Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and Others and Other Suits
[2006] SGHC 91

Case Number : Suit 763/2004, 774/2004, 775/2004, 781/2004, RA 296/2005, 298/2005, 300/2005, 302/2005

Decision Date : 31 May 2006

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Rebecca Chew and Lynette Koh (Rajah & Tann) for the plaintiff in S 774/2004; Lionel Tay and Paul Ng (Rajah & Tann) for the plaintiff in S 775/2004; Monica Chong, Sannie Sng and Tan Hsiang Yue (Wong Partnership) for the plaintiff in S 763/2004; Siraj Omar and See Hui Hui (Tan Kok Quan Partnership) for the plaintiff in S 781/2004; Hri Kumar, Shivani Retnam, Yarni Loi and Kabir Singh (Drew & Napier LLC) for the first defendant in Suits Nos 774, 775 and 781 of 2004, and the defendant in S 763/2004

Parties : Skandinaviska Enskilda Banken AB (Publ), Singapore Branch — Asia Pacific Breweries (Singapore) Pte Ltd

Civil Procedure – Disclosure of documents – Report commissioned by directors of company after discovery of fraud perpetuated by company's employee – Defrauded banks bringing action against company and seeking order for disclosure of report and drafts thereof – Report product of collaboration between lawyers and accountants – Whether report and drafts thereof protected by legal advice privilege and/or litigation privilege – Sections 128, 131 Evidence Act (Cap 97, 1997 Rev Ed)

31 May 2006

Belinda Ang Saw Ean J:

1 The appeals before me were related to several applications for discovery and production of various categories of documents. Specifically, Asia Pacific Breweries (Singapore) Pte Ltd ("APBS") was ordered by the assistant registrar on 17 October 2005 to, *inter alia,* produce for inspection the report (including all drafts thereof) commissioned or authorised by the Special Committee of directors (hereafter collectively referred to as the "PWC Draft Reports" as no engrossed final report was issued). The PWC Draft Reports were disclosed under Part II of APBS's list of documents filed respectively on 29 April 2005 in each of the four actions commenced by the banks named below. I upheld APBS's claim to privilege in respect of the PWC Draft Reports and allowed APBS's appeals. The banks have now appealed against that part of my decision relating to production for inspection of the PWC Draft Reports.

The banks' actions

2 The banks' actions came about as a result of the fraud perpetrated on each individual bank by Chia Teck Leng ("Chia"), the former finance manager of APBS. Chia is currently serving a long term of imprisonment for cheating the banks of large sums of money totalling approximately US$83m and S$18m.

3 The four actions are as follows:

(a) The plaintiff in Suit No 774 of 2004 is Skandinaviska Enskilda Banken AB (Publ) ("SEB") and its claim is for US$26,559,371.94 or alternatively S$45,347,671.235.

(b) The plaintiff in Suit No 775 of 2004 is Mizuho Corporate Bank Ltd ("Mizuho") and its claim is for US$8,024,045.97.

(c) The plaintiff in Suit No 763 of 2004 is Bayerische Hypo- und Vereinsbank AG ("Hypo") and its claim is for US$32,002,332.85.

(d) The plaintiff in Suit No 781 of 2004 is Sumitomo Mitsui Banking Corporation Singapore Branch ("Sumitomo"). Sumitomo's claim is for S$10,323,207.94.

4 The banks have sued APBS in contract. Hypo also sued in negligence claiming that APBS owed a duty to Hypo to ensure not only that persons employed in senior financial positions were individuals of integrity, honesty and good character, but that it also had in place a system of checks to monitor the activities of its bank accounts. The banks' pleaded case is that Chia's fraud on the banks was committed in the course of Chia's employment and the connection between the wrongdoing and his authorised and legitimate work responsibilities was sufficiently close for the wrongdoing to be within the scope of his employment. Separately, SEB has an alternative claim in restitution against APBS for the sum of S$45,347,671.23 being moneys which had been paid into APBS's account with Oversea-Chinese Banking Corporation Ltd on the instructions of Chia. APBS has denied all liability. It has counterclaimed against SEB in respect of the claim in restitution.

