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

Case Number : CA 17/2006, 18/2006, 19/2006, 20/2006

Decision Date : 22 February 2007

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA

Counsel Name(s) : Steven Chong SC, Chew Ming Hsien Rebecca, Koh Mei Ping Lynette, Tay Yew Jin Lionel, Ng Wei-Chern Paul and Christopher Eng (Rajah & Tann) for the appellants in Civil Appeals Nos 17 and 18 of 2006; Alvin Yeo SC, Monica Chong, Sannie Sng and Tan Hsiang Yue (Wong Partnership) for the appellant in Civil Appeal No 19 of 2006; Tan Kok Quan SC and Siraj Omar (Tan Kok Quan Partnership) for the appellant in Civil Appeal No 20 of 2006; Davinder Singh SC, Hri Kumar, Yarni Loi, Kabir Singh and Shivani Retnam (Drew & Napier LLC) for the respondent

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

Evidence – Documentary evidence – Private documents – Draft reports by lawyers and accountants commissioned by directors of company after discovery of fraud on company perpetuated by company's employee – Defrauded banks bringing action against company and seeking order for disclosure of draft reports – Whether draft reports protected by legal advice privilege and/or litigation privilege – Whether privileged information forming integral part of draft reports – Whether court should inspect draft reports to assess whether privileged information contained therein – Sections 128, 131 Evidence Act (Cap 97, 1997 Rev Ed)

22 February 2007 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 The present appeal raises several important legal issues with regard to both legal advice privilege (under s 128 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Act")) as well as litigation privilege (under s 131 of the Act and the common law). Indeed, as we shall see, the answers to these issues centre on a consideration and analysis of both the relevant statutory language and common law principles as well as the interaction between them. It would, however, be appropriate to first set out the relevant factual matrix of the present proceedings.

The facts

2 In January 1999, one Chia Teck Leng ("Chia") was employed by the respondent, Asia Pacific Breweries (Singapore) Pte Ltd ("APBS"), as its finance manager. Between 1999 and September 2003, Chia used the name of APBS to obtain credit and loan facilities from four foreign banks. He pleaded guilty to six charges under s 467 of the Penal Code (Cap 224, 1985 Rev Ed) and eight charges under s 420 of the same. Chia is currently serving a custodial sentence of 42 years.

3 The present actions arose out of suits filed by the foreign banks against APBS for the money that Chia had cheated them of. The plaintiff in Suit No 774 of 2004 (appellant in Civil Appeal No 17 of 2006) is Skandinaviska Enskilda Banken AB (PUBL), Singapore Branch ("SEB"). SEB's claim is

approximately US$26.6m, or alternatively S$45.3m.

4 The plaintiff in Suit No 775 of 2004 (appellant in Civil Appeal No 18 of 2006) is Mizuho Corporate Bank ("Mizuho"), which is claiming approximately US$8m.

5 The plaintiff in Suit No 763 of 2004 (appellant in Civil Appeal No 19 of 2006) is Bayerische Hypo-Un Vereinsbank Aktiengesellschaft ("Hypo"), and its claim is approximately US$32m.

6 The plaintiff in Suit No 781 of 2004 (appellant in Civil Appeal No 20 of 2006) is Sumitomo Mitsui Banking Corporation, Singapore Branch ("Sumitomo") and its claim is approximately S$10.3m. The banks shall hereafter be collectively referred to as "the appellant banks".

7 On 2 September 2003, officers from the Commercial Affairs Department of the Singapore Police Force ("CAD") visited the premises of Asia Pacific Breweries Limited ("APBL"), the parent company of APBS, to meet with senior officers of APBL. CAD informed them that Chia had used bank accounts fraudulently opened in the name of APBS by using forged documents and resolutions to borrow money for his own use. On the same day, Chia was taken into custody. He was charged two days later. APBS also received a letter from Mr Bernard Kong, a CAD officer, ordering it to produce documents pursuant to an order under s 58 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed).

8 On 3 September 2003, APBS wrote to the appellant banks to ascertain if there had been 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 its name. The appellant banks were also instructed to immediately suspend operation of the unauthorised accounts until further notice.

9 Hypo wrote to APBS on 3 September 2003, informing APBS of the term loan of US$30m borrowed in its name and that the first repayment of the principal instalment plus interest was due on 25 September 2003.

10 APBS also heard from Sumitomo 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 approximately S$10m by 5 September 2003.

11 On 4 September 2003, a special committee was constituted by APBL's board of directors ("the Special Committee"). The Special Committee immediately appointed PricewaterhouseCoopers ("PWC") and Drew and Napier LLC ("D&N"). APBL made an announcement on MASNET ("the first MASNET announcement") addressing these events. The full text of the first MASNET announcement, which was submitted by Mr Anthony Cheong Fook Seng ("Anthony Cheong"), the company secretary of APBL, is as follows:

> Asia Pacific Breweries Limited ("APBL") wishes to announce that Mr Chia Teck Leng, an employee of the Company, has been charged in the Subordinate Courts today. Mr Chia is suspected of unauthorized opening and operating of bank accounts in the name of Asia Pacific Breweries (Singapore) Pte Ltd ("APBS"), a subsidiary company, during his tenure as Finance Manager of APBS. Mr Chia has been suspended pending investigations.
>
> Steps have been taken to freeze the unauthorized accounts.
>
> A special committee of directors, comprising Mr Lee Yong Siang, Chairman of Audit Committee of the Board of APBL, Mr Goh Yong Hong, another member of the Audit Committee (both being independent directors) and Mr David Hazelwood, has been appointed to oversee investigations

and take any necessary actions.

The Company has also appointed Pricewaterhouse Coopers and Drew & Napier to undertake the following:

- Identify the nature, circumstances and extent of any unauthorized transactions;
- Quantify the financial impact of such unauthorized transactions;
- Assist the company in taking the necessary action to prevent such unauthorized transactions;
- Subsequently, to conduct a review of the system of internal control and procedures to prevent the occurrence of such unauthorized transactions in the future.

12 On 24 September 2003, APBL released a second MASNET announcement ("the second MASNET announcement") entitled "Update on Investigations". The full text of the second MASNET announcement is as follows:

> On 4 September 2003, Asia Pacific Breweries Limited ("the Company") announced that an employee of the Company had been charged in Court for opening and operating bank accounts in the name of Asia Pacific Breweries (Singapore) Pte Ltd ("APBS") without authority. The Company also announced that it had appointed PricewaterhouseCoopers ("PwC") and Drew & Napier to assist the Company in its investigation.
>
> PwC have completed their review of significant cash transactions for a 4-year period commencing in 1999.
>
> 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' bank 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.
>
> Claims against APBS have been asserted by the banks with respect to the unauthorised transactions. The Company 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, Drew & Napier, to contest these claims vigorously.

13 Preparation of the PWC draft reports pursuant to the first MASNET announcement ceased sometime in late 2003 and a final report was never issued. In early March 2004, the appellant banks made an application for pre-action discovery against APBS, seeking disclosure of documents including the PWC draft reports. APBS asserted privilege. The court dismissed the application on the ground that the appellant banks had not demonstrated that the documents sought were necessary for them to plead and commence an action against APBS (see *Bayerische Hypo- und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd* [2004] 4 SLR 39).

