.
64 This view was justified by the House of Lords in *Three Rivers (No 6)*, *supra* n 2, at [43].
65 See para 16 of the main text above.

> 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.[66]

Balabel may be construed to the effect that privilege attaches even though communications are not for the purpose of obtaining specific legal advice on rights and liabilities (*ie*, on the meaning and effect of the law):[67]

> The scope of the privilege is not limited to communications between client and solicitor which request and convey legal advice.

The primary consideration is whether they are necessary to enable the lawyer to act in a manner (for example, by providing his input on the presentation of a case) that will protect his client's legal position. Ultimately, it is a question of semantics whether the terminology "legal advice" is limited to specific advice on the law or encompasses any advice (including presentational advice) which protects the client's legal position. The approach of the Court of Appeal has since been denounced by the House of Lords in a different case.[68]

B. Documents prepared or commissioned for the dominant purpose of obtaining legal advice (or pursuant to the retainer between the BoE and its lawyers) but which were not sent to the lawyers[69]

(1) Literal application of s 128(1)

24 Both Tomlinson J[70] and the Court of Appeal[71] expressed the view in *Three Rivers (No 5)* that a communication which is not actually received by the lawyer is privileged as long as it is made for the purpose of legal advice. As Tomlinson J explained:[72]

> If the principle is that a person should not be in any way fettered in communicating with his solicitor, and must not be fettered in preparing documents to be communicated to his solicitor, it must be axiomatic that it is the confidentiality of the whole process of communication which requires protection, not just those documents which can be recognised as comprising the actual or final communication.

66 *Balabel*, *supra* n 15, at 330.
67 See para 16 of the main text above.
68 In *Three Rivers (No 6)*, *supra* n 2. See para 32 of the main text below.
69 See *supra* n 9.
70 *Supra* n 8, at [30].
71 *Supra* n 2, at [21].
72 *Supra* n 8, at [30].

25 This principle has particular application to a company which may have to prepare a variety of confidential documents through its officers for the purpose of obtaining legal advice. To limit the scope of the privilege to a situation in which the document has actually reached the lawyer would restrict the ability of the company to prepare in confidence for consultation with its legal adviser. In Tomlinson J's view:[73]

> [A]n internal confidential document, not being a communication with a third party, which was produced or brought into existence with the dominant purpose that it or its contents be used to obtain legal advice is privileged from production. The purpose must be that of the author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence.

However, both ss 128(1) and 131 of the EA indicate that the communication must actually be received by the lawyer or client as the case may be. Section 128(1) states that the communication must be "made to him". Section 131 refers to the communication as one "which has taken place between him [the client] and his legal professional adviser". As these sections were born in an era which had yet to experience modern-day corporate reality, it may be necessary for a Singapore court to adopt a facilitative approach in such circumstances.[74]

(2) Application of s 128(1) construed in the light of Balabel

26 The issue of whether an attempted communication for the purpose of obtaining legal advice is privileged did not arise for consideration in *Balabel*.

C. Documents sent to the lawyers although there is no indication that they were prepared or commissioned for the dominant purpose of obtaining legal advice (or pursuant to the retainer between the BoE and its lawyers)[75]

(1) Literal application of s 128(1)

27 As any communication referable to the relationship of client and lawyer (in the words of s 128(1), "any communication in the course and for the purpose of [the lawyer's] employment") is within the scope of

73 *Ibid.*
74 See *supra* n 31 for cases in which a facilitative approach was undertaken in respect of other provisions of the EA.
75 See *supra* n 10.

privilege as defined by s 128(1), a communication which has for its purpose a response from the lawyer which is within the scope of his employment (for example, advice on presentation of evidence or commercial or financial advice in a legal context), would be privileged. Section 128(1) certainly extends beyond advice on strictly legal matters such as the effect of statutory provisions and other sources of law. So, for example, if a lawyer advises his client on how to set up a tax scheme or a corporate or investment plan or how to carry out a business project locally or in a foreign country, a good deal of specialist commercial knowledge will have to be conveyed to the client apart from the effect of the applicable legal rules. Such information should be privileged if it has a sufficient legal perspective. Although the language of s 128(1) is broad, it must be construed in the light of the fundamental policy of legal advice privilege which is that a person should be fully aware of his legal position. The communications must carry a sufficient legal connotation or, put another way, they should relate to the performance by the lawyer of his professional duty as the legal adviser of his client. According to Tomlinson J in *Three Rivers (No 5)*, the purpose of the communication need only relate to the retainer between client and lawyer. The Court of Appeal thought this link was too tenuous and ruled that the communication must be for the dominant purpose of obtaining legal advice. Although Tomlinson J's view is more consistent with s 128(1), a more specific test (without the constraints imposed by the Court of Appeal) may be necessary in the interest of certainty.[76]