Appointment of PricewaterhouseCoopers and Drew & Napier LLC

5 The events leading to the appointment of PricewaterhouseCoopers ("PWC") and Drew and Napier LLC ("D&N") are gathered from, *inter alia*, the affidavits filed in support and opposition and the written submissions tendered. APBS is a wholly-owned subsidiary of Asia Pacific Breweries Limited ("APBL"). On or about 2 September 2003, officers from the Commercial Affairs Department of the Singapore Police Force ("CAD") informed the senior officers of APBL that Chia had used forged documents to borrow very large sums of money in APBS's name for his gambling debts incurred overseas. Funds from credit facilities obtained fraudulently in APBS's name from the four banks were channelled into the SEB account and then into Chia's bank accounts for his personal use. Chia was arrested on 2 September 2003 and charged two days later.

6 On 3 September 2003, APBS wrote to the banks for verification of the accounts opened in APBS's name of which it had no prior knowledge. At the same time, APBS requested all account opening documents and bank statements in APBS's name. The banks were also asked to immediately suspend operation of the unauthorised accounts until further notice.

7 Hypo wrote to APBS on 3 September 2003. In that letter, which was faxed to APBS the following day, APBS was informed of the term loan of US$30m borrowed in its name and was advised that the first repayment of the principal instalment of US$5m plus interest of US$465,520 was due on 25 September 2003.

8 Sumitomo also wrote to APBS on 4 September 2003 terminating with immediate effect a short term credit facility it had granted on 11 July 2001 to APBS. Sumitomo also demanded immediate repayment of the sum of S$10,022,891.78 by 5 September 2003. This notice was faxed to APBS in the late afternoon of 4 September 2003.

9 On 4 September 2003, APBS learnt that Chia had been charged. On the same day, the board of APBL appointed a Special Committee of directors ("the Special Committee") to oversee the investigations and to take any necessary actions in relation to Chia's fraud in order to protect the interests of APBS and APBL. The Special Committee appointed D&N and PWC as special accountant.

As announced by APBL in MASNET, in the form of MASNET No 7 of 4 September 2003, PWC and D&N were "to undertake" the following matters:

(a) identify the nature, circumstances and extent of any unauthorised transactions;

(b) quantify the financial impact of such unauthorised transactions;

(c) assist the company in taking the necessary action to prevent such unauthorised transactions; and

(d) conduct a review of the system of internal control and procedures to prevent the occurrence of such unauthorised transactions in the future.

10 APBL announced 20 days later in MASNET No 28 of 24 September 2003 the completion of the review by PWC of significant cash transactions, and the findings were as follows:

> The scope of [PWC]'s work included reviewing APBS' accounting records, checking all material cash receipts and payments for the relevant period. Their work has revealed that unauthorised payments have been made from APBS' banks accounts. The aggregate of all such unauthorised payments match the aggregate of payments into APBS' bank accounts from the unauthorised accounts. All material cash balances of APBS have been accounted for.

11 At the same time, APBL announced that:

> Claims against APBS have been asserted by banks with respect to the unauthorised transactions. The Company [APBL] has sought legal advice on these claims and has been advised that legal defences are available to APBS. APBS intends and has instructed its lawyers, [D&N], to contest these claims vigorously.

12 No engrossed final report was ever issued by PWC. The banks understandably wanted the PWC Draft Reports produced for inspection. No doubt the banks imagined the PWC Draft Reports to be particularly informative for a contemporaneous insight into what was discovered in the course of the investigations including systemic failure or weakness in internal controls, if any.

The claim to legal professional privilege

13 Mr Hri Kumar for APBS submitted that APBS could not be compelled to produce the PWC Draft Reports as these reports were subject to legal professional privilege which comprises legal advice privilege under the provisions of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Act") and common law litigation privilege.

14 APBS argued that D&N and PWC jointly conducted interviews and/or meetings with APBS's employees and other witnesses and jointly worked on the drafts prepared by PWC before they were sent to the Special Committee. Material from the interviews was used for the PWC Draft Reports. A central plank of the APBS's argument was that D&N and PWC were for all intents and purposes a single team working on the matter. The PWC Draft Reports were brought into existence together with D&N for the purpose of giving confidential legal advice to APBS and thus came within the ambit of legal advice privilege. Alternatively, the PWC Draft Reports were subject to litigation privilege as they came into existence for the dominant purpose of contemplated or anticipated litigation by the banks against APBS. APBS needed only to succeed on one ground to resist the banks' application for production of these draft reports.