14 In September 2004, the appellant banks commenced the present action against APBS, claiming, *inter alia*, that Chia had actual and/or apparent authority to enter into unauthorised agreements with the appellant banks and that even if there had been no contractual relationship between APBS and the appellant banks, APBS should be vicariously liable for the fraudulent acts of

Chia.

15 The appellant banks subsequently made applications against APBS for specific discovery, including the production of the PWC draft reports. APBS also made applications against each of the appellant banks for specific discovery. The applications were heard by an assistant registrar, who ordered, *inter alia*, that the PWC draft reports be produced by APBS as they were not privileged information. APBS appealed against this decision.

The decision below

16 The trial judge ("the Judge") reversed the assistant registrar's decision on the ground that the PWC draft reports were protected by both legal advice privilege and litigation privilege (see *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2006] 3 SLR 441 (hereafter referred to as "GD")).

17 The Judge found that legal advice privilege did not only apply to protect communications between the Special Committee and D&N but extended to communications between D&N and APBS as s 128 of the Act made no distinction between communications made by an individual or a corporate client and those made by an employee/agent of the individual or corporate client. Hence, the PWC draft reports *prima facie* fell within the ambit of legal advice privilege.

18 The next issue was whether the element of confidentiality in the communications between APBS and D&N had been lost because the communications occurred in the presence of PWC, who was a third party to the solicitor–client relationship. The Judge found that confidentiality had not been lost for two reasons. Firstly, *both* PWC and D&N owed an obligation of confidence to APBS. This could be inferred from the joint appointment of PWC and D&N and the degree of collaboration between PWC and D&N. Accordingly, the confidential nature of the communications was not lost just because the communications were disclosed in PWC's presence. Further, each PWC draft report was a record of the privileged communication and had the same sort of quality as the actual communication itself. The PWC draft reports were likely to be 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.

19 Secondly, PWC was APBS's agent for communication. D&N and PWC had collaborated as a team in order to fulfil the terms of their joint appointment. Implicit from the lawyers' and the accountants' *joint* appointment would be consent and authorisation from the client to each adviser to request, give and receive information and views to and from the other. Indeed, it would be unrealistic if this were not the case.

20 Turning to the applicability of litigation privilege, the Judge found that the relevant time period to consider was the time when the PWC draft reports were prepared. In this regard, the Judge had little doubt that APBS was aware that litigation would ensue. Indeed, some of the appellant banks had sent demand letters to APBS before the second MASNET announcement was made (see [12] above). As regards the purpose of the PWC draft reports, the Judge held that the confidential legal advice contained in the PWC draft reports was prepared predominantly for the purpose of prospective litigation against APBS (see GD at [48]). The PWC draft reports were required to determine whether APBS could maintain its denial of liability for Chia's unauthorised loans. The making of recommendations on improving internal financial controls within APBS was merely a subsidiary purpose of the PWC draft reports.

The issues

21 The issues in the present appeals mirrored the two bases for the Judge's decision in the court below. Put simply, were the PWC draft reports protected by legal advice privilege (pursuant to s 128 of the Act) and/or litigation privilege under the Act and/or under the common law?

22 Before we consider these issues, an examination of the nature of, as well as relationship between, legal advice privilege on the one hand and litigation privilege on the other would be both appropriate and helpful. This is especially so not only in the light of the developments in law relating to legal professional privilege in recent years, but also because business and legal practices have changed and become more complex and wide-ranging. For example, in the area of finance, lawyers do not necessarily limit their advice only to the law. We turn first to examining the rationale of these two privileges.

The rationale underlying legal professional privilege

23 Legal professional privilege is to be found in two principal forms – *viz*, legal advice privilege and litigation privilege, respectively, and has been firmly entrenched as part of the common law system of justice for centuries. The two privileges are conceptually distinct although they overlap. However, they both "serve a common cause: The secure and effective administration of justice according to law", and "they are complementary and not competing in their operation (*per* Fish J (delivering the judgment of McLachlin CJ and Binnie, Deschamps, Fish and Abella JJ) in the Canadian Supreme Court decision of *Minister of Justice v Sheldon Blank (Attorney General of Ontario, The Advocates' Society and Information Commissioner of Canada (Interveners))* [2006] SCC 39 ("*Minister of Justice*") at [31]). A neat exposition of the different rationales of these two related privileges is also provided by the same judge in that case, as follows (at [26]–[27]):

> [Legal advice privilege] recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.
>
> Litigation privilege, on the other hand, is not directed at, still less, restricted to communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor–client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and fear of premature disclosure.

24 Other judgments explaining the underlying rationale of the two privileges are found in decisions spanning many courts and (more importantly) many jurisdictions as well. These include the English decisions of *Greenough v Gaskell* (1833) 1 My & K 98 at 103–105; *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 at 649; *The Southwark and Vauxhall Water Company v Quick* (1878) 3 QBD 315 at 317–320 and 322–323; *David Lyell v John Lawson Kennedy (No 2)* (1883) 9 App Cas 81 at 86 and 90; *O'Rourke v Darbishire* [1920] AC 581 at 628; *Minter v Priest* [1930] AC 558 at 566 and 579; *Lee v South West Thames Regional Health Authority* [1985] 1 WLR 845 at 850; *Ventouris v Mountain* [1991] 1 WLR 607 at 611; *Regina (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 at [7]; and *Three Rivers District Council v Bank of England (No 6)* [2005] 1 AC 610 ("*Three Rivers No 6*") at [24], [34], [52], [54] and [61]; the Bombay High Court

decision of *Muchershaw Bezonji v The New Dhurumsey Spinning and Weaving Company* (1880) 4 ILR Bom 576 at 582–583; the Australian High Court decisions of *Baker v Campbell* (1983) 153 CLR 52 at 66, 115–116 and 129 as well as *Esso Australia Resources Limited v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49 at [35] and [85]–[87]; the Canadian Supreme Court decision of *Minister of Justice* ([23] *supra*); and the Ontario Court of Appeal decision of *General Accident Assurance Company v Chrusz* (1999) 180 DLR (4th) 241 ("*Chrusz*") at [92] and [94].

25 Another restatement of the public interest involved in relation to legal professional privilege is found in the House of Lords decision of *Regina v Derby Magistrates' Court, Ex parte B* [1996] 1 AC 487, where Lord Nicholls of Birkenhead observed thus (at 510):

> Legal professional privilege is concerned with *the interaction between two aspects of the public interest in the administration of justice.* The public interest in the efficient working of the legal system requires that people should be able to obtain professional legal advice on their rights and liabilities and obligations. This is desirable for the orderly conduct of everyday affairs. *Similarly, people should be able to seek legal advice and assistance in connection with the proper conduct of court proceedings. To this end communications between clients and lawyers must be uninhibited. But, in practice, candour cannot be expected if disclosure of the contents of communications between client and lawyer may be compelled, to a client's prejudice and contrary to his wishes. That is one aspect of the public interest. It takes the form of according to the client a right, or privilege as it is unhelpfully called, to withhold disclosure of the contents of client-lawyer communications. In the ordinary course the client has an interest in asserting this right, in so far as disclosure would or might prejudice him.*
>
> The *other aspect of the public interest is that all relevant material should be available to courts when deciding cases.* Courts should not have to reach decisions in ignorance of the contents of documents or other material which, if disclosed, might well affect the outcome.
>
> All this is familiar ground, well traversed in many authorities over several centuries. *The law has been established for at least 150 year*s, since the time of Lord Brougham L.C. in 1833 in *Greenough v. Gaskell*, 1 M. & K. 98: subject to recognised exceptions, communications seeking professional legal advice, whether or not in connection with pending court proceedings, are absolutely and permanently privileged from disclosure even though, in consequence, the communications will not be available in court proceedings in which they might be important evidence.
>
> [emphasis added]

