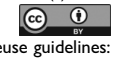
Article

THE INTERNATIONAL JOURNAL of EVIDENCE & PROOF

Legal advice privilege: The legacy of *Three Rivers (No. 5)* and the challenge of providing consistent protection to all client types

The International Journal of Evidence & Proof
2022, Vol. 26(2) 157–177



DOI: 10.1177/13657127221077330
journals.sagepub.com/home/epj


Michael Stockdale
Northumbria Law School, Northumbria University, Newcastle upon Tyne, UK

Rebecca Mitchell
Northumbria Law School, Northumbria University, Newcastle upon Tyne, UK

Abstract

Legal advice privilege operates in the corporate context subject to a dominant purpose test and an agency-based control mechanism. This mechanism fails to reflect the privilege's rationale and prevents the dominant purpose test from giving corporations the same level of protection that the privilege provides to other client types. Following analysis of approaches in other common law jurisdictions, this article concludes that the optimum control mechanism for English Law is the dominant purpose test unfettered by the agency-based control mechanism and extended to encompass third parties. It is the first significant attempt to consider the merits of the agency-based control mechanism since the operation of the dominant purpose test in this context was confirmed by the Court of Appeal. It rebuts the suggestion by some academics that legal advice privilege should be restricted in the corporate context by asserting that it is by expansion of the privilege's ambit that consistency of protection across client types will be achieved.

Keywords

dominant purpose test, functional equivalent test, legal advice privilege, legal professional privilege, subject-matter test

Corresponding author:
Michael Stockdale, Northumbria Law School, City Campus East, Northumbria University, Newcastle upon Tyne NE1 8ST, UK.
E-mail: m.w.stockdale@northumbria.ac.uk

Introduction

Legal advice privilege is the limb of legal professional privilege that attaches to confidential communications between legal adviser and client for the dominant purpose of giving or obtaining legal advice.[1] Its rationale is: there is a public interest in clients seeking legal advice to enable them to arrange their affairs in an orderly manner; to do so clients must make lawyers aware of the relevant facts; and, if a court could require the disclosure of communications between legal adviser and client then clients might not be prepared to confide in legal advisers.[2]

The other limb of legal advice privilege, litigation privilege, attaches to confidential communications that were made either for the sole or at least for the dominant purpose of obtaining legal advice, evidence or information in preparation for adversarial litigation which had commenced or at least was contemplated at the time when the communications were made. It encompasses communications between legal adviser or client and a third party.[3] It may be justified both via the same rationale that justifies the existence of legal advice privilege and also on the basis of the entitlement of parties to adversarial litigation not to disclose their cases prior to the trial.[4] To the extent to which it is capable of encompassing communications that were not made for the dominant purpose of giving or obtaining legal advice, however, the former justification would not appear to be applicable. This article focuses on the ambit and development of legal advice privilege, not litigation privilege.

A primary concern of this article is the adequacy of the agency-based control mechanism[5] governing the operation of legal advice privilege in the corporate context that has existed in English Law since its adoption by the Court of Appeal in *Three Rivers District Council & Ors* v *The Governor & Company of the Bank of England (No. 5)*.[6] The case concerned documents prepared by employees and former employees of the Bank of England for the Bank's legal advisers. The Court of Appeal held that the privilege only attached to communications between the lawyers and the Bingham Inquiry Unit (BIU), a unit that the Bank had set up to deal with the matter in question and seek and receive advice from the lawyers, this unit being held to equate with the client for the purposes of the disclosure application.

The control mechanism imposed by *Three Rivers (No. 5)* limits the ambit of legal advice privilege in English Law in the corporate context. Under this agency-based approach, legal advice privilege does not attach to communications between a corporation's legal advisers and corporate employees other than those employees or groupings of employees who are authorised to seek and receive legal advice on behalf of the corporation and are thus identified as the client for the purposes of the privilege. If litigation had not commenced and was not contemplated when an internal corporate communication was made (such that litigation privilege cannot apply) the agency-based control mechanism that limits the operation of legal advice privilege can restrict the ambit of legal professional privilege to a narrow range of corporate employees. As is demonstrated below, the extent to which it does so depends both upon the breadth of judicial interpretation and the flexibility of judicial application. Even if interpreted generously and applied flexibly, it still imposes a restriction upon the ambit of legal advice privilege that non-corporate clients are not subject to.

1. See; Lord Rodger of Earlsferry in *Three Rivers District Council* v *Governor and Company of the Bank of England (No. 6)* [2005] 1 AC 610 at para. 50. For confirmation that the dominant purpose test is applicable in the context of legal advice privilege see *The Civil Aviation Authority* v *R (on the application of Jet2.com Limited) and the Law Society* [2020] QB 1027 *per* Hickinbottom LJ at para. 96.
2. See Lord Scott of Foscote in *Three Rivers District Council and others* v *Governor and Company of the Bank of England (No 6)*, above n. 1 at para. 34.
3. See *Three Rivers District Council* v *Governor and Company of the Bank of England (No. 6),* above n. 1 *per* Lord Carswell at para. 102.
4. *Waugh* v *British Railways Board* [1980] AC 521 *per* Lord Wilberforce at 531.
5. The 'control-mechanism' terminology is adopted from the judgement of Tomlinson J at first instance in *Three Rivers (No. 5*) [2002] EWHC 2730 (Comm) at para. 30. He used it in reference to the dominant purpose test, but it is used here to describe the agency-based control mechanism that the Court of Appeal adopted in that case.
6. *Three Rivers District Council & Ors v The Governor & Company of the Bank of England (No. 5)* [2003] QB 1556.

At first instance in *Three Rivers (No. 5)*,[7] Tomlinson J had applied the dominant purpose test as a control mechanism that limited the ambit of the privilege to confidential communications for the dominant purpose of obtaining legal advice, regarding the test as being applicable to internal corporate communications.[8] The application of the dominant purpose test was unfettered by the agency-based constraints that were subsequently imposed by the Court of Appeal in that case. Tomlinson J had envisaged that this test would apply both to current employees and to former employees who had acquired relevant confidential knowledge in their employment capacity.[9] He did not, however, intend the test to encompass communications with third parties.[10] Subsequent to *Three Rivers (No. 5)*, the Court of Appeal in *The Civil Aviation Authority* v *R (on the application of Jet2.com Limited) and the Law Society*[11] (*Jet2*) held that the existence of legal advice privilege is subject to the operation of a dominant purpose test, under which confidential communications between legal adviser and client will only be privileged if made for the dominant purpose of giving or obtaining legal advice.[12] It recognised, however, that it was bound by the decision of the Court of Appeal in *Three Rivers (No. 5)*.[13] Thus, in the corporate context, the operation of the dominant purpose test is effectively restricted to confidential communications between legal adviser and those corporate employees who are authorised to seek and receive legal advice on behalf of the corporation. Where a corporate employee falls outside that category, subject to two exceptions, the effect of *Three Rivers (No. 5)* is that legal advice privilege cannot apply to communications between the employee and the legal adviser regardless of the purpose of the communication.[14]

In two decisions of the Court of Appeal decided subsequent to *Three Rivers (No. 5)*, it indicated that, had it been free to do so, it would not have followed the precedent laid down by the Court of Appeal in *Three Rivers (No. 5)*.[15] In *The Director of the Serious Fraud Office* v *Eurasian Natural Resources Corporation Limited and the Law Society*[16] (*Eurasian*), the court suggested that the privilege should apply equally to all client types but recognised that the approach from *Three Rivers (No. 5)* disadvantages

7. *Three Rivers (No. 5)*, above n. 5.
8. *Three Rivers (No. 5)*, above n. 5 at para. 30.
9. Former employees were dealt with in an addendum to Tomlinson J's judgment, see Lord Scott of Foscote in *Three Rivers District Council* v *Governor and Company of the Bank of England (No. 6)*, above n. 2 at para. 11.
10. *Three Rivers (No.* 5), above n. 5 at para. 30.
11. *The Civil Aviation Authority* v *R (on the application of Jet2.com Limited) and the Law Society* 2020, above n. 1 *per* Hickinbottom LJ at para. 96.
12. See *The Civil Aviation Authority* v *R (on the application of Jet2.com Limited) and the Law Society*, above n. 1 *per* Hickinbottom LJ at para. 96.
13. *The Civil Aviation Authority* v *R (on the application of Jet2.com Limited) and the Law Society*, above n. 1 at para. 48.
14. The first exception applies where the employee is merely acting as a conduit for communicating material between the legal adviser and employees who were authorised to seek and receive legal advice on behalf of the corporation. This is in line with the long-established position that where the role of an agent is merely that of communicating confidential material between legal adviser and client and does not include bringing the material into existence, this does not prevent legal advice privilege from attaching to the material (see *Wheeler* v *Le Marchant* (1881) 17 Ch D 675 *per* Jessel MR at 682 and Cotton LJ at 684 and see also Oliver LJ in *In Re Highgrade Traders Ltd* [1984] BCLC 151, 164 and Millet J in *Price Waterhouse (a firm)* v *BCCI Holdings (Luxembourg) SA and others* [1992] BCLC 583, 589. Under the second exception, a company may disseminate legal advice that it has received internally (and legal advice may also be disseminated to third parties) without legal advice privilege being lost (see *The Good Luck* [1992] 2 Lloyd's Rep 540 and see *The Civil Aviation Authority* v *R (on the application of Jet2.com Limited) and the Law Society*, above n. 1 at para. 45. In relation to dissemination to third parties see *USP Strategies Plc* v *London General Holdings Ltd* [2004] EWHC 373 (Ch) and see *The Civil Aviation Authority* v *R (on the application of Jet2.com Limited) and the Law Society*, above n. 1 at para. 45).
15. *The Director of the Serious Fraud Office* v *Eurasian Natural Resources Corporation Limited and the Law Society* [2019] 1 WLR 791 at para. 130; *The Civil Aviation Authority* v *R (on the application of Jet2.com Limited) and the Law Society*, above n. 1 at paras 48 and 57.
16. *The Director of the Serious Fraud Office* v *Eurasian Natural Resources Corporation Limited and the Law Society*, above n. 15 at para. 127.