15 The banks disagreed with APBS's claim that the PWC Draft Reports could contain "confidential communication" to the Special Committee. It was argued that the PWC Draft Reports would not contain any legal advice from D&N or confidential communications for obtaining such legal advice as the purpose of PWC's work as accountants was investigative in nature. On the objective evidence before the court, the PWC Draft Reports were produced because of either APBS's Reporting Procedure on Fraud which was akin or analogous to the internal report prepared as a matter of practice for "railway operation and safety purposes" as in *Waugh v British Railways Board* [1980] AC 521, or the fact situation in *Price Waterhouse v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583 ("*Price Waterhouse v BCCI*"). Consequently, there was no relevant legal context (as per the *Balabel v Air India* [1988] Ch 317 test referred to in [18] below) in which the PWC Draft Reports could be protected by legal advice privilege. The same points were used to challenge the claim for litigation privilege. The PWC Draft Reports, it was submitted, were not made for the dominant purpose of use in, or in relation to litigation then existing, anticipated or contemplated.

16 The common issue in the banks' applications for production for inspection of the PWC Draft Reports turned on the question of legal professional privilege. Ms Rebecca Chew for SEB led the principal arguments common to all the banks. Whilst counsel for the other banks aligned themselves with Ms Chew's submissions, other points were also advanced to augment their respective cases.

Discussions and decision

Legal advice privilege

17 It is convenient to consider the issue of legal advice privilege first. Legal advice privilege in Singapore is basically governed by ss 128 and 131 of the Act (see *Singapore Civil Procedure* (Sweet & Maxwell Asia, 2003) at p 468). The common law principles on legal advice privilege are applicable as long as they are consistent with the applicable provisions of the Act: s 2(2) of the Act. The relevant sections read as follows:

> **128.**—(1) No advocate or solicitor shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate or solicitor by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.
>
> (2) Nothing in this section shall protect from disclosure —
>
> (a) any such communication made in furtherance of any illegal purpose;
>
> (b) any fact observed by any advocate or solicitor in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.
>
> (3) It is immaterial whether the attention of such advocate or solicitor was or was not directed to such fact by or on behalf of his client.
>
> **131.** No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no

others.

18 The privilege recognised in ss 128 and 131 relates to legal professional communications. It protects the client as well as his advocate or solicitor from being compelled to disclose and produce for inspection confidential communications about legal advice and assistance stemming from the latter's professional employment. Legal professional communications encompass communications passing between the client and his lawyer and *vice versa*, the contents or condition of documents which the lawyer became acquainted with, and advice given in the course and for the purpose of his professional employment. Section 128 refers to communications for "the purpose of [the advocate or solicitor's] employment" as legal adviser which, on a purposive reading, is wide enough to cover confidential communications arising from the extensive range of activities undertaken by contemporary advocates and solicitors. As Taylor LJ said in *Balabel v Air India* ([15] *supra*) at 330:

> [T]he test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly … [L]egal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.

19 Not only must the communication pass between the client and the lawyer acting as such, confidentiality is another necessary element to establish legal professional privilege over such communications. Confidentiality may be lost if a communication between a client and his lawyer is made in the presence of a third party. The exact circumstances of the presence of the third party will have to be examined to see if the communication is intended to be confidential. In the present case, the fact that PWC and D&N collaborated as a team was particularly significant. I shall elaborate more on these points below.

20 The rationale of the privilege, which is that of the client's and not the solicitor or advocate, is to enable the legal advice to be both freely sought and given in confidence. Jessel MR in *Wheeler v Le Marchant* (1881) 17 Ch D 675 at 682 said, "It is a rule established and maintained solely for the purpose of enabling a man to obtain legal advice with safety." The rule is founded on "the impossibility of conducting legal business without professional assistance, and on the necessity, in order to render that assistance effectual, of securing full and unreserved intercourse between the two": *Sarkar's Law of Evidence* (Wadhwa and Company, 15th Ed, Reprint 2001) vol 2 at p 2027 and the English authorities cited there.

21 Ms Monica Chong for Hypo accepted that legal professional privilege comprises legal advice privilege and litigation privilege. For Ms Chong, the only dispute before the court was whether or not APBS had satisfied the evidentiary burden in order to succeed in its claim for privilege. Separately, Ms Chew argued that where legal advice privilege was concerned, ss 128 and 131 of the Act were inapplicable for the simple reason that the banks were not seeking discovery and production of D&N's legal advice to either the Special Committee or APBS that was based on the PWC Drafts Reports. It was the banks' case that no legal advice was set out in the PWC Draft Reports. They were also not seeking to obtain discovery and production of communications made by or on behalf of APBS to D&N in the course and for the purpose of D&N's professional employment as legal adviser.