26 And, nearer home, Ong CJ (Malaya) observed, in the Malaysian Federal Court decision of *Public Prosecutor v Haji Kassim* [1971] 2 MLJ 115 and in relation to the equivalent of s 128 of the Act, thus (at 116):

> The only relevant provision in our Evidence Ordinance excluding professional confidences is s 126 [s 128 of the Act], which states that no advocate and solicitor shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him and in the course of his employment as such. *This rule is founded on the principle that the conduct of legal business without professional assistance is impossible and on the necessity, in order to render such assistance effectual, of securing full and unreserved intercourse between the two.* This privilege does not protect professional disclosures made to clergymen or doctors: see *Phipsonon Evidence,* 10th Edition, para. 587 and commentaries in *Sarkar*on s 126 of the Indian Evidence Act 1872. [emphasis added]

The statutory provisions

Legal professional privilege in Singapore – sections 128 and 131 of the Evidence Act

27 In Singapore, legal professional privilege is a statutory right enacted in ss 128 and 131 of the Act. These two sections cover legal advice privilege and also an element of litigation privilege. They provide as follows:

> **Professional communications**
>
> 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.
>
> *Explanation.* [italics in original] —The obligation stated in this section ***continues after the employment has ceased***.
>
> [emphasis added in italics and in bold italics]
>
> …
>
> **Confidential communications with legal advisers**
>
> **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. [emphasis added]

28 The Act is modelled on the Indian Evidence Act of 1872 (Act I of 1872). When moving the First Reading of the Evidence Bill, the then Attorney-General observed (see *Proceedings of the Legislative Council of the Straits Settlements, 1893, Shorthand Report* (23 February 1893) at B23):

> [T]he Law of Evidence now in force in this Colony is to be found in various volumes of text-books on the Law of Evidence, containing many hundreds of pages, and in various Acts of the Indian Legislature which are in force here and no longer in force in India. Under these circumstances it

has been thought desirable to introduce here the Indian Evidence Code which is now in force in India. *That Code has stood the test of more than twenty years' experience*, and has been found an inestimable benefit to Magistrates and all persons concerned in the administration of justice, who have no longer to turn to reports of cases, *and wade through TAYLOR on* Evidence*, but can find in the compass of a few pages the proposition of law which meets the case before them.* That such a state of things is an improvement on the present state of things no one can deny. There is nothing or very little that is original in this Bill. *It is the Indian Code adapted to the circumstances of this Colony*. [emphasis added]

29 The Indian Evidence Act itself had its roots in English law. In drafting the Indian Evidence Act, Sir James Fitzjames Stephen drew almost entirely from the then existing English common law; in his own words (see James Fitzjames Stephen, *The Indian Evidence Act, with an Introduction on the Principles of Judicial Evidence* (Thacker, Spink & Co, 1872) at p 2):

> The Indian Evidence Act is little more than an attempt to reduce the English law of evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India.

In the Bombay decision of *Frámji Bhicáji v Mohánsing Dhánsing* (1893) 18 ILR Bom 263, Candy J observed thus (at 271–272):

> The law in India is contained in section 126 of the Evidence Act [s 128 of the Act], and with one exception *appears to be the same as the law in England*, which has been established by many decisions through a long course of years. The one exception relates to the substitution of "illegal purpose" for "criminal purpose" in the first portion of the proviso to section 126; and, as Mr. Field says in his Law of Evidence in British India, this "carries the principle enunciated in the proviso somewhat further than what can be said to be the established law in England, but is in conformity with the expressed opinion of several able Judges." …
>
> That the law in India on this point is *practically the same as in England, and that in interpreting section 126 of the Evidence Act this Court may rightly refer to English cases*, is shown by the judgments of Westropp, C. J., and Sargent, J., in the case *of Memon Háji Harun v. Mulvi Abdul Karim*, in which Chief Justice Sir M. Westropp said: "Communications to be protected by that section (126 of the Evidence Act) must, we think, be confidential." The words contained in it are indeed "any communication, &c.," but the word "disclose" shows, and common sense seems to demand, that the privileged communication must be confidential or private.
>
> [emphasis added]

30 In this connection, Prof Pinsler has observed that, historically, *Greenough v Gaskell* ([24] *supra*) is "the authority upon which s 126 of the Indian EA [Evidence Act; which is s 128 of our Act] was constructed" (see Jeffrey Pinsler, "The *Three Rivers District Council* Saga: New Issues of Professional Privilege for a Singapore Court to Decide" (2005) 17 SAcLJ 596 at 605). Prof Pinsler writes (*id* at note 45):

> This is obvious from the connection between the terminology of s 128 [of our Evidence Act and, as we have seen, the equivalent of s 126 of the Indian Evidence Act] and Lord Brougham LC's judgment in *Greenough v Gaskell*, *id* at 101–103. [Sir James Fitzjames] Stephen ... referred to this case as the principal authority underlying s 126 of the Indian EA [Evidence Act] (see [Sir James Fitzjames Stephen, *Digest of the Law of Evidence* (Macmillan and Co, Limited, 5th Ed, 1899)], Note XLIII, at p 193).

31 For the above reasons, we will need to refer to the English decisions in order to determine the scope of ss 128 and 131 of the Act as well as the current state of the law. However, we need to bear in mind that not all English law principles can be used for this purpose. The reason is that s 2(2) of the Act provides as follows:

> All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed.

The scope of sections 128 and 131 of the Evidence Act

32 As is evident from its language, s 128 applies only to an advocate or solicitor, but not to the client. He may not (a) disclose any communication made to him by or on behalf of his client, or (b) state the contents or condition of any document of which he has become "acquainted", or (c) disclose any advice given by him to his client, *if all these events occurred* "in the course and for the purpose of his employment as such advocate or solicitor."

33 However, when s 128 is read with s 131, it becomes clear that they complement each other and give full effect to the legal advice privilege, as the latter provision protects the client from not having to disclose to any other party any legal advice which he has obtained from his legal adviser, whether he is an advocate or a solicitor. In Singapore, the distinction between an advocate and solicitor would make no difference to the operation of legal advice privilege because we have a fused profession.

34 It should also be noted that since s 131 is expressed to operate in the broader context of court proceedings where the client might offer himself as a witness, in which case he may be compelled to disclose any communication the court deems necessary, it also extends the area of legal advice privilege to the domain of litigation privilege. That this is the intention of s 131 is made clear by the reference to the use of the expression "legal professional adviser" who need not necessarily be an advocate or solicitor. When s 131 was enacted, the legal profession in Singapore did not have any advocates or solicitors, but English barristers and solicitors and also what were then known as law agents and also pleaders, who might not even be legally qualified. But litigation privilege was applied to all legal advisers involved in assisting their respective clients in litigation.