large corporations when compared to individuals and small businesses. It believed that the court in *Three Rivers* (*No. 5*) should have made its primary focus the purpose of the privilege rather than the 19th Century jurisprudence it had relied upon.[17] It also recognised that *Three Rivers* (*No. 5*) had taken English Law out of alignment with approaches in other common law jurisdictions.[18] The court in *Jet2* agreed with the criticisms of *Three Rivers (No. 5)* raised in *Eurasian.* In addition, it could not see how *Three Rivers (No. 5)* accommodated internal communications between those authorised to instruct legal advisers and other corporate employees for the purpose of settling instructions. [19] And it could not see why gathering information within the company for the purpose of instructing lawyers should be treated in a different manner to the dissemination of legal advice within the company or indeed to third parties.[20]

A key assertion made in this article is that the dominant purpose test, freed from the fetters imposed by the Court of Appeal in *Three Rivers (No. 5)*, would be the optimum control mechanism to govern the ambit of legal advice privilege in the corporate context. Accepting the criticisms of *Three Rivers (No. 5)* made in *Eurasian*[21] and in *Jet2*, the view expressed in this article is that when it has the opportunity, the Supreme Court should free the dominant purpose test from those fetters. Doing so will only provide an equal level of protection to all client types, however, if, contrary to Tomlinson J's approach, the dominant purpose test is held to encompass not only corporate employees and former employees but also certain categories of third party. This is necessary in order that individuals and smaller entities that outsource functions are not disadvantaged in comparison to larger corporations. These conclusions are reached following consideration both of the privilege's rationale (underpinned by its status as a fundamental right) and of approaches adopted in other common law jurisdictions concerning its operation in the corporate context and its extension to encompass third parties.

This article is the first significant attempt to consider the merits of the agency-based control mechanism since the operation of the dominant purpose test in this context was confirmed by the Court of Appeal in *Jet2*. Its first section concerns the underlying rationale of legal advice privilege. Consideration of the rationale and its relationship with interest of justice considerations that favour the disclosure of information assists in determining the optimum parameters of the privilege with reference both to its application to internal corporate communications and its application to communications with external third parties. It accepts that the behavioural assumptions upon which legal advice privilege is based are flawed but also accepts that the privilege is entrenched as a fundamental constitutional or substantive right. From this standpoint it argues that implementation of the privilege's rationale requires its ambit to be such that it provides an equivalent level of protection to all client types. This might be achieved by removing the fetters imposed within the corporate structure by *Three Rivers (No. 5)* whilst also extending the ambit of the privilege to encompass appropriate communications with third parties.

The second section concerns the ambit of the agency-based control mechanism adopted by the Court of Appeal in *Three Rivers (No. 5)* and whether its operation is consistent with effective implementation of the privilege's rationale in the corporate context. It is informed in part by consideration of jurisprudence

17. *The Director of the Serious Fraud Office* v *Eurasian Natural Resources Corporation Limited and the Law Society*, above n. 15 at para. 125.
18. *The Director of the Serious Fraud Office* v *Eurasian Natural Resources Corporation Limited and the Law Society*, above n. 15 at para. 129.
19. *The Civil Aviation Authority* v *R (on the application of Jet2.com Limited) and the Law Society,* above n. 1 at para. 56.
20. *The Civil Aviation Authority* v *R (on the application of Jet2.com Limited) and the Law Society,* above n. 1 at para. 56.
21. Though rejecting the view, expressed obiter by the Court of Appeal in *The Director of the Serious Fraud Office* v *Eurasian Natural Resources Corporation Limited and the Law Society*, above n. 15 at para. 131, also rejected by that Court in *The Civil Aviation Authority* v *R (on the application of Jet2.com Limited) and the Law Society*, above n. 1 at para. 89, that the dominant purpose test is tautologous and unnecessary. Indeed, the Court of Appeal in *Three Rivers (No. 5)*, above n. 6 appears to have assumed the existence of the dominant purpose test in the context of legal advice privilege (see *The Civil Aviation Authority* v *R (on the application of Jet2.com Limited) and the Law Society*, above n. 1 at para. 84).

from Singapore and Hong Kong, jurisdictions which have both found it necessary to consider the merits of the approach adopted by the Court of Appeal in *Three Rivers (No. 5)*. It is also informed by jurisprudence from the United States of America, in which the Supreme Court rejected a test similar to that adopted in *Three Rivers (No. 5)* and gave implicit approval to a more generous approach. It asserts that the *Three Rivers (No. 5)* agency-based control mechanism does not deliver the privilege's rationale in the context of modern corporate governance by preventing communications with most corporate employees from falling within the ambit of the privilege. It also asserts that the rationale is further undermined by uncertainty with regard to the nature of those employees who fall within the ambit of the privilege as delineated by the agency-based control mechanism.

The third section considers the merits of the dominant purpose control test as the optimum control mechanism to limit the ambit of legal advice privilege in English Law in line with the privilege's rationale. It takes into account common law jurisprudence from Australia under which that test governs the ambit of the privilege both in relation to internal corporate communications and in relation to communications with external third parties. It is also informed by the rejection of the *Three Rivers (No. 5)* approach in Hong Kong, where the dominant purpose test was preferred. It argues that the operation of a dominant purpose test, freed from the constraints of the agency-based control mechanism from *Three Rivers (No. 5)* and extended to encompass employees, former employees and third parties, can provide greater consistency of protection across the range of client types. Whilst it accepts that the application of a dominant purpose test involves a degree of uncertainty, it also argues that removal of the *Three Rivers (No. 5)* test will remove one current cause of potential uncertainty.

The fourth section considers the merits of the subject matter test, which is applied in multiple jurisdictions in the United States of America. The issue is whether the subject matter test provides an alternative control mechanism, regulating the operation of legal advice privilege in the corporate context, that the English and Welsh Supreme Court might gainfully prefer to the dominant purpose test. It concludes that the dominant purpose test is to be preferred in providing a simpler and more certain test than the subject matter test

The fifth section considers whether the application of the dominant purpose test to communications with third parties should be subject to constraints based on the functional equivalent test applied in some US jurisdictions for the purpose of ensuring that any interference with interests of justice considerations favouring disclosure is justified by the privilege's rationale. It concludes that the functional equivalent test should not be adopted both because it would increase complexity and uncertainty and because it would limit the extent to which legal advice privilege could provide a consistent level of protection across the range of client types.

Finally, the conclusion advocates the adoption in English Law of an approach to the operation of legal professional privilege in the corporate context which is based on the application of the dominant purpose test to communications with corporate employees, with former employees and with external third parties. This approach, like the approach at common law in Australia, encompasses the realities of 21st-century group and multi-national corporate business structures whilst also providing a more consistent level of protection to smaller companies, partnerships and individuals, each of which are more likely to need to outsource functions to third parties than do larger corporations. Its basis, and the main contribution of this article, is the assertion that the key to implementing the privilege's rationale in such a way as to provide a consistent level of protection to all client types is expansion of its ambit subject to reliance upon the dominant purpose test as the control mechanism that will keep it within reasonable bounds.