22 The banks' first argument related to a determination of the purpose of the PWC Draft Reports. A perceived shift in emphasis by the deponents of affidavits filed on behalf of APBS on two different occasions had caused some suspicion and hence, the argument that the purpose of the PWC Draft Reports appeared to have changed over time due to APBS's attempts to cover the PWC Draft Reports with privilege. In this respect, comparing the affidavit of Anthony Cheong Fook Seng ("Cheong") dated 8 September 2005 with the earlier affidavit of Tay Kok Chye ("Tay") filed on

26 March 2004 to oppose the banks' pre-action discovery applications, the banks concluded that there were inconsistencies between the two affidavits which undermined the overall reliability and veracity of Cheong's affidavit. Ms Chong further submitted that the evidence adduced by APBS on the role of D&N was "at odds with contemporaneous evidence". The banks submitted that in determining the purpose of the PWC Draft Reports, Cheong's affidavit should be viewed with caution and discounted in favour of the only available contemporaneous evidence in the form of the two MASNET announcements. The banks gave three reasons in support of their contention that the PWC Draft Reports did not contain any communication made to D&N for the purpose of its employment as legal adviser to APBS.

23 Their first point was that APBS had not at the stage of pre-action discovery claimed that D&N was actually involved in the investigation and that the preparation of the PWC Draft Reports was a joint effort by both PWC and D&N. When pre-action discovery was sought against APBS for the same draft reports in March 2004, APBS claimed litigation privilege and not legal advice privilege. Tay was Assistant General Manager, Finance, of APBS, and the relevant paragraphs of his affidavit read:

> 37 [T]he Special Committee has draft reports prepared by [PWC], working with [D&N], which were engaged to act for APBL and [APBS] jointly in relation to the fraud by [Chia]. Their reports are being prepared for the dominant purpose of obtaining legal advice in relation to the anticipated litigation brought by various banks … The various banks have issued notices and/or letters of demand against [APBS]. The present application, as well as those filed by the other banks, confirm the intention of the said banks to sue [APBS].
>
> 38 In the circumstances, I have been advised and do verily believe that the draft reports prepared by [PWC] with [D&N] are clearly privileged.

24 Second, at the hearing for pre-action discovery on 13 April 2004, counsel for APBS informed the court that in relation to the PWC Draft Reports, D&N had "pencilled in" legal advice on the drafts. Cheong's affidavit, however, made no reference at all to D&N's alleged "pencilled in" legal advice to APBS. Instead, Cheong deposed that the PWC Draft Reports contained "confidential communications between [D&N] and the Special Committee for the purpose of obtaining legal advice and assistance in the course of and for the purpose of [D&N's] professional employment as legal adviser to APBL and [APBS]".[note: 1]

25 Third, it was argued that contemporaneous evidence in the form of the two MASNET announcements in September 2003 did not support APBS's assertion as to the nature of the PWC Draft Reports or D&N's role. The roles stated in the first MASNET announcement all related to functions normally undertaken by an accounting firm. The mere reference to D&N in the first MASNET announcement did not detract from the envisaged investigative role of PWC, as was evident from the contents of the second MASNET announcement (see [10] above). The PWC Draft Reports were investigative in nature and hence factual. Ms Chew pressed the point that PWC's undertaking as disclosed in the first MASNET announcement mirrored APBS's Reporting Procedure on Fraud so much so that the PWC Draft Reports were produced in fulfilment of that procedure. In short, the purpose of the PWC Draft Reports was not to obtain legal advice but to fulfil APBS's obligation under the Reporting Procedure on Fraud.

26 Mr Kumar denied that APBS had shifted its position. I accepted his arguments and reasoning which sufficiently disposed of the banks' first argument. Tay's affidavit did not contradict Cheong's affidavit where legal advice privilege and litigation privilege were concerned. Tay's affidavit clearly alluded to the PWC Draft Reports having being prepared *with* D&N. As the notes of evidence taken by the assistant registrar at the first hearing of the pre-action discovery applications in 2004 bear out,

Mr Jimmy Yim SC, who was then counsel for APBS, made it known at the outset that APBS was claiming both privileges. As for the pencilled-in advice, Mr Kumar dismissed it as counsel's submission from the bar. Any pencilled-in advice for that matter would appear in the next draft as textual amendments, which amendments would likewise be protected by legal advice privilege. By comparing the drafts, D&N's comments could be identified and extracted. I should add that drafts are an essential part of the process of advising and being advised. As for the first MASNET announcement, it listed the tasks that both PWC and D&N were to "undertake". The undertaking was to be a joint effort. I agreed with Mr Kumar that Cheong's affidavit evidence was not inconsistent with the statements in the two MASNET announcements which were issued by APBL to ensure compliance with its disclosure obligations under the relevant provisions of the Singapore Exchange's Listing Manual.