35 Although s 128 does not refer to the confidentiality of the communication from the client to the lawyer, whilst s 131 refers to such a quality with respect to any communication passing between him and his lawyer, it is implicit that the nature of the business or enterprise involved in a client obtaining legal advice from a lawyer must have the element or quality of confidentiality in the communication to the lawyer or the advice given to the lawyer: see *O'Shea v Wood* [1891] P 286 and *Government of the State of Selangor v Central Lorry Service & Construction Ltd* [1972] 1 MLJ 102.

Legal advice privilege

Who is the client? – the status of Three Rivers No 5 in Singapore

36 As will be seen, legal advice privilege at common law, which is fairly well-settled, is not inconsistent with the parameters of s 128 of the Act. The only "legal hiccup" at common law in recent times relates to the issue as to the identity of the client. In particular, the English Court of Appeal decision in *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2003] QB 1556 ("*Three Rivers No 5*") adopted an exceedingly narrow meaning of a "client" for the purposes of legal advice privilege.

37 In *Three Rivers No 5*, the liquidators of the collapsed bank, BCCI, had commenced an action against the Bank of England ("BOE") on behalf of its creditors after the Bingham inquiry, ordered by the Chancellor of the Exchequer, into the supervisory role of the BOE in the spectacular collapse of BCCI. The inquiry was conducted by Bingham LJ (as he then was). For the purpose of the inquiry, the BOE had set up its own unit, the Bingham Inquiry Unit ("BIU") to deal with all matters relating to the inquiry. The court held that *only* the *BIU* could be considered as a client for the purpose of legal advice privilege and all other employees, including the Governor himself, stood in the position of third parties providing information to the solicitors. Hence, all other documents prepared by *employees of the BOE* and sent to BOE's solicitors for advice in relation to its conduct did *not* fall under the scope of such privilege.

38 The decision in *Three Rivers No 5* has been almost universally criticised – and often trenchantly at that (see, but for a mere sampling, *Phipson on Evidence* (Sweet & Maxwell, 16th Ed, 2005), especially at para 23-60 and *The Law of Privilege* (Bankim Thanki, ed) (Oxford University Press, 2006) ("*Thanki*"), especially at paras 2.18–2.34 and 2.136–2.138); though *cf* Adrian Zuckerman, *Zuckerman on Civil Procedure – Principles of Practice* (Sweet & Maxwell, 2006) at paras 15-38–15-51). One of the central threads of the critique is that as a company can only act through its officers and employees, the decision in *Three Rivers No 5* is far too restrictive, impractical and unworkable. The House of Lords was in fact invited, in *Three Rivers No 6*, to consider and overrule *Three Rivers No 5* but declined to express a view on the Court of Appeal's ruling as that issue was not relevant to the appeal.

39 The issue arises, in the local context, as to whether or not *Three Rivers No 5* is, in any event, good law in the light of the relevant provisions of the Act (in particular, s 128 thereof).

40 In the court below, the Judge held that the words "by or on behalf of his client" in s 128 of the Act made a crucial difference. In particular, in her view, s 128 "makes no distinction between communications made by an individual and those made by his employee or agent", and that "[n]either is there a distinction made between communications made by a corporate client and those made by the corporate client's employees or agents" (see GD at [30]). The Judge concluded thus (see *id*):

> 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.

41 In our view, the Judge, with respect, has given too broad an interpretation of the ruling in *Three Rivers (No 5)*. That ruling does not lay down a general principle that all communications between a company and its legal advisers must be made by a specially appointed committee or that no communication made by an employee to the company's legal adviser is privileged. In that case, the English Court of Appeal held ([36] *supra* at [31]) that "the BIU, which was established to deal with inquiries and to seek and receive Freshfields' advice, is for the purpose of this application, the client rather than any single officer however eminent he or she may be [including, presumably, the Governor of the Bank of England]". Implicit in this finding would be that only the BIU was authorised to communicate with the Bank of England's lawyers. No other employee was authorised, including the Governor. The principle is that if an employee is not authorised to communicate with the company's solicitors for the purpose of obtaining legal advice, then that communication is not protected by legal advice privilege. We do not find this principle exceptional. When a company retains solicitors for legal advice, the client must be the company. But since a company can only act through its employees, communications made by employees who are authorised to do so would be communications made "on behalf of his client". The only relevant issue is whether the communication is made for the purpose of obtaining legal advice, and if so, the communication falls within the privilege, provided the other requirements of the privilege are present, *viz*, that the communications are confidential in nature, and

the purpose of the communication is for the purpose of seeking legal advice. Authorisation need not be express: it may be implied, if that function is related to or arises out of relevant employee's work.

42 In our view, *Three Rivers No 5* should be read in the context of the court's finding that the BIU (and no one else) was authorised to communicate with the bank's solicitors. In so far as s 128 of the Act is concerned, the company cannot itself make the communication to its solicitors: only individuals can do so, and those individuals would be those authorised to do so, expressly or impliedly. The words "by or on behalf of his client" in this particular provision embody, statutorily, the proposition just mentioned. Accordingly, we see no inconsistency between *Three Rivers No 5* and s 128 of the Act.

The relationship between legal advice privilege and litigation privilege

43 Because of the functional difference between legal advice privilege and litigation privilege (see [23] above), they operate in different ways. There are, in fact, a number of operational differences. *First*, legal advice privilege exists at any time a client seeks legal advice from his solicitor whether or not litigation is contemplated, whereas litigation advice applies only where litigation exists or is contemplated. The former applies only to confidential communications made for the purpose of seeking legal advice, and not just any communication made to the lawyer. Hence it does *not* apply to communications by *third parties* to the solicitor unless they were made to the solicitor as agent for the client. In this respect, we should note that although s 128 refers to communication made by or on behalf of his client, the words "*on behalf of*" do not signify that *any communication* by an agent is protected. The established principle is that only a communication made through the agent as a *conduit* that is protected. In the English Court of Appeal decision of *Wheeler v Le Marchant* (1881) 17 Ch D 675*,* Cotton LJ observed thus (at 684–685):

> It is said that as communications between a client and his legal advisers for the purpose of obtaining legal advice are privileged, therefore any communication between the representatives of the client and the solicitor must be also privileged. That is a fallacious use of the word "representatives." *If* the representative is a person employed as *an agent* on the part of the client to obtain the legal advice of the solicitor, of course he stands *in exactly the same position as* the client as regards protection, and his communications with the solicitor stand in the same position as the communications of his principal with the solicitor. *But these persons were not representatives in that sense.* They were representatives in this sense, that they were employed on behalf of the clients, the Defendants, to do certain work, but that work was not the communicating with the solicitor to obtain legal advice. *So their communications cannot be protected on the ground that they are communications between the client by his representatives and the solicitor.* In fact, the contention of the Respondents comes to this, that all communications between a solicitor and a third person in the course of his advising his client are to be protected. It was conceded there was no case that went that length, and the question is whether, in order fully to develop the principle with all its reasonable consequences, we ought to protect such documents. *Hitherto such communications [from third parties]* have *only been protected* when they have been in contemplation of some *litigation*, or for the purpose of giving advice or obtaining evidence with reference to it. And that is reasonable, because then the solicitor is preparing for the defence or for bringing the action, and all communications he makes for that purpose, and the communications made to him for the purpose of giving him the information, are, in fact, the brief in the action, and ought to be protected. *But here we are asked to extend the principle to a very different class of cases, and it is not necessary, in order to enable persons freely to communicate with their solicitors and obtain their legal advice, that any privilege should be extended to communications such as these*. [emphasis added]

4 4 *Secondly,* in contrast to legal advice, litigation privilege applies to every communication, whether confidential or otherwise so long as it is for the purpose of litigation. It also applies to communications from *third parties* whether or not they were made as agent of the client. This is the critical difference between legal advice privilege and litigation privilege: see *Wheeler v Le Marchant* ([43] *supra*) and the Singapore Court of Appeal decision of *Brink's Inc v Singapore Airlines Ltd* [1998] 2 SLR 657 at [20] ("*Brink's*"). This difference is explained by the different functions of the two privileges. One is concerned with protecting confidential communications between lawyers and clients, and the other is concerned with protecting information and materials created and collected for the dominant purpose of litigation.