The rationale for legal advice privilege: which class(es) of person within (or outside) a corporation should fall within the ambit of the privilege

In considering whether the ambit of legal advice privilege within the corporate context should exceed the parameters imposed by *Three Rivers (No. 5)* and whether the privilege should encompass former

employees and/or third parties it is necessary to have recourse to the privilege's underlying rationale. As was indicated above, this is that: there is a public interest in clients seeking legal advice to enable them to arrange their affairs in an orderly manner; to do so clients must make lawyers aware of the relevant facts; and, if a court could require the disclosure of communications between legal adviser and client then clients might not be prepared to confide in legal advisers.[22] In determining the ambit of the privilege, it is necessary to balance its rationale against the public interest in relevant information being disclosed to the court.[23] The approach of the English courts is that the existence of the privilege is justified by the public interest considerations embodied in its rationale even though the operation of the privilege may result in relevant information not being available to the court.[24]

Historically, the dichotomy between the public interest favouring disclosure and the privilege's rationale manifested itself in the form of divergence between common law and chancery practice, with the chancery side being reluctant to permit expansion of legal advice privilege at the expense of a reduction in the efficacy of discovery (Tapper, 2005: 182–183). The influence of these chancery decisions can still be demonstrated via case law that influenced the decision of the Court of Appeal in *Three Rivers (No. 5)*.[25] Conversely, the decision of the House of Lords in *Three Rivers (No. 6)* (which concerned the ambit of legal advice privilege but did not concern the issue that arose in *Three Rivers (No. 5)*)[26] was identified by Tapper (2005: 183) as one that favours a broader ambit for the privilege. When attempting to balance these conflicting public interest considerations in the context of modern corporate governance and the appropriate regulation of corporate activity, an argument relied on by Cronin in support of the privilege's rationale, based on experience to the contrary in the United States, is that the existence of a privilege which has clear parameters and is applied consistently will encourage self-policing and legal compliance on the part of corporations (Cronin, 2008: 930–931). Corporations will often need to obtain the information they require to seek comprehensive legal advice from a wide group of employees. It is therefore important to the corporation to know where the parameters of legal advice privilege lie and how best to gather the information necessary for comprehensive legal advice to be given. It is optimal for the company and its legal advisers to have reasonable certainty regarding whether information provided by employees to the legal advisers will be protected by legal advice privilege, otherwise the privilege's rationale may be undermined.[27] The fact that communications are privileged does not mean that a company will not in due course be prepared to, and/or feel obliged to, cooperate with a prosecuting authority/regulator by waiving privilege on a limited basis even though under the terms of the limited waiver privileged communications may end up being deployed in legal proceedings and privilege lost[28]

It is arguable that the cogency of the privilege's rationale and the proportionality of its interference with the public interest in favour of disclosure is weakened by the assertion that the underlying assumptions about client behaviour upon which the rationale is based do not reflect actual client behaviour. As

22. See Lord Scott of Foscote in *Three Rivers District Council and others* v *Governor and Company of the Bank of England (No 6*), above n. 1 at para. 34.
23. *Three Rivers District Council and others* v *Governor and Company of the Bank of England (No 6*), above n. 1 *per* Lord Carswell at para. 86.
24. *Three Rivers District Council and others* v *Governor and Company of the Bank of England (No 6*), above n. 1 *per* Lord Scott at para. 34.
25. I.e. *Anderson* v *Bank of British Columbia* (1876) 2 Ch D 646 and *Wheeler* v *Le Marchant* (1881) 17 Ch D 675. For example, in the latter case, in a passage referred to by the Court of Appeal in *Three Rivers (No. 5)*, above n. 5, Sir George Jessell MR, 680–681, had regarded the case before him as 'an attempt…to extend the rule as to protection from discovery', being of the view that it was not 'necessary, either as a result of the principle which regulates this privilege or for the convenience of mankind, so to extend the rule.'
26. The issue which it concerned was whether advice on presenting a case to an inquiry fell within the ambit of the privilege, which it did.
27. As the United States Supreme Court recognised in *Upjohn Co* v *United States* 449 U.S. 383 (1981), which is considered below.
28. See, for example, *PCP Capital Partners LLP* v *Barclays Bank Plc* [2020] EWHC 1393 (Comm).

Ho (2006: 170) recognises, as well as assuming that 'the privilege will…make clients more candid with their lawyers' it also assumes that 'clients know that the privilege exists and understand how it works'.

In fact, it may be that many clients are either not aware that the privilege exists at all or, if they are, do not appreciate the consequences of its operation. Based on the admittedly limited number of empirical studies that have been conducted, Imwinkelried (2004: 156–159) regards the behavioural assumption that underlies the privilege as 'unsubstantiated', both in relation to 'natural person clients' and in relation to 'corporate executives'. If many legal adviser/client communications would take place regardless of whether the privilege existed, the cogency of the rationale is weakened proportionately.

As regards corporations specifically, Higgins (2010: 382, 391) asserts that, to enable them to carry out their business and to comply with their legal duties 'most large corporations are virtually dependent on accurate legal advice…and thus need little incentive in the form of a privilege to obtain it', though he accepts that this is less likely to be the case in relation to smaller companies. He argues that the narrow agency-based control mechanism adopted by the Court of Appeal in *Three Rivers (No. 5)* 'strikes a fair balance' between the ability of corporations to obtain legal advice in confidence and disclosure of information for the purposes of legal proceedings or investigations and protects small companies if 'those in charge…have knowledge of the matters on which the company is seeking advice' (Higgins, 2019: 166).

If it is accepted that the behavioural assumptions underlying the privileges' rationale may often not reflect the realities of either corporate or natural person client behaviour, the key questions are whether the existence of the privilege can still be justified and, if so, what its ambit should be.

In *Three Rivers (No. 6)*,[29] Lord Scott of Foscote acknowledged that clients may frequently be prepared to disclose all relevant facts to their lawyer whether or not the protection of legal advice privilege is available. However, he believed that securing communications to which legal advice privilege applies from disclosure 'is necessary in a society in which the restraining and controlling framework is built upon a belief in the rule of law…'[30]

In modern jurisprudence, legal advice privilege is regarded, in the words of Lord Taylor of Gosforth CJ in *R* v *Derby Magistrates' Court, Ex parte B* as, 'a fundamental condition on which the administration of justice as a whole rests'.[31] This classification of the privilege has not been without judicial[32] and academic critics. For example, Tapper regarded the decision in *Three Rivers (No. 6)* which expanded the ambit of legal advice privilege as strange in the context of the modern process of civil litigation as conducted under the Civil Procedure Rules[33] and believed that it had become 'fashionable here as in other jurisdictions to take a peculiarly exalted view of such suppression of relevant material by the invocation of legal professional privilege' (Tapper, 2005: 183). Disapproving of this fashion (Tapper, 2005: 184–185), he suggested that 'the optimum approach is to draw as sharp a line as possible between revelation of the material necessary to establish the substance of the dispute, and suppression of communications with a lawyer only about the application to that substance of the relevant legal rules' (Tapper, 2005: 182–183). In practice, the line which the English courts have drawn to restrict the ambit of the privilege, via the decision in *Three Rivers (No. 5),* is applicable only in the corporate context and has resulted both

29. *Three Rivers District Council* v *Governor and Company of the Bank of England (No. 6)*, above n. 1. In *Three Rivers (No. 6)* the House of Lords was not required to determine the validity of the agency based control mechanism imposed by the Court of Appeal in *Three Rivers (No. 5)* and declined to express any views, favourable or otherwise.
30. *Three Rivers District Council* v *Governor and Company of the Bank of England (No. 6)*, above n. 1 at para. 34.
31. [1996] AC 487, 507.
32. For example, in *R Morgan Grenfell & Co Ltd)* v *Special Commissioner of Income Tax* [2003] 1 AC 56, [43], Lord Hobhouse, suggested that Lord Taylor's description of the character of legal professional privilege would probably 'benefit from further examination'.
33. Which is much less adversarial, and much more case managed, than was the case in the 19th Century.

in an inconsistent application of the privilege across different client types and inconsistency with other common law jurisdictions.

Whilst Tapper (2005: 184) did not believe that this was justified (and Ljubanovic (2019: 167) wondered 'whether the *Derby* court made its judicial pronouncement without fully considering the consequences'), the reality is, that the 'fashionable' view that legal advice privilege is a fundamental, constitutional or substantive right has won the day not only in England and Wales but also in other common law jurisdictions.[34] The purpose of this article is not to debate either whether the existence of the privilege's and/or the status of the privilege as a fundamental right are justified. These are valid objectives (Imwinkelried, 2003: 315), but our purpose is to identify the optimum ambit of legal advice privilege, acting on the assumptions that both rationale and fundamental right status are entrenched for the foreseeable future. Acceptance of the existence of this enhanced status for legal advice privilege does not, however, dictate that the privilege has a specific ambit. What it does appear to dictate is that, to the extent to which this is possible, the privilege should provide an equivalent level of protection to all client types.