27 The banks' second argument, which was also the principal dispute between the parties, was the extent to which APBS could claim privilege for communications passed in confidence between APBS and D&N in the presence of PWC, which communications were later incorporated in the PWC Draft Reports that also contained D&N's input.

28 The starting point is that legal advice privilege only covers communications between the legal adviser and his client. Ms Chew's contention was that the Special Committee was D&N's client for the purposes of legal advice privilege. As such, privilege did not attach to communications between D&N and the employees of APBS.

29 The English Court of Appeal in *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2003] QB 1556 ("*Three Rivers (No 5)*") held that legal advice privilege could not extend to documents prepared by employees or ex-employees of the Bank of England, whether or not for the purposes of the Bingham Inquiry into the collapse of BCCI. In that case, the Bank of England had set up the Bingham Inquiry Unit ("BIU"), an internal unit, to coordinate its response to and evidence for the Bingham Inquiry. There was no dispute that legal advice privilege applied to the actual communications between the BIU and the Bank of England's solicitors. In the context of the preparations for the Bingham Inquiry, the court regarded the BIU, and not the Bank of England or its individual employees, as the client. It therefore held that only communications between the BIU and the lawyers would qualify for legal advice privilege. Material brought into existence internally for the purpose of the Bank of England obtaining legal advice was not protected as communications between the lawyers and the Bank of England's employees and officers, whether former or current, were outside the ambit of legal advice privilege.

30 In the present case, the Special Committee comprised a specific group of directors of APBL with authority to act for and on behalf of APBL and APBS in their dealings with D&N in connection with Chia's fraud and the unauthorised accounts opened by Chia in APBS's name. In fact, D&N was acting for APBS and APBL. APBS is claiming the privilege as "client". Ms Chew's question, "Who is the client?" is irrelevant because, as Mr Kumar rightly pointed out, the wording of s 128 of the Act expressly includes communications made to the solicitor "by or on behalf of his client". The provision makes no distinction between communications made by an individual and those made by his employee or agent. Neither is there a distinction made between communications made by a corporate client and those made by the corporate client's employees or agents. This view is the same as the common law position, which is that both the client and the solicitor may act through the medium of an agent (see [34] below). From this perspective, the decision in *Three Rivers (No 5)* is inconsistent with the provisions of s 128 on professional communications and is inapplicable by virtue of s 2(2) of the Act.

31 There is thus no question that the communications between APBS and D&N *prima facie* fell within the ambit of legal advice privilege. The complication arises from the fact that these communications were made in the presence of PWC, who was strictly speaking a third party to the

solicitor-client relationship between D&N and APBS. The question is whether confidentiality, which is an essential element of legal advice privilege, is lost in these circumstances. Put another way, the issue is whether APBS, in disclosing the interviews, was necessarily manifesting an intention to give up privilege for a communication which might otherwise be privileged.

32 Case law indicates two strands of authorities in which confidentiality, and thus privilege, continues to attach to communications made between a client and his lawyer in the presence of a third party.

33 The first strand of authorities concerns solicitor-client communications that are disclosed to the third party in confidence. In such cases, legal advice privilege still attaches to the communications as against outsiders such as the banks in the present proceedings. This can be seen from the decision of Colman J in *Nederlandse Reassurantie Groep Holding NV v Bacon & Woodrow* [1995] 1 All ER 976. There, the plaintiff ("NRG") assembled a team comprising, *inter alia*, merchant bankers, lawyers and accountants to advise on the purchase of the share capital of three insurance companies. Subsequently, NRG discovered that it had taken on more liabilities and sued its non-legal advisers for negligent advice. The accountants sought specific discovery of communications that passed between NRG and its lawyers for the purpose of obtaining advice in connection with the transaction. The accountants contended that NRG could not claim legal advice privilege against them since all of NRG's advisers worked together in a team. Communications had passed between the legal and non-legal advisers on many occasions both at meetings and in telephone conversations and by correspondence. Sometimes, the legal advisers communicated only with NRG. Sometimes, the legal advisers communicated with the other advisers and sometimes with both. There was also disclosure to the non-legal advisers of documents containing legal advice given to NRG. Colman J held that the lawyers owed a qualified duty of confidence to NRG to the extent that if, for the purpose of giving advice on the transaction, the lawyers exercising their professional judgment considered it necessary in the performance of their duties to disclose any communications passing between them and NRG to the non-legal advisers, the lawyers could go ahead to do so. Correspondingly, the non-legal advisers owed a duty of confidence to their client. As such, they would have been professionally unable to show documents which they were shown by NRG or its legal advisers to a third party. In explaining that the lawyers had professional discretion in the matter, Colman J at 984 said:

> They were working in a developing transaction where negotiations in respect of the terms of the deal were progressing and where many of those terms related to matters on which the other non-legal advisers were retained to advise. It was obviously essential that in order to give further advice and in order that NRG should get the professional advice which it needed from the team, the legal advisers should from time to time be able to disclose to those other advisers their communications which NRG or the advice they were giving to NRG. This was clearly an implied qualification to the duty of confidence which [the lawyers] owed to NRG.

As for communications which were never disclosed to the other non-legal advisers and which were the subject matter of the discovery application, Colman J held that they remained confidential and privilege continued to attach to them. Significantly, even if as between the team members no claim for privilege could be maintained for the confidential communications disclosed, NRG could still have claimed privilege as against the rest of the world. See also Charles Hollander QC, *Documentary Evidence* (Sweet & Maxwell, 8th Ed, 2003) at para 17-04.

34 The second strand of authorities concerns a third party as an agent for communication. Both the client and solicitor may act through the medium of an agent. Communications between a client and his lawyer in a third party's presence will remain confidential (and legal advice privilege is available) where the third party is an agent for communication of either the client or the lawyer, or of

both (see *Wheeler v Le Marchant* ([20] *supra*) at 682).

35 The above principles are clear enough. The difficulty lies in applying them to the circumstances of any particular case. Each case must of course depend upon its own particular facts, and a detailed scrutiny of the exact circumstances under which the solicitor-client communications in question passed is definitely required.

36 Turning to the circumstances of the present case, as stated in [9] above, APBS appointed external lawyers at the outset on 4 September 2003 to jointly undertake the work described in the first MASNET announcement. The degree of collaboration between PWC and D&N as a team, and the extent of the latter's legal input were real and not peripheral. It was not suggested, and I would not find that the engagement of external lawyers by APBS was a colourable device to cover the PWC Draft Reports with privilege. It was in the context of a legal professional relationship that involved advising on legal rights and obligations in respect of the unauthorised loans taken out by Chia in APBS's name that D&N met and interviewed employees of APBS. These interviews and meetings were jointly conducted by D&N and PWC, and the information gathered from the interviews would have been processed by D&N and incorporated in the PWC Draft Reports. Although these draft reports were eventually prepared and sent to the Special Committee in PWC's sole name, the fact remains that they were worked on jointly by the accountants and D&N before being submitted.

37 In these circumstances, I was able to infer from the joint appointment of PWC and D&N an obligation of confidence owed to APBS by both PWC and D&N. It followed that disclosure of the interviews between D&N & APBS's employees to PWC took place on a confidential basis. The confidential character of these communications was not destroyed even when passed or made in the presence of PWC. On this ground, the PWC Draft Reports, which incorporated such confidential communications, continued to be privileged. For privilege purposes, each draft report was a record of the privileged communication and had the same sort of quality as the communication itself. The PWC Draft Reports were directly related to the performance of the duties undertaken by D&N and confidential communication passing between D&N and PWC was privileged against the banks. Protection is afforded for disclosure of that material might reveal the contents of confidential communications gathered by D&N from the interviews with employees of APBS for the purpose of fulfilling its professional employment. Such information would equally have contained the thoughts of the lawyers in regard to the matters communicated to them at the interviews and would thus be protected by privilege: see *Kennedy v Lyell* (1883) 23 Ch D 387 at 408.

38 A further ground which led me to rule that legal advice privilege continued to attach to those communications between APBS and D&N which were made in PWC's presence was that PWC was APBS's agent for communication (see [34] above).