45 However, the two forms of privilege *overlap*. As Lord Scott of Foscote put it in the recent House of Lords decision in *Three Rivers No 6* ([24] *supra* at [27]):

> [L]egal advice privilege has an undoubted relationship with litigation privilege. Legal advice is frequently sought or given in connection with current or contemplated litigation. But it may equally well be sought or given in circumstances and for purposes that have nothing to do with litigation. If it is sought or given in connection with litigation, then the advice would fall into both of the two categories. But it is long settled that a connection with litigation is not a necessary condition for privilege to be attracted: see, e g, *Greenough v Gaskell* (1833) 1 My & K 98, 102–103, per Lord Brougham and *Minet v Morgan* (1873) LR 8 Ch App 361). On the other hand it has been held that litigation privilege can extend to communications between a lawyer or the lawyer's client and a third party or to any document brought into existence for the dominant purpose of being used in litigation. The connection between legal advice sought or given and the affording of privilege to the communication has thereby been cut.

46 What is of particular significance in the context of the present appeal is the fact that if it is proved that the communications concerned, *ie*, the communications made by APBS to PWC and D&N (and *vice versa*) in connection with the joint undertaking under the terms of the first MASNET Announcement, are related to contemplated or imminent litigation, then it would follow that such communications would be covered by *both* legal advice privilege *and* litigation privilege. Indeed, the only communications which would not be covered by legal advice privilege would, as we have already noted, be those which emanate *from third parties.* However, *even such communications* would be covered by legal advice privilege if the decision in *Pratt Holdings* ([53] *infra*) is accepted as good law in Singapore in preference to the present English position as embodied in, most notably, in *Wheeler v Le Marchant* ([43] *supra*).

Impact of modern developments on legal advice privilege

47 The relationship between clients and legal advisers, especially in economic activities, has changed considerably since the legal privilege rules were formulated more than a century ago. Business has become much more complex, and so have the legal knowledge and skills that are required of lawyers to guide their clients safely in their commercial and investment ventures. Today, such clients not only need legal advice in the conduct of their business but also require multi-disciplinary advice from different professions in many of the problems they face or encounter. Furthermore, the nature of the advice that lawyers may be asked to give may also extend to other fields of learning which go beyond what was traditionally legal advice. In the English Court of Appeal decision of *Balabel v Air India* [1988] 1 Ch 317 ("*Balabel*"), one of the most influential decisions on the nature of legal advice privilege in modern conditions, Taylor LJ (as he then was, and with whom Lord Donaldson of Lymington MR and Parker LJ agreed) said (at 330):

> Although originally confined to advice regarding litigation, the privilege was extended to non-

litigious business. Nevertheless, despite that extension, the purpose and scope of the privilege is still to enable legal advice to be sought and given in confidence. *In my judgment, therefore, the test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly.* Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be *a continuum of communication and meetings* between the solicitor and client. … Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do". But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. *Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.* [emphasis added]

48 Taylor LJ's observations have been approved subsequently in numerous English and other Commonwealth judgments. In *Three Rivers No 6* ([24] *supra* at [111]), Lord Carswell said:

I agree with the view expressed by Colman J in *Nederlandse Reassurantie Groep Holding NV v Bacon & Woodrow Holding* [1995] 1 All ER 976, 982 that the statement of the law in *Balabel v Air India* does not disturb or modify the principle affirmed in *Minter v Priest*, that *all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, notwithstanding that they do not contain advice on matters of law or construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client*. [emphasis added]

49 And, in the English High Court decision of *Guild (Claims) Ltd v Eversheds (a firm)* [2001] Lloyd's Rep PN 910, Jacob J (as he then was) had this to say (at [22]):

I think that it is not possible to deal with the question of duty in relation to quasi-commercial matters in the abstract. Solicitors concerned with assisting parties in relation to commercial transactions are often faced with commercial considerations. *Ultimately, commercial matters are for the client but things are not so simple that one can say the solicitor's duty simply stops at questions of law*. [emphasis added]

50 Other decisions where similar statements of approval of Taylor LJ's observations in *Balabel* include the English decision of *Nederlandse Reassurantie Groep Holding NV v Bacon & Woodrow (a firm)* [1995] 1 All ER 976 and *Three Rivers No 6* ([24] *supra*); the Federal Court of Australia decision of *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 203 ALR 348 as well as the Hong Kong decisions of *Time Super International Ltd v Commissioner of the Independent Commission Against Corruption* [2002] HKEC 821 and *Yau Chiu Wah v Gold Chief Investment Limited* [2003] 3 HKLRD 553 at [43].

Legal advice privilege and third parties

51 We have referred to many judicial statements according recognition to the changing nature and scope of legal advice in a more complex world. The case under appeal is a good example: APB and APBS needed not only the advice of accountants but also the advice of lawyers to determine the

nature of the legal claims that would inevitably be made by the banks as well as the complexity of the financial and legal issues arising from Chia's unauthorised loans. In this appeal we have a complex situation where the respondent has claimed legal advice privilege not merely in the context of communications between it and its solicitors but, rather, in the context of communications rendered to it as a result of the joint efforts of its solicitors and its accountants in investigating the massive fraud by its financial controller and the consequent financial impact on its operations.

52 This raises the important issue as to whether the draft reports submitted by PWC to the respondent are protected by legal advice privilege as PWC are alleged by the appellant banks to be third parties. The English position is clear: communications to and from a third party are not protected by legal advice privilege (see the leading decision of *Wheeler v Le Marchant* ([43] *supra*), as well as *Re Highgrade Traders Ltd* [1984] BCLC 151; *Ventouris v Mountain* ([24] *supra*); *Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583 ("*Price Waterhouse*"); *The Patraikos 2* [2001] 4 SLR 308; as well as *Thanki* ([38] *supra* at para 2.04) and Charles Hollander, *Documentary Evidence* (Sweet & Maxwell, 9th Ed, 2006) at paras 13-05 and 13-06), unless the third party is an agent for communication, and in this respect an agent is a mere conduit and nothing more (see [43] above, as well as, for example, not only *Wheeler v Le Marchant*, but also the House of Lords decision of *Jones v Great Central Railway Company* [1910] AC 4 at 6; the English Court of Appeal decision of *Anderson v Bank of British Columbia* ([24] *supra*); and the New Zealand High Court decision of *C-C Bottlers Ltd v Lion Nathan Ltd* [1993] 2 NZLR 445). We have already mentioned that the Judge found that PWC was for this purpose an agent for receiving and communicating confidential information from the respondent to D&N and that the fact that PWC was a co-author of the draft reports did not make them any less an agent for the purpose of s 128 of the Act. In our view, the Judge's holding is at odds with established English authority that a third party is only an agent if he performs no function other than to act as a conduit for communication between the client and the legal adviser. In so far as PWC was a co-author of the PWC draft reports and had done considerable work in preparing the reports, as borne out by the contents of second MASNET announcement, it would *not* be an agent of communication for the purpose of legal advice privilege if we apply the English decisions. However, a recent Australian decision suggests that the distinction between an agent who is a mere conduit of communication and one who may at the same time be a creator of information for communication should no longer hold in modern conditions.