Lord Scott in *Three Rivers (No. 6)* indicated that the ambit of legal advice privilege should reflect 'the policy reasons that justify its presence in our law'.[35] Based upon his analysis of the rationale for legal advice privilege, the Court of Appeal in *Eurasian* believed that the privilege should apply equally to clients in general, regardless of 'size or reach'.[36] Previously, sitting in the High Court of Australia in *Esso Australia Resources Ltd* v *Commissioner of Taxation*[37](*Esso*), Callinan J had suggested that, where possible, corporations should neither be put in an advantaged or a disadvantaged position in comparison to 'natural persons'.[38] If the validity of these propositions is accepted, the logical consequence is that legal advice privilege should provide an identical level of protection to all client types. Higgins (2019: 159) has asserted that 'a generally applicable privilege, whether large or narrow in its scope, will always confer greater or lesser protection on clients who are different in nature and/or size and structure'. This assertion appears to be correct *if* the ambit of the privilege as it operates in the corporate context is restricted to communications with corporate employees and is prohibited from encompassing communications with external third parties, as smaller corporations and non-corporate client types will lack the in-house resources available to larger corporations. Legal advice privilege could, however, provide a largely consistent, if not identical, level of protection to all client types if the agency-based fetters imposed by *Three Rivers (No. 5)* were relaxed via a mechanism that enabled the privilege to encompass appropriate communications both within the corporation itself and with external third parties.

Relaxing the fetters imposed by *Three Rivers (No. 5)* within the corporate context would mean that corporations, which must conduct many of their activities via internal communications between their employees, would not suffer a significant disadvantage when compared to individuals and partnerships. If the privilege was also extended to encompass appropriate communications with third parties, this would mean that individuals, partnerships and smaller companies who retain third parties to perform

34. For example, the High Court of Australia, has classified legal professional privilege as best explained on the basis 'that it is a practical guarantee of fundamental, constitutional or human rights' (*Carter* v *Northmore Hale Davy & Leake* (1995) 183 CLR 121, *per* McHugh at 161). The Supreme Court of Canada, recognising that 'it is well established that solicitor-client privilege has evolved from a rule of evidence to a rule of substance' noted that 'some even suggest that the Court has granted it a quasi-constitutional status' (*Alberta* v *University of Calgary* [2016] 2 SCR 555 *per* Côté J at para. 38). And in Hong Kong, legal advice privilege 'has since 1997 been constitutionally entrenched…as a basic right under Article 35 of the Basic Law' (*Citic Pacific Ltd* v *Secretary for Justice (No 2)* [2015] 4 HKLRD 20 at para. 2). It was arguably entrenched prior to that (see *Citic Pacific Ltd* v *Secretary for Justice (No 2)* at para. 2).

35. *Three Rivers District Council* v *Governor and Company of the Bank of England (No. 6)*, above n. 1 at para. 35.

36. *The Director of the Serious Fraud Office* v *Eurasian Natural Resources Corporation Limited and the Law Society*, above n. 15 at para. 127.

37. *Esso Australia Resources Ltd* v *Commissioner of Taxation* (1999) 168 ALR 123.

38. *Esso Australia Resources Ltd* v *Commissioner of Taxation,* above n. 37 *per* Callinan J at para. 162.

functions that would be performed by employees in a larger corporation would not suffer a significant disadvantage when compared to larger corporations. These changes would result in a privilege that provided a much more consistent level of protection to all client types.

The control mechanism imposed by the Court of Appeal in *Three Rivers (No. 5)* has resulted in a regime that excludes most corporate employees and former employees and provides corporate clients with a limited degree of protection that does not reflect the privilege's rationale. The following section of this article demonstrates why this is so.

The agency-based control mechanism from *Three Rivers (No. 5)*; ambit, uncertainty and relationship with the privilege's rationale

The agency-based control mechanism that *Three Rivers (No. 5)* imposed on the operation of legal advice privilege in the corporate context, in restricting the ambit of legal advice privilege to communications between legal advisers and a small core of corporate employees, fails to reflect the realities of modern corporate governance, producing a privilege which is too narrow to reflect its underlying rationale. As Passmore (2019: 4-016) recognises, 'the reality of daily corporate life [is that] it is essential that employees in large organisations are able to be open with their employer's lawyers so that they can receive the best available advice'.

The agency-based control mechanism also increases the level of uncertainty that legal advisers and their clients face when attempting to predict whether communications are likely to be privileged, in requiring them to predict which persons or units within a corporation the court will regard as the client for the purposes of legal advice privilege. If legal advisers and their clients are unable to predict with reasonable certainty whether communications will be privileged in advance of them being made, the rationale of the privilege will be undermined, and the privilege will be of little practical value.[39]

Higgins (2014: 3.15) suggests that prior to *Three Rivers (No 5)*, it must have been assumed, for the purposes of legal advice privilege, both that the client was the entity that obtained and paid for legal advice and that this encompassed the entity's employees. Post *Three Rivers (No 5)*, it is clearly not the case that, for the purposes of the privilege, all employees are part of the client. Instead, attention will be paid to who within the corporation has authority to seek and receive legal advice from the corporation's lawyers.[40] It is communications between these individuals and the company's lawyers that may be protected by legal advice privilege rather than communications between the company's lawyers and its employees more generally.

Shortly after *Three Rivers (No. 5)* was decided, the Singapore Court of Appeal in *Skandinaviska Enskilda Banken* v *Asia Pacific Breweries*[41] *(Enskilda)* adopted a generous interpretation of *Three Rivers (No. 5)*. The court's view was that the principle from *Three Rivers (No. 5)*, which it did not regard as exceptional, was that legal advice privilege does not apply where a corporate employee was not authorised to communicate with the corporation's legal advisers to obtain legal advice.[42] It held that express authority is not required, and that authority may be implied 'if that function is related to or arises out of the relevant employee's work'.[43] It regarded the narrow definition of the client as applied on the facts of *Three Rivers (No 5)* as simply being a result of the court in that case determining

39 See *Upjohn Co* v *United States* 449 U.S. 383 (1981), *per* Rehnquist J at 393.

40. *Three Rivers District Council & Ors* v *The Governor & Company of the Bank of England,* above n. 6 at para. 31.

41. *Skandinaviska Enskilda Banken* v *Asia Pacific Breweries* [2007] 2 SLR 367.

42. *Skandinaviska Enskilda Banken* v *Asia Pacific Breweries,* above n. 41 at para. 41.

43. *Skandinaviska Enskilda Banken* v *Asia Pacific Breweries,* above n. 41 at para. 41.

that only the Bingham Inquiry Unit had been authorised by the Bank of England to communicate with the lawyers.[44]

The generous interpretation of *Three Rivers (No. 5)* from *Enskilda*, which focuses on express or implied authority to communicate with the legal advisers, has not been adopted by the English Courts. In *The RBS Rights Issue Litigation*[45] (*RBS*), Hilyard J[46] held that authorisation to communicate with corporate legal advisers does not render a corporate employee the client for the purposes of the privilege. Not being required to determine the issue, he speculated, applying attribution theory,[47] that only employees who form part of a company's 'directing mind and will' can qualify as the client for these purposes.[48]

Had this attribution theory-based interpretation of *Three Rivers (No. 5)* been adopted by the Court of Appeal in *Jet2*, it would have resulted in an extremely restrictive control mechanism. This very narrow interpretation was not adopted by the Court of Appeal in *Jet2* but the court, with reference to RBS, did accept that mere authorisation to communicate with corporate legal advisers does not equate an employee with the client for the purposes of legal advice privilege.[49] Having held that this was the correct interpretation of *Three Rivers (No. 5)* by which it was bound, the *Court of Appeal* in *Jet2* was nevertheless prepared to infer on the facts of the case before it that corporate employees satisfied the *Three Rivers (No. 5)* test simply because they were 'relatively senior executives' and there was no evidence to support the suggestion that they were not authorised to seek legal advice.[50] The result is a control mechanism that makes it difficult to predict with an appropriate degree of certainty whether the courts will regard legal advice privilege as attaching to a communication.

As regards uncertainty, the issue is one of predicting which corporate employees the courts will classify as constituting the client upon the facts of a given case. There are two aspects to this. First, the Court of Appeal in *Three Rivers (No. 5)* did not lay down a coherent test to enable the identification of such employees. As Loughrey (2005: 190) put it, the court 'gave very little guidance on the test for distinguishing non-client employees from client employees'.

