THREE RIVERS AND ITS IMPLICATIONS FOR LEGAL PROFESSIONAL PRIVILEGE

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[Abstract: although the House of Lords' decision in Three Rivers is to be welcomed as providing clarity on some aspects of legal advice privilege, there are other areas of the law on legal professional privilege (arguably of more practical concern to most lawyers) which remain unclear and difficult.]

1 On 11th November 2004 the House of Lords gave its reasons for having allowed an appeal on 29th July 2004 in *Three Rivers District Council v Bank of England* [2004] UKHL 44. Many in the legal profession will have responded to this long-awaited judgment with a sigh of relief, principally because the basis for legal advice privilege has been re-asserted, and its scope has (as many had protested) been confirmed to have been unduly restricted by the Court of Appeal.

2 However, it is important to remember just how much of the law on legal professional privilege has been called into question during the *Three Rivers* litigation. Privilege used to be thought of as "absolute" and "fundamental" (both in the language of individual rights, and, more powerfully still, in the language of public policy) and, in consequence, so important that it defeated the temptations of "pulling back the veil" in any individual case. The House of Lords' decisions in *R v Derby Magistrates' Court ex parte B* [1996] 1 AC 487 and *R (Morgan Grenfell Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 both (albeit in very different contexts) confirmed the necessity and the powerful consequences of legal professional privilege arising. In that judicial atmosphere it was perhaps unsurprising that many assumed that, in order

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for the rationale of legal professional privilege to be fully effective, and for clients to be able to appreciate, in advance of instructing their lawyers, that correspondence with those lawyers would not later be revealed, the rule had to be very generously construed and rigorously applied.

3 However, what *Three Rivers* arguably shows is that the "price" to be paid for awarding legal professional privilege an absolute *status* once it applies is that the Courts might be somewhat sceptical about its *scope* (i.e. in determining whether it *does* arise in the first place). Despite its welcome ratio, there can nevertheless be detected – even in some of the judgments in *Three Rivers (No 6)* - a new scepticism about the *need* for privilege. Baroness Hale, for example, justifies legal advice privilege because (paragraph 61) it is "too well established in the common law for its existence to be doubted now". That is not, it can be suggested, the most ringing possible endorsement of part of what had previously been described[2] as a "fundamental condition upon which the administration of justice as a whole rests".

4 In *Three Rivers (No 5)*[3] the Court of Appeal had to consider whether certain communications between employees of the Bank of England and Freshfields (the Bank's lawyers) had been privileged. The communications had arisen in the context of requests for advice and guidance from Freshfields about how best to present evidence to the Bingham Inquiry, set up in the aftermath of the collapse of BCCI. In 1993, after the conclusion of the Inquiry, proceedings were launched against the Bank, alleging bad faith in the way it had carried out its statutory obligations in supervising BCCI. There were various requests for discovery of documents. As Lord Scott noted, because the Banking Act 1987 had set the Claimants' evidential hurdle at the high level of bad faith (so that negligence would not be enough) it was not surprising that the Claimants sought the widest possible discovery from the Bank in order to assist their efforts to jump that hurdle.

5 The Bingham Inquiry was conceded not to be adversarial, with the consequence that litigation privilege could not apply to the documents requested. Did legal advice privilege apply? The Court of Appeal said not in this context. It gave two reasons. First, it held that communications between lawyer and client, and client *only*, could attract legal advice privilege. Although companies could only act through employees, it did

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2 *R v Derby Magistrates Court, ex parte B* [1996] 1 AC 487 per Lord Taylor at p 507

3 *Three Rivers District Council v Bank of England* (No 5) [2003] QB 1556

not follow that all employees of a company were to be regarded as the client. Indeed, an employee might stand in no different a position from that of a third party, who (in respect of legal advice) does not qualify. It followed that *only* communications between the Bank of England's Bingham Inquiry Unit ("BIU") and Freshfields could in principle attract legal advice privilege, since only the BIU was the "client" in that context. Communications between other employees of the Bank ("however eminent he or she may be") and Freshfields could not, said the Court of Appeal, attract privilege.