Pratt Holdings

53 The Australian Federal Court in *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357 ("*Pratt Holdings*") has recently suggested a broader and more flexible approach in giving protection to communications from *third parties* in the context of *legal advice* privilege. The facts in *Pratt Holdings* were straightforward. A corporation had asked an accountant to prepare a report valuing its losses in the context of a balance sheet reconstruction and financing exercise. The corporation then forwarded the report from the accountant to the lawyer who had in fact advised that such a report be obtained in the first instance. No litigation was contemplated at the material time. Hence, this particular case related only to legal advice privilege.

54 The Commissioner of Taxation subsequently sought statutory access to the report and the corporation claimed legal advice privilege on the basis that the report had been prepared for the dominant purpose of obtaining legal advice. Two of the three the judges were of the view that the accountant was *not* an *agent* of the corporation. In the circumstances, this raised squarely for the decision of the court the status of *third party* communications in the context of *legal advice* privilege.

55 The court held that legal advice privilege was indeed capable of being extended to such third party communications. But as the trial judge had not made an actual finding as to the client's

purpose(s) in having the report concerned created, the case was remitted back to the trial judge. The reasoning of the court is of the first importance and we will examine it now. Finn J was of the view that the distinction hitherto drawn between communications via agents and communications via third parties was "an apparently arbitrary distinction" ([53] *supra* at [3]). He observed thus (see *id*):

> The principal question in these appeals is whether we are, nonetheless, obliged to accept the distinction so drawn with *its inevitable and obvious triumph of form over substance*. I consider we are *not*. [emphasis added]

Finn J did not find any existing Australian authority that was binding on him, and was of the view that "the present question falls to be decided by reference to principle, legal policy and to such authority of other jurisdictions as is persuasive" (see at [34]). In the circumstances, "the obvious starting point is with what was the intended use (or uses) of [the] document which accounted for it being brought into existence", and that "[i]n answering that question – which is a question of fact … – attention necessarily must focus on the purpose (or purposes) of the person who created the document, or who, if not its author, had the authority to, and did, procure its creation" (see at [35]).

56 Finn J then proceeded to observe as follows (at [39]):

> I have already commented upon what I consider to be the *patent artificiality* flowing from the denial of privilege in such circumstances. If Pratt Holdings [the party claiming legal advice privilege] had its own and appropriately qualified accounting staff which prepared a like report, that report would have been privileged. Equally, if it had directed PricewaterhouseCoopers [the third party] to send the report directly to ABL [the firm of lawyers], it would likewise be privileged as Pratt Holdings would have thus constituted PricewaterhouseCoopers its agent to make the, or else a part of the … communication by Pratt Holdings to ABL for the purpose of obtaining legal advice. [emphasis added]

57 And, in so far as *general principle* was concerned, the learned judge opined thus (at [41]–[43]):

> The important consideration in my view is not the nature of the third party's legal relationship with the party that engaged it but, rather, *the nature of the function it performed for that party. If that function was to enable the principal to make the communication necessary to obtain legal advice it required, I can see no reason for withholding the privilege from the documentary communication authored by the third party. That party has been so implicated in the communication made by the client to its legal adviser as to bring its work product within the rationale of legal advice privilege.*
>
> There are, in my view, *clear reasons of policy that support extending* the privilege to such third party authored documentary communications. Whether a natural person or a corporation, a party seeking to obtain legal advice may not have the aptitude, knowledge, skill and expertise, or resources to make adequately, appropriately or at all such communication to its legal adviser as is necessary to obtain the advice required. *Such is commonplace today where advice is sought on complex and technical matters. To deny that person the ability to utilise the services of a third party to remedy his or her own inability or inadequacy unless he or she is prepared to forego privilege in the documents prepared by the third party, is to disadvantage that person relative to another who is able adequately to make the desired communication to a legal adviser by relying upon his or her own knowledge, resources, etc.*
>
> *For the law to provide such an incentive not to utilise the services of third parties in such*

circumstances is to undercut the privilege itself. It would not facilitate access to effective legal advice nor would it facilitate effective communication with legal advisers for the purpose of obtaining legal advice.

[emphasis added]

58 However, the counterweight to too liberal an extension of the doctrine *vis-à-vis* third parties is the requirement that the communication concerned be for the *dominant purpose* of giving legal advice (see also *per* Stone J, *id* at [86]). In this regard, Finn J was of the following view (at [47]):

> [N]otwithstanding the principal's stated purpose in having a documentary communication brought into existence, the principal may have so conducted himself or herself in the matter as to indicate that the intended use of the document authored by the third party was not its communication to the legal adviser as the principal's communication, but rather it was to advise and inform the principal concerning its subject matter, with the principal then determining (a) in what manner, if at all, the whole or part of the document would be used by the principal in making its *own* communication or (b) the purpose(s) for which the document could or should be used. ***The less the principal performs the function of a conduit of the documentary information to the legal adviser, the more he or she filters, adapts or exercises independent judgment in relation to what of the third party's document is to be communicated to the legal adviser, the less likely it is that that document will be found to be privileged in the third party's hands. This will be because the intended use of the document is more likely to be found to be to advise and inform the principal in making the principal's communication to the lawyer (whether or not that communication embodied wholly or substantially the content of the document) and not to record the communication to be made.*** [emphasis added in bold italics]

59 Stone J sought to distinguish the decision in *Wheeler v Le Marchant* ([43] *supra*). In particular, she was of the view that "[t]he letters from the surveyors [in that case] were not created for the purpose of obtaining legal advice for the client" and that "[i]n the absence of such purpose the rationale for legal professional privilege does not require that a communication be protected" ([53] *supra* at [95]). The surveyors in *Wheeler v Le Marchant* were, in fact, retained by the solicitors on behalf of the client to do certain work, but the purpose of the communications with the solicitor did not relate to the obtaining of legal advice as such (see *ibid*).