Secondly, whilst the Court of Appeal in *Jet2* has adopted a relatively narrow interpretation of *Three Rivers (No. 5)*, its willingness to readily infer that the test has been satisfied results in uncertainty as regards the application of the test Even a patently coherent test is of little value if it is applied inconsistently by the courts.[51]

The position produced by *Three Rivers (No. 5)* may be equated with that created in the United States by the control group test, which the US Supreme Court rejected in in *Upjohn Co* v *United States* (*Upjohn).*[52] The control group test equates the corporate client with corporate employees who are 'in

44. *Skandinaviska Enskilda Banken* v *Asia Pacific Breweries,* above n. 41 at para. 42.
45. *The RBS Rights Issue Litigation* [2017] 1 WLR 1991 at para. 64.
46. Relying on comments made by Aikens J in *Winterthur Swiss Insurance Company* v *AG (Manchester) Limited (In Liquidation)* [2006] EWHC 839 at para. 69, fn. 32.
47. Relying on comments made by Aikens J in *Winterthur Swiss Insurance Company* v *AG (Manchester) Limited (In Liquidation)* [2006] EWHC 839 at para. 69, fn. 32.
48. *The RBS Rights Issue Litigation*, above n. 45 at paras 94 and 96.
49. *The Civil Aviation Authority* v *R (on the application of Jet2.com Limited) and the Law Society,* above n. 1 at para. 58.
50. *The Civil Aviation Authority* v *R (on the application of Jet2.com Limited) and the Law Society*, above n. 1 at para. 59. Examples of pre-*RBS* cases in which the courts were quick to infer that persons within a corporate or organizational structure satisfied the criteria necessary to represent the client for the purposes of legal advice privilege are provided by *Menon and others* v *Herefordshire Council* [2015] EWHC 2165 (QB) and *AB* v *Ministry of Justice* [2014] EWHC 1847 (QB). An example of a post *RBS* but pre-*Jet2* case in which an assertion of privilege was unsuccessful where witness statements asserting privilege had, amongst other failings, failed to identify those employees who were authorised to request and receive legal advice is provided by *Glaxo Wellcome UK Ltd (trading as Allen & Hanburys) and another company* v *Sandoz Ltd and other companies* [2018] EWHC 2747 (Ch) *per* Chief Master March at paras 27–28).
51. See *Upjohn Co* v *United States,* above n. 39 *per* Rehnquist J at 393.
52. *Upjohn Co* v *United States,* above n. 39.

a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney'.[53] It was criticised by the US Supreme Court both for creating uncertainty and for lacking synergy with the rationale for privilege. Uncertainty is created by the control group test because it is difficult to predict which corporate employees the courts will regard as falling within the control group.[54] The same is true of the agency-based control mechanism imposed by the Court of Appeal in *Three Rivers (No. 5)*.

Recognition of the uncertainty that may be caused when members of the judiciary who are required to determine whether communications are privileged regard a control mechanism as too restrictive is provided by the decision of the High Court of Australia in *Esso*.[55] The court, rejecting the sole purpose test[56] in favour of the dominant purpose test, believed that the former test, if applied literally, was extremely narrow, and that if the courts (attempting to ameliorate the consequences of its narrowness) did not apply it literally, it lacked clarity.[57] Fact-specific generosity on the part of the judiciary in inferring that particular corporate employees amount to the client for the purposes of the agency-based control mechanism imposed by the Court of Appeal in *Three Rivers (No. 5)* is likely to cause similar problems.

The agency-based control mechanism from *Three Rivers (No. 5)* limits the category of those corporate employees that the dominant purpose test may bring within the ambit of the privilege to those in the company tasked with seeking and receiving legal advice. Even if the court (as in *Jet2*) is prepared to infer on the facts of the case before it that 'relatively senior executives' have been authorised to instruct the corporation's legal advisers, such a generous approach still imposes significant fetters upon the operation of the dominant purpose test in the corporate context by preventing it from operating across the corporation's employee base as a whole.

As was seen above, Higgins (2019:166) asserts that the agency-based control mechanism from *Three Rivers (No 5)*, 'strikes a fair balance' between the ability of corporations to obtain legal advice in confidence and disclosure of information for the purposes of legal proceedings or investigations. To accept that this is so would, however, require acceptance that the rationale of the privilege does not outweigh the public policy considerations favouring disclosure where corporate clients, particularly large corporations, are concerned. In failing to encompass the range of internal corporate communications that need to take place to obtain information essential to the obtaining of effective legal advice, legal advice privilege as limited by this narrow agency-based control mechanism does not deliver the rationale of the privilege in the corporate context. Indeed, the friction between the restrictive nature of this control mechanism and the temptation faced by judges to apply it generously on the facts of specific cases, with the danger that inconsistent judicial practice will result in uncertainty, is a consequence of a disconnect between the limited ambit of the privilege in the corporate context and the desire to implement the privilege's rationale.

In *Citic Pacific Ltd* v *Secretary for Justice (No 2)*[58] (*Citic*), the Hong Kong Court of Appeal believed that the privilege would be 'meaningless' in the corporate context if internal information the company needed to acquire to obtain legal advice was not privileged and that adopting a restrictive view of the nature of the client would probably prevent a narrowly defined client group from requesting information from other employees who were better informed about the relevant matters.[59] It suggested that the

53. *Philadelphia* v *Westinghouse Electric Corp*, 210 F Supp 483 (1962), *per* Kirkpatrick J at 485, and see *Upjohn Co* v *United States,* above n. 39 at 390.
54. *Upjohn Co* v *United States,* above n. 39 at 393.
55. *Esso Australia Resources Ltd* v *Commissioner of Taxation,* above n. 37.
56. Under which, if it applied for example to legal advice privilege in English Law, the privilege would only attach to communications made for the sole purpose of giving or obtaining legal advice.
57. *Esso Australia Resources Ltd* v *Commissioner of Taxation,* above n. 37 Gleeson CJ, Gaudron and Gummow JJ, at para. 58.
58. *Citic Pacific Ltd* v *Secretary for Justice (No 2)* [2015] 4 HKLRD 20.
59. *Citic Pacific Ltd* v *Secretary for Justice (No 2),* above n. 58 at para. 55.

approach adopted by the English Court of Appeal in *Three Rivers (No. 5)* 'would tend to frustrate the policy of LPP'.[60] In this regard it equated the latter approach with the control group test from the US,[61] a test which, according to Weiss (1981–1982: 1195), also 'ignores modern corporate realities'. The US Supreme Court in *Upjohn*[62] observed that the nature of a corporation means that information needed by the lawyer to give accurate and informed advice to the corporation will often be held by middle or lower-level employees outside the control group.[63] It recognised that the control group test frustrates the privilege's purpose by discouraging corporate employees from communicating with corporate legal advisers.[64]

The recognition by the Court of Appeal in *Jet2* that legal advice privilege in English Law is subject to a dominant purpose test has not resolved the problems that *Three Rivers (No. 5)* created for corporations and their legal advisers. This is so because the court in *Jet2* also recognised that, in the corporate context, the operation of that test is subject to the constraints imposed by the agency-based control mechanism from *Three Rivers (No. 5)*. In the next section we consider whether freeing the dominant purpose test from those constraints would provide the solution to those problems.

The dominant purpose test unfettered: Can this control mechanism provide reasonable certainty and a broadly equal level of protection to all client types?

The *Court of Appeal in Three Rivers (No. 5)* failed to take the opportunity, provided by Tomlinson J's first instance judgment, to make the dominant purpose test, unfettered by agency-based constraints, the key control mechanism that limits the operation of legal advice privilege in the corporate context. If this opportunity had been taken, *Three Rivers (No. 5)* might well have become a leading and well regarded domestic and international common law authority concerning the operation of legal advice privilege in the corporate context.

A dominant purpose test that is applicable across the corporate employee base has the potential to give companies a level of protection that more closely equates with that accorded to other client types than does the current *Three Rivers (No. 5)* regime. The application of the dominant purpose test subject to the constraint envisaged by Tomlinson J would not, however, have provided an equal level of protection to all client types. As was seen above, Tomlinson regarded the test as encompassing both current and former employees who had acquired relevant confidential knowledge in the course of their employment but not third parties with relevant confidential knowledge. Applied in this way, the test would work more favourably for larger corporations with extensive in-house resources and less favourably for smaller entities outsourcing a greater range of functions. Such application would, however, be in line with the long-established position in English Law that where the role of a third-party agent goes beyond that of merely communicating confidential material between legal adviser and client and requires the third party to create material, legal advice privilege does not attach to the material produced by the third party.[65]

60. *Citic Pacific Ltd* v *Secretary for Justice (No 2),* above n. 58 at para. 63.
61. *Citic Pacific Ltd* v *Secretary for Justice (No 2),* above n. 58 at paras 55–56.
62. With reference to the decision of the US Court of Appeals for the Eighth Circuit in *Diversified Industries, Inc.* v *Meredith* 572 F.2d 596 (1978).
63. *Upjohn Co* v *United States,* above n. 39 at 391.
64. *Upjohn Co* v *United States,* above n. 39 at 392.
65. In relation to privilege attaching where the third party has the former role, see *Wheeler* v *Le Marchant* (1881) 17 Ch D 675 per Jessel MR at 682 and Cotton LJ at 684 and see, also, Oliver LJ in *In Re Highgrade Traders Ltd* [1984] BCLC 151 at 164. For the position where the role of the agent goes beyond this, see *Price Waterhouse (a firm)* v *BCCI Holdings (Luxembourg) SA and others* [1992] BCLC 583.