(2) Application of s 128(1) construed in the light of Balabel

28 Both Tomlinson J in the High Court and the Court of Appeal in *Three Rivers (No 5)* applied *Balabel* but interpreted it differently. The Court of Appeal's conclusion that the privilege could only extend to communications made for the dominant purpose of obtaining legal advice was sustained by the same court in *Three Rivers (No 6)*, in which it was held that the advice sought from a lawyer must be advice specifically related to legal rights or liabilities.[77] In *Three Rivers (No 6)*, the House of Lords, having considered *Balabel*, ruled that the approach of the Court of Appeal was too restrictive and that the privilege applied to communications for the purpose of obtaining advice in relation to the manner in which a case should be presented.[78] This is because there was a

76 See paras 28–29 and Section V of the main text below: "*Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] AC 610".
77 [2004] QB 916. See Section V of the main text below.
78 *Supra* n 2, at [37]–[38], [45], [58] and [111].

broader legal context involved which justified the application of the privilege (the potential liability of the BoE in respect of its public duties as a result of the conclusions of the Inquiry).

29 Therefore, according to the House of Lords in *Three Rivers (No 6)*, a communication may be protected by legal advice privilege even if it does not directly concern the client's immediate legal position as long as there is a broader legal context. This raises a more difficult issue of how significant the legal context must be before the privilege applies. In *Balabel*, although Taylor LJ did indicate that a court needs to take a broad approach when determining whether the purpose of a communication is to obtain legal advice,[79] he qualified this by pointing out that "to extend privilege without limit to all solicitor and client communications upon matters within the ordinary business of a solicitor and referable to that relationship [would be] too wide".[80] This restriction on the scope of legal advice privilege (which was accepted as correct by the House of Lords in *Three Rivers (No 6)*[81]) is not evident in s 128(1), which appears to cover all communications referable to the relationship of client and lawyer in the course of the latter's employment. Indeed, the section was enacted on the basis of earlier case law to this effect.[82] It would therefore seem that the legal context of the communication, according to a literal interpretation of s 128(1), may be more tenuous than it would be according to the *Balabel* formulation. Subtle distinctions may cause uncertainty and it may be best for a Singapore court to bring s 128(1) in line with the common law (*ie*, the position taken in *Balabel*), particularly as the range of a modern lawyer's work has been said to be much more extensive than it was in the past, hence giving rise to the present need to keep the privilege "within justifiable bounds".[83]

79 See main text accompanying *supra* n 49.

80 *Supra* n 15, at 331.

81 *Three Rivers (No 6)*, *supra* n 2, at [38].

82 See, for example, *Greenough v Gaskell*, *supra* n 40, at 101–103 (considered at para 15 of the main text above).

83 *Per* Taylor LJ in *Balabel*, *supra* n 15, at 331–332. Although Lord Rodger of Earlsferry in *Three Rivers (No 6)*, *supra* n 2, at [58] thought this view was an "over-simplification" of practice in the past.

D. *Documents within the first three categories sent by employees at the time but who have since left their employment*

(1) Literal application of s 128(1)

30 These communications would be privileged under s 128(1) because they were made by persons who were employees at the time they were made on behalf of the client.