60 Like Finn J, Stone J was of the view (*id* at [102]–[106]) that:

> 102 … [T]he present issue must be decided by ***the application of principle, eschewing formalistic approaches and concentrating on substance.***
>
> 103 The history of legal professional privilege shows that the courts have been willing and able to adapt the doctrine ***to ensure that the policy supporting the doctrine is not sabotaged by rigid adherence to form that does not reflect the practical realities surrounding the application of privilege. The complexity of present day commerce means that it is increasingly necessary for a client to have the assistance of experts,*** including financial experts such as accountants, in formulating a request for legal advice and in providing legal advisers with sufficient understanding of the facts to enable that advice to be given. This much was recognised by Taylor LJ in Balabel.
>
> …

> 1 0 5 ***The coherent rationale for legal professional privilege developed by the High Court does not lend itself to artificial distinction between situations where that expert assistance is provided by an agent or alter ego of the client and where it is provided by a third party. Nor, in my view, should the availability of privilege depend on whether the expert opinion is delivered to the lawyer directly by the expert or by the client. Provided that the dominant purpose requirement is met I see no reason why privilege should not extend to the communication by the expert to the client. ...***
>
> …
>
> 106 I do not accept that this approach would lead to uncontrollable extension of the privilege. The difficulties in proving the relevant purpose should not be underestimated. Advice as to commercially advantageous ways to structure a transaction are extremely unlikely to attract privilege because the purpose in putting the advice together will, in most cases, be quite independent of the need for legal advice. Even if the parties have in mind that the advice will be submitted to a lawyer for comment, the purpose is unlikely to be the *dominant* purpose. Determining the dominant purpose underlying a communication may be difficult but no more so than many questions that come before courts. Courts would need to take into account exactly what function was served by the expert advice and whether it was really required in order to instruct the legal advisers fully. Obviously if the third party is an agent of the client and the client has the requisite purpose the determination is comparatively simple. Similarly if the material sought by the lawyer is required for litigation it is not difficult to determine the chain of authority and to find the requisite purpose … Ultimately the question is one of fact and the onus is on the person seeking privilege protection to establish the case.
>
> [emphasis added in bold italics]

61 Merkel J agreed (at [52]) with the judgments of both Finn and Stone JJ.

62 The reasoning of the judges in *Pratt Holdings,* apart from preferring substance to form, is particularly apposite in cases of large commercial frauds where the victims need expert advice not only to protect themselves from future frauds but also to determine the rights or liabilities in connection with the fraud. In the present case, the respondent was faced with precisely these two problems. Instead of obtaining a report from the accountants on the failings of its system of financial controls, the respondent employed two teams of experts to work together to ensure how such kinds of fraud would not be perpetrated again as well as how its financial exposure resulting from Chia's fraud could be defended. There is no doubt in our minds that, on the evidence, the respondent was seeking both accounting and legal advice when it appointed PWC and D&N to report on the problem. The only question we have to determine is which was the dominant purpose, and if on the evidence, the dominant purpose was for legal advice, we cannot see why, in principle, following the reasoning in *Pratt Holdings*, we should not hold that the draft PWC reports are subject to legal advice privilege.

63 However, since no argument was made to us by counsel for the parties who did not refer to *Pratt Holdings* (although Mr Alvin Yeo SC, counsel for Hypo, did make oral submissions before us, advocating the (contrary) English position), we are constrained from going further except to reiterate that the reasoning in *Pratt Holdings* appears sound and provides a sensible and a workable basis for balancing the need for complete confidentiality in a solicitor and client relationship with the need for disclosure of information which is not communicated for the purpose of obtaining legal advice. The approach in *Pratt Holdings* is principled, logically coherent and yet practical, and is also consistent with the reality of legal practice expressed in Taylor LJ's views in *Balabel* (see generally above at [47]–[50]).

64 We should add that in relation to legal advice privilege under s 128 of the Act, Mr Yeo did contend in his oral arguments that the obtaining of legal advice had to be the *sole* purpose of the communications in question before privilege would accrue. In response, counsel for the respondent, Mr Davinder Singh SC, contended that as long as communications were for the purpose of D&N's employment, whether this was a dominant or subsidiary purpose was irrelevant for the purpose of legal advice privilege.

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

66 We now turn to litigation privilege, which was the primary basis on which this appeal was argued by the parties below. The issue here is a short one: Was the appointment of PWC and D&N to advise on the matters set out in the first MASNET announcement for the purpose of legal advice in contemplation of litigation and was it the dominant purpose?

Litigation privilege

Introduction – common law or statute?

67 As already mentioned at the outset of this judgment, litigation privilege exists by virtue of *the common law*. Since, as we have stated earlier (at [34]), *s 131* of the Act (reproduced at [27] above) clearly envisages the concept of *litigation* privilege, there is no inconsistency between the common law and the statutory provisions. Accordingly, s 2(2) of the Act would apply to confirm the applicability of litigation privilege at common law in the local context (reproduced above at [31]) as there is no inconsistency between litigation privilege at common law and ss 128 and 131 read together: see *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd* [2006] 4 SLR 807, a decision of this court on the applicability of the English decisions on "without prejudice" communications in relation to s 23 of the Act.

68 We now proceed to consider the requirements of litigation privilege.

The applicable rules and principles

69 There are, in essence, two basic (and closely related) principles.

Is there a reasonable prospect of litigation?

70 Turning to the basic principles or requirements of litigation privilege, the threshold question is whether litigation must have been contemplated. This is only logical and commonsensical, for if litigation was not even contemplated to begin with, how could any party invoke litigation privilege in the first instance? This is a question of fact. The question is: At the time the client sought legal advice or consulted his lawyer, did he have the prospect of litigation in mind? To determine his state of mind, we would need to know the circumstances in which legal advice was sought. In this respect, we are of the view that Taylor LJ's concept of a legal context in *Balabel* (although originally expounded in the context of legal advice privilege) is appropriate for this purpose. Was, in other words, the legal context in the present case one in which litigation was contemplated?

71 For this purpose, the generally accepted criterion is that of a "*reasonable prospect*" of litigation (see also, for example, *per* Lord Carswell in *Three Rivers No 6* ([24] *supra* at [83]) and *per* Rix J (as he then was) in the English High Court decision of *Hellenic Mutual War Risks Association (Bermuda) Ltd and General Contractors Importing and Services Enterprises v Harrison (The "Sagheera")* [1997] 1 Lloyd's Rep 160 at 166, as well as *Phipson on Evidence* ([38] *supra* at para 23-85) and *Singapore Civil Procedure 2003* (Sweet & Maxwell Asia, 2003) at para 24/3/15).

72 In the recent English Court of Appeal decision of *United States of America v Philip Morris Inc* [2004] EWCA Civ 330, for example, Brooke LJ (with whom Chadwick and Scott Baker LJJ agreed) observed thus (at [68]):

> In the present case it is quite clear that the judge correctly considered that a "mere possibility" of litigation did not suffice. He was also correct to conclude that the fact that there was "a distinct possibility that sooner or later someone might make a claim" was insufficient. So was "a general apprehension of future litigation". He repeated three times that the appropriate test was that litigation must have been reasonably in prospect. The expression "real likelihood" seems to have been used as a counterpoise to "a mere possibility", and I do not consider that any more can properly be read into this phrase. The judge was certainly not saying that there must have been a greater than 50% chance of litigation.

73 Adopting the general sense of the above passage, it is clear that there is no requirement that the chance of litigation must be higher than 50% (although as it was once thought that there must be a virtual certainty: see *Collins v London General Omnibus Company* (1893) 68 LT 831, a standard/threshold which was too high and unrealistic). We are content to accept that the test of a "*reasonable prospect*" of litigation is sufficient to raise the privilege.

The "dominant purpose" test

74 There is, however, the *second requirement* that has to be satisfied before litigation privilege can be successfully established, assuming that litigation was contemplated as having been reasonably in prospect. This second requirement relates to the *purpose* for which legal advice had been sought. If, of course, the sole purpose, on the facts of the case concerned, was for seeking legal advice in anticipation or contemplation of legal proceedings, there would be no problem – and *vice versa*. However, difficulties arise when there is *more than one purpose* for seeking such legal advice in a given case.