In *Citic*, The Hong Kong Court of Appeal preferred the approach that Tomlinson J had adopted at first instance in *Three Rivers (No. 5)*[66] to the approach adopted by the Court of Appeal in that case because the dominant purpose test was consistent with the 'fundamental nature' of the privilege. It was not required to consider the position of third parties and left that issue to be considered on a future occasion.[67] The authors of Thanki (2018: 2.147, 2.30) assert that English Law should follow Tomlinson J's approach, including the application of that approach to former corporate employees. In addition, they would regard the extension of the privilege to encompass communications with third parties for the purpose of the client obtaining legal advice as sensible in principle (Thanki, 2018: 2.82). If the privilege's rationale is to be implemented as consistently as possible across the spectrum of client types, the operation of the dominant purpose test should be capable of bringing within the ambit of the privilege communications with current employees, with former employees and with a range of third parties such that client types who need to utilise third parties to perform certain functions are treated equally with client types who have internal human resources which enable them to allocate such functions in house. The extension of the dominant purpose in this way is exemplified by the position at common law in Australia.

The decision of the Full Federal Court in *Pratt Holdings PTY Ltd* v *Commissioner of Taxation*[68] (*Pratt*) confirmed that documents prepared by third parties for the dominant purpose of a corporation obtaining legal advice may be privileged, whether the third party was instructed to send the document directly to the corporations legal advisers or was instructed to send the document to the corporation for communication by the corporation to its lawyers for the dominant purpose of the corporation receiving legal advice. Finn J believed that entities lacking the 'aptitude, knowledge, skill and expertise, or resources' to make an adequate communication to a legal adviser without recourse to a third party should not be disadvantaged by having to choose either to forego third party assistance or to forego privilege in communications with the third party.[69] Withholding privilege in such circumstances would undermine the privilege by creating an incentive not to communicate with third parties in circumstances in which it was necessary to obtain information from them to obtain effective legal advice. Stone J did not believe that permitting the parameters of legal advice privilege to encompass direct communications from third party to client would result in 'uncontrollable extension of the privilege', though he recognised that the application of the dominant purpose test could be difficult and that the court would have to consider both the function that the third party's advice served and whether the advice was needed to instruct the experts.[70]

The approach adopted in *Pratt* facilitates the attainment of a more consistent level of protection from legal advice privilege across all client types by recognising that some clients will need to outsource functions that others can have performed by internal corporate employees. The danger of this approach is that it also may have the potential to go beyond proportionate implementation of the privilege's rationale and result in a disproportionate level of interference with the public policy considerations that favour disclosure. Consequently, in a subsequent section of this article, it is considered whether expansion of legal advice privilege to encompass third party communications should be restricted by the operation of a test similar to the functional equivalent test that is applied in some US jurisdictions.

Putting the issue of extension of the privilege to encompass third parties to one side for the present, if the dominant purpose test in English Law is freed from the shackles imposed by *Three Rivers (No. 5)* but is not extended to encompass third parties, Loughrey (2005: 202) would still argue that this would result in a privilege the ambit of which was so wide that it would be disproportionate to its rationale. At first

66. This decision is referred to by the Hong Kong Court of Appeal in *Citic* as *Three Rivers (No. 3).*
67. *Citic Pacific Ltd* v *Secretary for Justice (No 2),* above n. 58 at para. 28.
68. *Pratt Holdings PTY Ltd* v *Commissioner of Taxation* (2004) 207 ALR 217.
69. *Pratt Holdings PTY Ltd* v *Commissioner of Taxation*, above n. 68 at para. 42.
70. *Pratt Holdings PTY Ltd* v *Commissioner of Taxation,* above n. 68 at para. 106.

instance in *Three Rivers (No. 5)*, however, Tomlinson J suggested that the dominant purpose test was difficult to satisfy if applied rigorously and did not believe that his decision would permit legal advice privilege to be asserted in a wide range of situations in which it had not previously been available.[71] If the dominant purpose test is not applied with an appropriate degree of rigour, the control mechanism may be too weak and the ambit of the privilege could result in a level of interference with the public policy that favours disclosure that is disproportionate to that which is required to deliver the privilege's rationale. If it is applied with enhanced levels of scepticism and scrutiny in certain contexts, such as that of internal corporate investigations, Eastwood and Smyth (2018: 3) argue that this, alongside the agency-based control mechanism from *Three Rivers (No. 5)* and pressure from regulators to disclose privileged material to them, will discourage corporate employees and corporate legal advisers from engaging in internal conversations that are necessary if corporations are to obtain effective legal advice. If the rigour of its application is variable, this may result in a lack of consistency and thus uncertainty, again reducing the value of the privilege.

The dominant purpose test may at times be difficult to apply in practice, but Liu and Wong (2016: 72–73) assert that this is a price worth paying given that the sole purpose test would set the ambit of the privilege too narrowly and a substantial purpose test would be too generous. In *Esso*, the High Court of Australia, in the course of endorsing the dominant purpose test at the expense of the sole purpose test, made explicit that it was attempting to balance the public policy considerations underlying the privilege's rationale against those favouring disclosure of information and that it sought a test that would produce 'reasonable certainty' and would avoid 'undue delay and expense'.[72] A dominant purpose test operating in conjunction with an agency-based control mechanism (which is the current position in English Law post *Jet2*) introduces an additional and unnecessary moving part, increasing both complexity and the opportunity for inconsistency and uncertainty.

Higgins (2010: 395) has asserted that determining what the dominant purpose of a communication is will often require the court to examine the relevant communication. In answer to this assertion, it should be pointed out that the courts have been required to apply the dominant purpose test for over forty years in the context of litigation privilege,[73] and the general approach is that whilst they possess discretion to inspect documents to determine a privilege claim they should exercise caution before so doing.[74] In any event, post *Jet2* the dominant purpose test is now an established control mechanism in relation to legal advice privilege. Thus, whilst freeing the dominant purpose test from the constraints imposed by *Three Rivers (No. 5)* may result in an increased volume of privilege claims, there is nothing to suggest that the proportion of claims that require the court to examine the documents as opposed to the proportion that can be determined without the court being required to do so will increase. And the additional uncertainty (beyond any uncertainty resulting from the fact-sensitive application of the dominant purpose test itself) created by the necessity of determining whether specific employees amount to the client for the purposes of the agency-based control mechanism will be removed.

The subject matter test: Does it provide a superior alternative to the dominant purpose text in the corporate context?

Long before the decision of the Court of Appeal in *Three Rivers (No. 5),* the US Supreme court in *Upjohn* considered the parameters of legal advice privilege in the corporate context. In *Three Rivers (No 6)* Lord

71. *Three Rivers (No. 5)*, above n. 5 at para. 34.
72. *Esso Australia Resources Ltd* v *Commissioner of Taxation,* above n. 37 Gleeson CJ, Gaudron and Gummow JJ, at para. 57.
73. That the dominant purpose test applies in the context of litigation privilege was confirmed by the House of Lords in *Waugh* v *British Railways Board* [1980] AC 521.
74. *WH Holding ltd* v *E20 Stadium LLP* [2018] EWCA Civ 2652 at para. 40. Para. 14.3 of the Disclosure Pilot for the Business and Property Courts (CPD51U) empowers the court to inspect allegedly privileged documents where inspection is 'necessary' to determine whether they are privileged, which mean that the courts should be even more cautious before inspecting where para. 14.3 applies (see Vos C in *UTB LLC* v *Sheffield United Ltd* [2019] EWHC 914 (Ch, at para. 72).

Scott described *Upjohn* as 'valuable authority in a common law jurisdiction' but also regarded it as 'debatable' whether the principles from *Upjohn* should be applied in England and Wales.[75] Does it provide a viable alternative to the dominant purpose test that the English courts could adopt in replacement of the regime created by *Three Rivers (No. 5)*?

The communications that *Upjohn* concerned were responses by corporate employees to questionnaires sent to them by the corporations' legal advisers. In deciding that they were privileged, the Supreme Court found that: the employees had made them as directed by their superiors so that the corporation could obtain legal advice, information not available from senior managers was required so that legal advice could be obtained, the matters dealt with by the communications fell within the ambit of the employees' duties, and the employees were aware that the purpose of the questions was to enable the legal advice to be obtained.[76]

As was seen above, the Supreme Court in *Upjohn* rejected the control group test, but it declined to 'draft a set of rules' of its own.[77] It declined to do so in compliance with Federal Rule of Evidence 501 which required the courts to determine privilege challenges on a 'case-by-case basis', even though it recognised that this might produce a slight degree of uncertainty as regards the privilege's ambit.[78] Thus, the Supreme Court did not dictate the adoption of a specific control mechanism that could be relocated to the context of English law. The absence of a standardised approach post *Upjohn* appears to have resulted in uncertainty, Weiss (1981–1982: 1183–1184) suggesting that '*Upjohn* and its progeny have left corporate counsel unable to determine whether communications made to them will be afforded protection from disclosure.'