6 Giving a second reason for its decision (arguably one which was *obiter*), the Court of Appeal contrasted presentational advice with legal advice and said that the dominant purpose of the communications at issue (advice as to how best to present the evidence to the inquiry) was not such as fell within the scope of "legal advice". That led to further applications and appeals. Meanwhile, the House of Lords dismissed a petition to appeal from the Court of Appeal on the "client point" in *Three Rivers (No 5)*.

7 Encouraged by the second reason given by the Court of Appeal in *Three Rivers (No 5)* (i.e. about what constitutes "legal advice"), the Claimants then applied for disclosure of all documents between the *BIU* (sic) and Freshfields given for presentational purposes. The Court of Appeal, in a second decision (*Three Rivers (No 6)*) confirmed and expanded upon its earlier view, noting that "legal advice" meant advice as to legal rights or liabilities. Advice about how to present evidence to the inquiry did not qualify for protection, since it was not about any relevant right or obligation of the Bank. The Bank was ordered to disclose the documents concerned.

8 It was this second decision (*Three Rivers (No 6)*) of the Court of Appeal that has now been considered and reversed by the House of Lords. The House of Lords has effectively reinstated an earlier test for the scope of legal advice privilege, set out in *Balabel v Air India* [1988] Ch 317. The test there was, in essence, whether the communication is made in a "relevant legal context" – significantly more generous than whether the communication relates to "rights or liabilities". The House of Lords further confirmed that there was such a "legal context" to the circumstances of the Bingham Inquiry.

9 The decision in *Three Rivers (No 6)* is surely to be welcomed. It seems to confirm that the basic test, applied carefully for many years by solicitors in this jurisdiction, of whether a communication or a document is made in a relevant legal context, was indeed the right one. It also implicitly

recognises that a rule designed to encourage litigants to "open up" to lawyers should not depend on difficult, legalistic and unpredictable distinctions.

10 But, as the House itself recognised, the issue in *Three Rivers (No 6)* was rather narrow. For supporters of legal professional privilege, there remain, as it were, reasons not to be cheerful, of which I suggest three.

11 First, of significant concern to many lawyers and to large companies, is the fact that, in the aftermath of the House of Lords' judgment, the "client" issue as addressed by the Court of Appeal in *Three Rivers (No 5)* remains unresolved and difficult. For a time, it seemed possible that the House of Lords, concerned by the ramifications of a lack of clarity in this area of the law, might address that issue in *Three Rivers (No 6)* (even though it did not strictly speaking arise on that appeal). In the event, the House of Lords declined to address the point or to express its views. Many have commented that this was a missed opportunity.

12 It is in fact understandable that the House of Lords chose not to address an issue that was not strictly part of the case before them (and as to which a recent panel had refused permission). Nevertheless the present law remains somewhat unclear and unsatisfactory. To distinguish between a "unit" of a company said to be the "client", and employees of that company, is rather artificial and formalistic. This is after all, as Lord Brown recognised in *Three Rivers (No 6)*, "an area of the law in which clarity and certainty are at a premium". And as Lord Millett had observed in a recent Privy Council case, "a lawyer must be able to give his client an absolute and unqualified assurance that whatever the client tells him in confidence will never be disclosed without his consent."[4] At present many lawyers will no doubt feel that they are unable, responsibly, to give such an assurance to their clients (ironically, partly because it will not be easy to know who the client really is).

13 Secondly, Lord Scott appears to have doubted (paragraph 29) the rationale for *litigation* privilege insofar as it applies to communications between litigants and third parties. That comment, although *obiter*, is a somewhat unexpected development in a case advertised as reasserting the justification for legal professional privilege generally and legal advice privilege in particular.

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4 *B v Auckland District Law Society* [2003] 2 AC 736, at para 54

14 Finally, it is perhaps arguable that the *Balabel* test may not have been completely or effectively reinstated by the House of Lords in *Three Rivers (No 6)*. The relevant passage in *Balabel*[5] was notable, and arguably of considerable wisdom, not only because it identified a *threshold requirement* ("relevant legal context") without which legal advice privilege could not be present, but *also* because it identified a *process* (described as a "continuum") within which there could be identified communications to which privilege attached, even where they did not specifically contain or ask for legal advice, but were (for example) merely designed to keep the other party informed. In *United States of America v Philip Morris and others* [2004] EWCA Civ 330, it was argued on behalf of the Appellant that a proper application of the *Balabel* principle meant that where the dominant purpose of the *retainer* of the lawyer was the provision of *bona fide* legal advice, it did not matter that there were some communications delivered pursuant to that retainer which did not themselves relate to rights and obligations. The whole "continuum" should be protected. The Court of Appeal rejected that submission, insisting that the focus had to be on communications, not retainers. It is unclear how that aspect of the decision in *Philip Morris* stands in the light of *Three Rivers (No 6)*.