(2) Application of s 128(1) construed in the light of Balabel

31 This issue did not arise for consideration in *Balabel.*

V. *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] AC 610

32 The case before the House of Lords arose from an application for discovery subsequent to the decision of the Court of Appeal in *Three Rivers (No 5)*. The claimants sought discovery of communications between the BIU and its lawyers and related documents such as internal notes and memoranda concerning the "overarching" statement which had been submitted by the BoE to the Inquiry. The bank contended that these documents were privileged.[84] The Court of Appeal in *Three Rivers (No 6)*[85] ruled that as the communications were for the purpose of obtaining advice "on preparation and presentation of evidence" for the Inquiry and not for the purpose of "advising on legal rights and obligations",[86] the BoE was not entitled to claim privilege. The House of Lords disagreed and ruled that "legal advice privilege must cover also advice and assistance in relation to public law rights, liabilities and obligations".[87] The privilege applied because the issue of whether the bank had discharged its duties of supervision could have resulted in the invocation of public law remedies.[88] Presentational advice was necessary "for the purpose of enhancing the [BoE's] prospects of persuading the [I]nquiry" that it had complied with its duties.[89] Accordingly, "all the communications between the BIU and [the lawyers] regarding the content and manner of presentation of the overarching statement made on [BoE's] behalf to the

84 *Three Rivers (No 6)*, *supra* n 2, at [16].
85 *Supra* n 77, at [28].
86 *Ibid*. This was the same approach taken by the Court of Appeal in *Three Rivers (No 5)* in respect of the four categories of documents.
87 House of Lords in *Three Rivers (No 6)*, *supra* n 2, at [36].
88 *Id* at [37].
89 *Id* at [43].

[I]nquiry, and all internal notes and memoranda relating thereto, qualified for legal advice privilege".[90] The House observed that communications for the purpose of presentational advice in the sphere of private law rights may also be privileged. The House endorsed Taylor LJ's statement in *Balabel* that "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".[91] As there must be a "legal context", not every communication between client and lawyer in the ordinary course of their professional relationship will be privileged.[92] Lord Scott of Foscote gave the following guidelines in a case where it is not obvious that communications have taken place in the relevant legal context:[93]

> 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.

The House declined to express any views on the issue of whether the Court of Appeal in *Three Rivers (No 5)* was correct to hold that the four categories of documents[94] were not privileged.[95]

VI. Conclusion

33 It is likely that the Court of Appeal's decision in *Three Rivers (No 5)* will be regarded by future courts as imposing an unjustifiable fetter on the scope of the legal advice privilege. This reaction may even be more strongly anticipated in Singapore given the broad context of s 128 of the EA. This is a fundamental provision the scope of which no

90 *Id* at [45].
91 *Id* at [38]. Also see *Balabel*, *supra* n 15, at 330.
92 House of Lords in *Three Rivers (No 6)*, *supra* n 2, at [38]; *Balabel* at 330.
93 *Three Rivers (No 6)*, *supra* n 2, at [38].
94 See paras 3(a) to 3(b) of the main text above.
95 For the reasons given, see [47] of the judgment of the House of Lords, *supra* n 2.

Singapore court has yet had the opportunity to examine and explain. When the occasion does arise, the court will no doubt take into account the impact of the Court of Appeal's decision on the operation of a corporate entity which, as a matter of commercial necessity, must entrust its officers with the task of providing confidential information to lawyers for the purpose of obtaining legal advice which is ultimately for the benefit of the company – the client. This was recognised by the US Supreme Court in *Upjohn Co v United States*,[96] which held that confidential information provided by employees (irrespective of their level of authority)[97] on behalf of their employer-company (the client) to lawyers – so that the client can be properly advised as to its legal position – is protected by privilege. Rehnquist J, in delivering the judgment of the Supreme Court, pointed out that just as an individual client provides information to his lawyer in order that he can be properly advised, so a company must supply the information through its employees for this purpose.[98] As the federal rule governing legal advice privilege in the US is based on common law principles,[99] this case should have persuasive status in Singapore because s 128 of the EA shares the same foundation.

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96 449 US 383 (1981).

97 The Supreme Court disagreed with the Court of Appeals' view that the category of employees should be restricted (for the purpose of legal advice privilege) to those who are sufficiently responsible or senior enough to be regarded as being in control of the company or involved in its decision-making process (*id* at 390–391).

98 *Id* at 391.

99 Rehnquist J referred to r 501 of the Federal Rules of Evidence at 389. The provision remains the same in the current Federal Rules of Evidence (2004). It states:

> [T]he privilege … shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. …