The result of the uncertainty that still exists post-*Upjohn* is that different US jurisdictions apply different tests when determining whether the attorney-client privilege attaches to communications made in the corporate context, with a few still applying the control group test and the majority applying versions of what is known as the 'subject matter test' (Richmond, 2021: 41). The Supreme Court in *Upjohn* did not expressly validate the subject matter test but, as Saunders (1999: 883) puts it, 'implicitly allowed [it] to stand as an alternative standard in federal courts for deciding when the attorney-client privilege applies in the corporate context'. More specifically, the version of the subject matter test that the Supreme Court implicitly adopted is the test that is sometimes referred to as the 'modified subject matter test' (Riegler, 1981: 1175–1177).

The subject matter test had been developed prior to *Upjohn*, by the seventh circuit in *Harper & Row Publishers Inc.* v *Decker.*[79] The modified subject matter test (which it described as 'the modified *Harper & Row* test') was adopted, again prior to *Upjohn*, by the US Court of Appeals for the Eighth Circuit in *Diversified Industries, Inc.* v *Meredith*[80] *(Diversified)*. In *Diversified,* the court concluded that attorney-client privilege covered communications from employees if:

> (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.[81]

75. *Three Rivers District Council and others* v *Governor and Company of the Bank of England (No 6),* above n. 1 *per* Lord Scott of Foscote at para. 47.
76. *Upjohn Co* v *United States,* above n. 39 at 394.
77. *Upjohn Co* v *United States,* above n. 39 at 396–397.
78. *Upjohn Co* v *United States,* above n. 39 at 396–397. Under Federal Rule of Evidence 501, claims of privilege were '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'.
79. 423 F2d 487, 491–492 (7th Cir. 1977).
80. *Diversified Industries, Inc.* v *Meredith* 572 F.2d 596 (1978), 610.
81. *Diversified Industries, Inc.* v *Meredith,* above n. 80 at 609.

The modified subject matter test is clearly more aligned to the realities of corporate activity than either the control group test or the test adopted by the Court of Appeal in *Three Rivers (No. 5)* as it can encompass a wider range of corporate employees than either of the others. Loughrey (2005: 197) suggested that it is similar to the dominant purpose test in that both focus 'on the nature of the communication, rather than the identity of the communicator'. Weiss (1981–1982:1198) asserts, however, that the modified subject matter test imposes unnecessary restraints upon disclosure within corporations, such as the need to identify a corporate superior and to identify duties relating to the employee's corporate role. In contrast, the dominant purpose test provides a much simpler control mechanism to determining whether legal advice privilege attaches to communications from corporate employees than the modified subject matter test. The dominant purpose test reduces uncertainty by neither requiring the court to determine whether a direction was given by someone who qualifies as a corporate superior nor to conduct an analysis of the junior employee's duties. Consequently, whilst preferable to the current regime created by *Three Rivers (No. 5)*, importing the more complex subject matter test into English Law would not be the optimum solution to the problems created by that decision.

In *Upjohn*, the Supreme Court declined to consider whether the attorney-client privilege attached to communications with former employees,[82] though Chief Justice Burger did encompass both employees and former employees in his concurring opinion.[83] Different US jurisdictions have adopted different approaches (Henley, 2016: 247). The Fourth and Ninth Circuits both held that the rationale from *Upjohn* is equally applicable to current and former employees.[84] This is the most generous US approach to former employees but it still brings with it the more complex requirements of the modified subject matter test The simpler approach of Tomlinson J who, as was seen above, envisaged that the dominant purpose test would encompass communications with former employees who had acquired relevant knowledge in the course of their employment is to be preferred.

Should extension of legal advice privilege to encompass communications with third parties be limited by the operation of the functional equivalent test?

It was suggested above that for legal advice privilege to provide a largely consistent level of protection to all client types it is necessary for the dominant purpose test to encompass communications with third parties as well as with current and former employees. It was also suggested, however, that extending the dominant purpose test to encompass communications with third parties in general could result in a disproportionate interference with the public policy considerations that favour disclosure. In this section, the possibility of limiting such extension by utilising a variant of the functional equivalent test, applied in some US jurisdictions is evaluated.

As regards the functional equivalent test, the US Court of Appeals for Eighth Circuit *In Re Bieter Co*[85] (*Bieter*) made clear that the modified subject matter test does not merely apply to corporations but can also apply to partnerships and other public and private entities, but not to individuals.[86] Proposed

82. *Upjohn Co* v *United States,* above n. 39 at 394 fn 3.
83. *Upjohn Co* v *United States,* above n. 39 at 402–403.
84. See *In re Allen*, 106 F3d 582 (4th Cir 1997), 606 and *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig*., 658 F2d 1355 (9th Cir 1981), 1361, n 7, and see, also, Heath Henley 'The Attorney-Client Privilege and Former Employees: History, Principle, and Precedent' (2016) 3 Belmont Law Review 229, 250.
85. *In Re Bieter Co* 16 F 3d 929 at 935 (8th Cir 1994).
86. In Re *Bieter Co,* above n. 85 at 935.

Federal Rule of Evidence 503(b),[87] which was promulgated by the US Supreme Court but was never enacted by Congress, is commonly referred to as Supreme Court Standard 503(b) and is relied on as a 'a comprehensive guide to the federal common law of attorney-client privilege'.[88] With reference to this proposed rule, the court in *Bieter* considered 'whether an independent consultant can be a representative of the client for purposes of applying the attorney-client privilege'.[89] It extended the modified subject matter test developed in *Diversified* to encompass independent contractors using a functional equivalent test, the question being whether the independent contractor is the 'functional equivalent' of an employee of the client corporation or partnership. Citing observations made by Sexton (1982: 498), it believed that distinguishing corporate employees from independent contractors was inconsistent both with *Upjohn* and with *Diversified*.[90] Upon the facts of *Bieter*, the court's view was that the independent contractor's involvement in the relevant subject meant that he was 'precisely the sort of person with whom a lawyer would wish to confer confidentially in order to understand [the client's] reasons for seeking representation.'[91]

The functional equivalent test has been adopted in a number of US jurisdictions.[92] A version of the test which, Robbins (2018: 19) suggests, provides the courts with 'a broader, more flexible tool' than that adopted in *Bieter,* is that applied by the *Colorado Supreme Court in Alliance Construction Solutions Inc* v *Dep't of Corrections*.[93] Under this version of the test the independent contractor must have a significant relationship both with the client and with the relevant transaction, the communication must have been made to seek or provide legal advice, its subject matter must fall within the scope of the independent contractor's duties to the client, it must be confidential and it must only be disseminated amongst those who specifically need to have knowledge of its contents.[94] It differs from the version in *Bieter* in that it does not require that the third party was directed to make the communication by a superior who had so directed in order that the client could obtain legal advice.

It was suggested above that the adoption of the modified subject matter test in English Law would import unnecessary complexity and increased uncertainty. The possibility considered here is the adoption in English Law of a flexible functional equivalent test, shorn of the requirements of the modified subject

87. Which provides as follows. 'A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and his lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client' (see *In Re Bieter,* above n. 85 at 936). The court in *In Re Bieter*, above n. 85 at 935, indicated that the version put before congress had not defined 'representative of the client', a definition proposed in 1969 had been adopted in a number of States but that this definition had been a product of the control group test which the 8th Circuit had rejected in *Diversified* and the US Supreme Court had rejected in *Upjohn*, the Advisory Committee on the Federal Rules of Evidence having 'dropped its proposed definition of "representative of the client," leaving the issue to be decided on a case-by-case basis'.
88. See *US* v *(Under Seal)* 748 F2d 871, 874 n. 5 (4th Cir 1984).
89. *In Re Bieter*, above n. 85 at 936.
90. *In Re Bieter*, above n. 85 at 937.
91. *In Re Bieter*, above n. 85 at 938.
92. For example, in *Dialysis Clinic, Inc* v *Medley*, 567 SW 3d 314, 324 (Tenn 2019), the Supreme Court of Tennessee, having considered jurisprudence from various US jurisdictions post-Bieter, listed the following 'non-exclusive factors' to be considered when determining whether the functional equivalent test is satisfied:

    '…whether the nonemployee performs a specific role on behalf of the entity; whether the nonemployee acts as a representative of the entity in interactions with other people or other entities; whether, as a result of performing its role, the nonemployee possesses information no one else has; whether the nonemployee is authorized by the entity to communicate with its attorneys on matters within the nonemployee's scope of work to facilitate the attorney's representation of the entity; and whether the nonemployee's communications with the entity's attorneys are treated as confidential'.
93. *Colorado Supreme Court in Alliance Construction Solutions Inc* v *Dep't of Corrections* 54 P.3d 861, 869 (Colo. 2002), 869–870.
94. *Colorado Supreme Court in Alliance Construction Solutions Inc* v *Dep't of Corrections,* above n. 93.