39 On this point, Ms Chong contended that APBS made no mention of agency in the sense described above. With respect, Ms Chong omitted to take into account the nature of PWC's and D&N's joint appointment and the fact that the accounts and the lawyers collaborated as a team in fulfilment of their engagement. These two factors were central to APBS's case on legal advice privilege. Implicit from the lawyers' and the accountants' joint appointment (and it would be unrealistic if that was not the case) would be consent and authorisation from the client to each adviser to request, give and receive information and views to and from the other. Inevitably, APBS, its lawyers and its accountants would interact and communicate to receive and pass on any information or document (including privilege material) concerning the unauthorised accounts which either D&N or PWC thought appropriate so to do. Each of them was the agent of APBS in communicating with the other. To give an example, PWC had special duties and responsibilities as accountant to follow the money trail and recommend enhancing or changing existing internal controls.

At the same time, on account of its joint appointment with D&N, PWC also had the duty to give and receive communications to or from the lawyers as APBS's agent for communications so as to bring it within the purview of legal advice privilege.

40 I pause here to mention that in so far as the issue of agency is concerned, the facts of this case differ from those in *Wheeler v Le Marchant* ([20] *supra*). There, a solicitor received reports from a surveyor on a property in the course of advising his client at a time when there was no pending litigation. When the property later became the subject matter of litigation, it was held that the reports were not protected by legal advice privilege as the surveyor was merely a producer of the information in question, and not an agent for the communication of such information. Similarly, in *Price Waterhouse v BCCI* ([15] *supra*), the claim for legal advice privilege did not rest upon any notion of the accountants being an internal organ of BCCI. The accountants' report was to enable BCCI's solicitors to give legal advice to BCCI in respect of the problem loans and was thus not privileged. The court equated the position of Price Waterhouse with the surveyors in *Wheeler v Le Marchant*, *ie* as producers of the material and not agents for communication.

41 Quite apart from the fact that PWC was APBS's agent for communications and that those communications between APBS and D&N which took place in PWC's presence occurred in confidence, the PWC Draft Reports in their entirety attracted legal advice privilege for another added reason – namely, the privileged material communicated to PWC was, so to speak, inseparably embedded in the reports. I agreed with Mr Kumar that the findings of the accountants in the PWC Draft Reports could not be presented from purely an accounting point of view without a legal dimension and perspective. Redaction or separation of parts of the drafts so as to exclude passages containing privileged information would not be practical here since PWC and D&N acted as a single unit. The PWC Draft Reports were in all likelihood so intertwined with the legal advice and assistance given by D&N to PWC that these reports became part of the privileged solicitor-client communications. A similar view was taken in *Re Sarah Getty Trust* [1985] QB 956, where a director of an oil company sought disclosure of information which a solicitor had received from the company's representatives and which he had then passed on to his client. The court rejected the suggestion that part of the privileged solicitor-client communications could be separated out and taken outside the ambit of the privilege. It held that the communications between the solicitor and his client, including the information in question, were made in a professional capacity for the purpose of giving legal advice and therefore, the information could not be separated from the rest of what was said between them.

42 Lastly, I should mention that the notion of severance was advocated by Tan Yock Lin in *The Law of Advocates and Solicitors in Singapore and West Malaysia* (Butterworths Asia, 2nd Ed, 1998). The author argued for its application where communications passed between a client and all the members of its team, as well as between the members of the team *inter se*. Tan Yock Lin at p 551 reasoned:

> [T]he only situation in which communications from third parties not for the purpose of litigation can attract privilege would be where they cannot be hived off from the rest of the solicitor and client communications.

After explaining his view that the "doctrine of severance gives flexibility to the rule of privilege given the changing role of solicitors in modern society where solicitors are engaged in a wider range of activities of a legal nature", the author added at p 539:

> Where disclosure is sought of a document, it may be impossible to sever one part of it from another. If one part is privileged, the privilege must be asserted to the whole. In these circumstances, the court will accord privilege to the whole document as being the simplest,

safest and most straightforward thing to do.

43 For these reasons, I held that APBS's claim for legal advice privilege was made out.

Litigation privilege

44 I now turn to the question of litigation privilege in the event a different view is taken on legal advice privilege. Whilst it appears that legal advice privilege accords with the Act, litigation privilege is based on common law principles: see *Singapore Civil Procedure* ([17] *supra*) at p 469; *Brink's Inc v Singapore Airlines Ltd* [1998] 2 SLR 657; and *The Patraikos 2* [2001] 4 SLR 308 at [13]. Litigation privilege is wider than legal advice privilege and can include documents brought into being by a third party, provided that the dominant purpose of such documents is to obtain legal advice as to whether a claim can be made or defended in litigation. The test for determining whether or not litigation privilege attaches to the PWC Draft Reports is as follows: (a) the draft reports must have come into existence when litigation was pending or anticipated or in contemplation; and (b) the dominant purpose of preparing these draft reports must have been for use in, or in connection with litigation then pending or anticipated or in contemplation.