15 It is also notable, and perhaps of some concern, that where it comes to contested assertions of privilege in marginal cases, Lord Scott has stated that not only should the Judge consider whether there is a request for advice relating to rights, liabilities, obligations and remedies under private or public law, but that he or she should also consider whether the communication "falls within the policy underlying the justification for legal advice privilege in our law". That is, potentially, too unfocused a test to be of real assistance to practitioners advising their clients before the issue is raised in court. It is, at worst, a potential justification for a new, more sceptical, privilege procedure in which *considerations of policy* are taken into account and balanced against the rationale for having the privilege, in deciding whether to allow exceptions to the rules of privilege in individual cases. That there is not supposed to be such a "balancing exercise" in individual cases has repeatedly been pointed out.[6]

16 On the other hand, it should be remembered the problem in *Three Rivers (No 5)* was somewhat unusual, as the documents concerned came into existence in a *non-litigious context* (so that litigation privilege could not

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5 *Balabel v Air India* [1988] Ch 317 per Taylor LJ at 330

6 *B v Auckland District Law Society* [2003] 2 AC 736 at para 54

apply).[7] Furthermore, the "client" was said to be a "unit" within a very large organisation. That too may be unusual. It is possible that – even in a purely legal advice privilege context – a Court might feel able to distinguish the decision in some way or other. Where a company instructs lawyers to advise it on a proposed transaction, or on the impact of a new law, it seems artificial and pointless for all the relevant employees to have to form a "unit" within the company so that that unit may be thought of as "the client" for privilege purposes. It remains to be seen whether any such procedures would be regarded by the Courts as (a) necessary, or (b) conversely, as impermissibly creating privilege where none should exist.

17 In conclusion, I attempt to provide a summary of what I regard as the more uncontroversial points about legal professional privilege in the light of *Three Rivers*. It is perhaps unwise to seek to provide summaries of the law in this difficult area. But I think that the following can be said with reasonable certainty:

17.1 legal professional privilege, where it applies, is a fundamental rule of evidence, and also a substantive and fundamental right, usually (and possibly without exception) overriding the competing public interest in having all relevant material placed before a court;

17.2 legal professional privilege is commonly divided into (1) litigation privilege (which depends on there being litigation reasonably in prospect) and (2) legal advice privilege (which does not). Litigation privilege extends to communications with third parties, whereas legal advice privilege does not;

17.3 the Court of Appeal's recent scepticism about the rationale of retaining legal advice privilege (as opposed to litigation privilege) is, according to the House of Lords, misplaced. Our legal system needs both legal advice privilege and litigation privilege;

17.4 legal professional privilege does not apply to a communication if (1) it came into existence as part of a crime or fraud, or (2) it has either lost its confidentiality, or lost its privilege through a waiver;

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7 C.f. *United States of America v Philip Morris and others* [2004] EWCA Civ 330, in which the Court of Appeal said that litigation must be reasonably in prospect in order for litigation privilege to apply

17.5 the test for legal advice privilege is to be found in the judgments in *Balabel* and *Three Rivers (No 6)* (HL), but cannot at present be said to be precisely clear. In practice, care still needs to be taken to ensure that the individual communication is taking place within a specifically "legal context";

17.6 the Court of Appeal's distinction between advice about rights and obligations, and advice about presentation, was not the correct way of separating legal advice from non-legal advice. "Legal advice" can include advice about the effective presentation of a case – especially if the consequences of failing to present the relevant evidence is public criticism, or private or public law proceedings;

17.7 whether the employees of a large company seeking advice from a lawyer are to be regarded as "the client", or as the client's agents, and therefore eligible for legal advice privilege (and if so which of them, and why), is an unresolved legal question. It is likely that the point will need to be reconsidered soon.