matter test and instead operating in conjunction with the dominant purpose test. This test could apply to independent contractors retained by corporations, partnerships or individuals, rather than excluding third parties retained by individuals, as is the case in the US. Under this approach, legal advice privilege would attach to third parties retained by the client whose relationship with the client and with the subject matter of the legal advice was sufficiently significant to make them the functional equivalent of an employee of the client provided that the communications were made for the sole or dominant purpose of giving or obtaining legal advice. An example of facts that this test would readily encompass is provided by a decision of the New York Supreme Court that a consultant acting as a corporation's director of risk management who had formerly been employed by the corporation as its director of risk management was the functional equivalent of an employee.[95]

The advantage of adopting this variant of the functional equivalent test in English Law is that it would limit the extent of the expansion of legal advice privilege to encompass communications with third parties and thus reduce the degree of conflict with the public policy considerations supporting disclosure. Such adoption would, however, have two disadvantages. First, it would result in increased complexity and thus uncertainty in requiring the courts to determine whether a third party was the functional equivalent of an employee. Secondly, and fundamentally, in restricting the nature of those third parties who could fall within the reach of the dominant purpose test, it would limit the extent to which the operation of the dominant purpose test could deliver the rationale of legal advice privilege to clients who needed to outsource functions and, thus, reduce the consistency of such delivery across the spectrum of client types. Consequently, the adoption of a functional equivalent test in English Law is not recommended.

Conclusion

The decision of the Court of Appeal in *Three Rivers (No. 5)* was criticised by that court in *Eurasian* and in *Jet2* but it will take a decision of the UK Supreme Court to overrule it. The Court of Appeal in *Jet2* recognised that legal advice privilege is subject to a dominant purpose test, but the operation of that test in the corporate context is fettered by the narrow agency-based control mechanism from *Three Rivers (No. 5)*. The result is a failure to deliver the rationale of the privilege in the corporate context. In contrast, at common law in Australia (under *Esso* and *Pratt*) and in Hong Kong (under *Citic*) the dominant purpose test is not so fettered and, implementing the rationale of the privilege, operates as the control mechanism that limits the ambit of the privilege in the corporate context. This equates with the approach of Tomlinson J at first instance in *Three Rivers (No. 5)*, who favoured the application of the dominant purpose test to employees and former employees. It is an approach that should deliver an acceptable level of certainty, and one that has fewer moving parts than the subject matter tests that governs the position in a number of US jurisdictions, particularly post *Upjohn*.

A valid criticism of removing the agency-based fetters of *Three Rivers (No. 5)* from the dominant purpose test in the corporate context is that legal advice privilege would then provide large corporations with a higher level of protection than is provided to other client types. Implementing the rationale of the privilege in such a way as to provide all client types with a level of protection that is largely consistent would additionally require the extension of the privilege to encompass third parties, as is the case in *Australia* under *Pratt*. The danger that this might catalyse expansion of the privilege to a degree that exceeds the privilege's rationale and interferes with the interests of justice in disclosure of relevant material to a disproportionate extent could be counterbalanced by a robust application of the dominant purpose test.

95. *Frank* v *Morgans Hotel Group Management LLC*, 116 NYS3d 889 (NY Sup Ct 2020).

The consequence of these suggestions, if implemented by the Supreme Court, would be that legal advice privilege would be capable of encompassing the following categories of communication between legal adviser, client, employees, former employees and third parties.

- Communications in confidence between the legal adviser and the client or between the legal adviser and an employee of the client provided that the communications were made for the sole or dominant purpose of giving or obtaining legal advice.
- Communications in confidence between the client and an employee of the client or between employees of the client provided that the communications were made for the sole or dominant purpose of giving or obtaining legal advice.
- Communications in confidence between the legal adviser or the client or an employee of the client and a former employee of the client concerning knowledge relevant to the subject matter of the legal advice that the former employee obtained in the course of their employment provided that the communications were made for the sole or dominant purpose of giving or obtaining legal advice.
- Communications in confidence between the legal adviser or the client or an employee of the client and a third party provided that the communications were made for the sole or dominant purpose of giving or obtaining legal advice.

Where the role of an employee or third party is merely to act as a confidential conduit for communication of information falling within any or the above categories, the involvement of such an employee or third party for this purpose should not prevent legal advice privilege from attaching to the communication. The categories of communication identified above should be capable of encompassing the confidential dissemination of legal advice obtained both to employees and to those who are the functional equivalent of employees. These two propositions are both in line with established principles which were referred to above.[96]

If the Supreme Court, given an appropriate opportunity, was to adopt the suggestions made in this article, this would require it to focus on the rationale of the privilege, the realities of modern business structures and international development of the common law in this area rather than on the 19th-century case law analysis of which resulted in the decision of the Court of Appeal in *Three Rivers (No. 5)* and which the Court of Appeal in *Eurasian* and *Jet2* did not believe should determine the ambit of the privilege.

The recommendations made in this article would result in a privilege that provided different client types with a largely equivalent level of protection, recognised the realities of corporate governance, would share a greater level of consistency with other common law jurisdictions than the current English Law regime, would provide an appropriate level of certainty and would strike an appropriate balance between the privilege's rationale and the public interest in favour of disclosure. Of course, the Supreme Court might choose to question the rationale of the privilege itself or the need for that rationale to apply equally to all client types. In that case, the key assumptions upon which this article is based would break down. But this possibility goes beyond the ambit of the current article, which has been written upon the basis of the assumptions that the rationale for legal advice privilege is entrenched as a fundamental right in common law jurisdictions for the foreseeable future and should provide an equivalent level of protection to all client types.

96. See above, n. 14.

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship and/or publication of this article.

ORCID iD


Michael Stockdale https://orcid.org/0000-0002-3809-8504

References

Cronin MM (2008) Slow and steady wins the race: lessons learned, and why it is time to establish a corporate legal advice privilege. *Penn State International Law Review* 26: 913–934.

Eastwood A and Smyth M (2018) Internal investigations and privilege: A response to recent challenges. *Australian Journal of Corporate Law* 33: 3.

Henley H (2016) The attorney-client privilege and former employees: history, principle, and precedent. *Belmont Law Review* 3: 229–257.

Higgins A (2010) Legal advice privilege and its relevance to corporations. *The Modern Law Review* 73: 371–398.

Higgins A (2019) Too much and too little secrecy in the law of corporate privilege: serious fraud office v Eurasian National Resource Corp [2018] EWCA Civ 2006 and WH Holding Ltd v E20 Stadium LLP [2018] EWCA Civ 2652. *Civil Justice Quarterly* 38(2): 145–167.

Higgins A (2014) *Legal Professional Privilege For Corporations. A Guide to Four Major Common Law Jurisdictions*. Oxford: Oxford University Press. Chapter 3.

Ho HL (2006) Legal professional privilege and the integrity of legal representation. *Legal Ethics* 9: 163–186.

Imwinkelried EJ (2004) Questioning the behavioral assumption underlying Wigmorean absolutism in the Law of evidentiary privileges. *University of Pittsburgh Law Review* 65: 145–182.

Imwinkelried EJ (2003) The New Wigmore: An essay on rethinking the foundation of evidentiary privileges. *Boston University Law Review* 83: 315–344.

Liu HT and Wong H (2016) The scope of legal advice privilege in Hong Kong: Citic Pacific Limited v Secretary for Justice and Commissioner of Police [2015] HKEC1263. *Common Law World Review* 45: 68–75.

Ljubanovic O (2019) Absolute privilege: A legal fiction. *Ohio Northern University Law Review* 45: 153–182.

Loughrey J (2005) Legal advice privilege and the corporate client. *The International Journal of Evidence and Proof* 9: 183–203.

Passmore C (2019) *Privilege*. 4th ed. London: Sweet and Maxwell, [4-016].

Richmond DR (2021) The attorney-client privilege and former employees. *Catholic University Law Review* 70: 39–64.

Riegler K (1981) Attorney client privilege in the corporate context: Upjohn Company v. United States. *Detroit College of Law Review* 4: 1163–1180.

Robbins BJ (2018) Defining attorney-client privilege for the independent contractor: A case for the functional equivalent doctrine in Washington. *Washington Law Review Online* 93: 1–26.

Saunders CW (1999) Defining 'scope of employment' for corporations. *Mary's Law Journal* 30: 863–930.

Sexton JE (1982) A post-Upjohn consideration of the corporate attorney-client privilege. *New York University Law Review* 57: 443–520.

Tapper C (2005) Privilege, policy and principle. *Law Quarterly Review* 121: 181–185.

Thanki B, Carpenter C, Cutress J et al. (2018) *The Law of Privilege*. 3rd ed. Oxford: Oxford University Press, [2.147] and [2.30].

Weiss JA (1981–1982) Beyond Upjohn: achieving certainty by expanding the scope of the corporate attorney-client privilege. *Fordham Law Review* 50: 1182–1209.