45 The leading authority on litigation privilege is *Waugh v British Railways Board* ([15] *supra*) which was adopted and followed in *Brink's Inc v Singapore Airlines Ltd.* The argument in *Waugh v British Railways Board* centred on the status of an internal report prepared by two of the British Railways Board's officers two days after a collision involving the death of a locomotive driver. While the report undoubtedly contained material collected by or on behalf of the Railways Board for use of their solicitors in anticipated litigation, the House of Lords ruled that because it could not be shown that such use was the dominant purpose for preparing the report, the document did not attract litigation privilege. Lord Edmund-Davies said of this aspect of privilege from disclosure:

> Litigation, apprehended or actual, is its hallmark.

Litigation is anticipated or in contemplation if, objectively on the facts and circumstances, litigation was a reasonable prospect as distinct from "an average possibility of a claim": see *Brink's Inc v Singapore Airlines Ltd* at [19] and *Re Highgrade Traders Ltd* [1984] BCLC 151 at 172.

46 Dealing first with the question of whether litigation was pending or contemplated when the PWC Draft Reports came into existence, the relevant time to consider this is the time when the PWC Draft Reports were prepared; contrary to the banks' submission, it is not the time when D&N was first instructed by the Special Committee on 4 September 2003. Given that APBS, through D&N, wrote to Hypo's lawyers on 5 September 2003 disavowing the unauthorised loans and accounts created by Chia, there was little doubt that litigation would ensue given, *inter alia,* the magnitude of the fraud. The prospect of litigation was beyond doubt by the time the second MASNET announcement was made, as evidenced by APBL's statement therein that the banks had asserted claims against APBS (see [11] above). Indeed, Hypo, Sumitomo and Mizuho had sent demand letters to APBS before the second MASNET announcement was made. Peter Vassiliou, the managing director of Hypo, stated in his affidavit of 5 September 2003 that APBS was likely to be made a party to subsequent proceedings. For these reasons, I found that litigation was reasonably in prospect at the time the PWC Draft Reports were prepared. A first draft of the reports would have been ready sometime before 24 September 2003 to enable APBL to release the second MASNET announcement in those terms. The fact that an engrossed final report was never issued (unlike the factual scenario in all the other cases cited by the parties) and that it was unclear when exactly the PWC Draft Reports were sent to the Special Committee were immaterial.

47 As for APBS's dominant purpose in preparing the reports, the banks contended that litigation could not have been the dominant purpose. Ms Chew emphasised that the first MASNET announcement made no mention of possible claims by the banks against APBS arising from Chia's fraud. The main focus, she argued, was instead to gather the relevant facts, assess the financial impact of the fraud on APBS and review the company's internal control and procedures so as to prevent the occurrence of similar unauthorised transactions. This showed that APBS's dominant purpose in preparing the PWC Draft Reports was to comply with its Reporting Procedure on Fraud, under which the company had to investigate and report all fraud committed regardless of whether there was any pending litigation. Litigation, it was said, was at best a secondary purpose for preparing the PWC Draft Reports and that was insufficient for litigation privilege to attach to the documents.

48 I was not persuaded by the banks' arguments on the dominant purpose of the PWC Draft Reports. How the banks came to be defrauded had already been made known on 2 September 2003. As far as APBS was concerned, the accounts that Chia opened with the banks and the bank loans which he obtained were unauthorised. By 5 September 2003, APBS had disavowed these loans and accounts. The PWC Draft Reports would have been required for legal advice on whether the denial of liability could be maintained. By 24 September 2003, APBL's position, as set out in the announcement in MASNET, was that the claims by the banks against APBS would be strenuously defended. Taking an objective view of all of the evidence, I felt that the confidential legal advice contained in the PWC Draft Reports was prepared predominantly for the purpose of prospective litigation against APBS. Ascertaining the financial impact of the fraud on APBS would in context be relevant for litigation as well, as at that time, APBS was co-operating with Hypo to injunct the assets of Chia. Recommendations, if any, on improving internal controls in APBS were merely a subsidiary purpose.

49 In view of these facts, I was satisfied that APBS had a sustainable claim for litigation privilege as well.

Result

50 Since APBS succeeded on either the legal advice privilege or the litigation privilege issue, I allowed its appeal and ruled against production of the PWC Draft Reports.

[note: 1]Para 27 of Cheong's affidavit