75 In the leading House of Lords decision of *Waugh v British Railways Board* [1980] AC 521 ("*Waugh*"), the House held that if the *domina*nt purpose for which legal advice had been sought and obtained was for anticipation or contemplation of litigation, then the advice concerned would be protected by litigation privilege. In arriving at this legal proposition, the House endorsed and adopted the *minority* view expressed by Barwick CJ in the Australian High Court decision of *Grant v Downs* (1976) 135 CLR 674.

76 The "dominant purpose" test in *Waugh* (now firmly established in England (see, for example, the English Court of Appeal decision of *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027, amongst many others)) has, in fact, been endorsed in the Singapore context (see, for example, the Singapore High Court decision of *Wee Keng Hong Mark v ABN Amro Bank NV* [1997] 2 SLR 629 at 631 and the Singapore Court of Appeal decision of *Brink's* ([44] *supra*)). It has also found favour in other jurisdictions as well (see, for example, the New Zealand Court of Appeal decision of *Guardian Royal Exchange Assurance of New Zealand v Stuart* [1985] 1 NZLR 596). Most significantly, perhaps, the Australian High Court (by a majority), in *Esso Australia Resources* ([24]

supra) chose to *overrule* its (majority) decision in *Grant v Downs*, and approved *Waugh* instead. *Waugh*, of course, adopted the *minority* view of Barwick CJ in *Grant v Downs* (see at [75] above). *However*, there was, this time around, *still* a *minority* view expressed. Both McHugh and Kirby JJ were of the view that the majority decision in *Grant v Downs* ought *not* to be overruled, although the majority (comprising Gleeson CJ and Gaudron, Gummow Callinan J) thought otherwise. In a subsequent decision, the Australian High Court, in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 192 ALR 561, confirmed its decision in *Esso Australia Resources* (with Kirby J expressly acknowledging (at [82]) that, although he was in a minority in the earlier decision, the principle laid down by the majority there "must be accepted", although McHugh J did not, apparently, make any express comment in this particular regard as such). Significantly, though, with the latest position adopted by the Australian High Court, the "dominant purpose" test in *Waugh* apparently represents the established law at the present time throughout the Commonwealth (including Singapore).

77 There might have been some doubt as to the Canadian position but, as far as we could tell, there were clear authorities that endorse the "dominant purpose" test in *Waugh* (see, for example, the Ontario Court of Appeal decision of *Chrusz* ([24] *supra*) and the Saskatchewan Court of Queen's Bench decision of *International Minerals & Chemical Corp (Canada) Ltd v Commonwealth Insurance Co* (1990) 47 CCLI 196 ("*International Minerals*")). Significantly, since an initial draft of this judgment was prepared, it has come to our attention that the Canadian Supreme Court has in fact endorsed the "dominant purpose" test in its recent judgment in *Minister of Justice* ([23] *supra* at [59]–[60]).

Our decision

Litigation privilege

78 We turn now to consider the rival arguments of the appellant banks and the respondent on whether, on the facts of this case, the respondent is entitled to claim litigation privilege with respect to the PWC draft reports.

The parties' arguments

79 The appellant banks' arguments that the respondent is not entitled to claim litigation privilege with respect to the PWC Report may be summarised as follows:

(a) The purpose for which the respondent commissioned PWC and D&N to undertake the work described in the first MASNET announcement was to reassure shareholders and investors in the immediate aftermath of Chia's arrest and this purpose is confirmed by the second MASNET announcement which disclosed that PWC's "work has revealed that the unauthorized payments had been made from APBS' bank accounts. The aggregate of all such authorized payments match the aggregate of payments into APBS' bank accounts from unauthorized accounts. All material cash bank balances of APBS have been accounted for."

(b) The respondent's basis of its claim for privilege is contradictory and inconsistent. In pre-action discovery in March 2004, the claim was based on the alleged presence of "handwritten advice" in the draft. For this reason, the AR found that the PWC draft reports were not privileged as the handwritten advice in the report could be "cleaned up". In these proceedings, 18 months later, the respondent now asserts, through Anthony Cheong's affidavit, that the PWC draft reports "contain and/or comprise confidential communications between D&N and the Special Committee".

(c) Tay Kok Chye's affidavit (Tay being Assistant General Manager, Finance of the respondent) filed in March 2004 merely asserted that "the reports are being prepared for the dominant purpose of obtaining legal advice in relation to the anticipated litigation brought by the various banks". This is merely a bare assertion which is inadequate to support a claim of litigation privilege.

(d) There was nothing in the first MASNET announcement which referred to litigation. Given the nature and scale of the fraud, accountants had to be appointed to uncover the extent of the fraud, to ascertain the loss, and to put in control procedures to prevent a recurrence of fraud. This work is unrelated to litigation. The second MASNET announcement confirms this. D&N is mentioned in the separate context of litigation. Accordingly, if litigation was contemplated in relation to the reports, it was merely for a subsidiary purpose.

(e) If the dominant purpose of the report were for litigation purposes, it would not have been left in draft.

(f) On an objective analysis of the evidence, the Judge's conclusion on dominant purpose is not supported by the evidence.

(g) The respondent is not entitled to argue that there was a change of purpose between the time when the report was commissioned (4 September 2003) and when the drafts were prepared (around 18 September 2003: see [97] below) since its evidence as to its state of mind has always focused on the time when the Special Committee and PWC were appointed. The respondent's position has always been that litigation was on its mind and featured as the dominant purpose from the outset. There is no evidential basis for any argument of a subsequent "change of purpose".

(h) Under the APBL Group Policy – Reporting Procedure on Fraud ("Reporting Procedure on Fraud"), it is stated that "all fraud shall be investigated and corrective action implemented", and that an investigative report must be issued as soon as possible after a fraud is reported. This is a requirement set by APBL to deal with the investigation of all frauds perpetrated in their operating subsidiary companies regardless of whether litigation was contemplated or whether legal advice was required. The PWC draft reports were prepared to comply with the Reporting Procedure on Fraud, and not for the purpose of anticipated litigation. If this was not the case, the investigations would have been done in private and not made public.

(j) In the light of the conflicting evidence, the Judge should have inspected the PWC draft reports before making her decision (we deal specifically with this argument at [101]–[104] below).

80 In response, the respondent argues as follows:

(a) The relevant time to consider in determining the respondent's motive for commissioning the report is the time the document is brought into being. The appellant banks themselves, in their submissions, admitted that there could be no question that litigation was in contemplation at the very latest by 5 September 2003. The first PWC draft report was prepared about two weeks after the Special Committee was appointed, which was well after litigation was contemplated.

(b) The objective facts and circumstances demonstrate that litigation was the dominant purpose of commissioning the reports. First, there was the size of the claim. Secondly, litigation

was imminent. Letters of demand were received around the same time PWC and D&N were engaged. Thirdly, the paramount interest in commissioning the PWC draft reports was to protect or advance the interests of APBS and its shareholders. It was clear at the material time that whatever the findings of PWC, APBS would in all likelihood be involved in significant litigation. The paramount concern was to protect and advance the interests of APBS and APBL.

(c) The MASNET announcements were not meant to address the purpose of the PWC draft reports. A MASNET announcement is an announcement which listed companies must release to the public under the relevant provisions of the Singapore Exchange's Listing Manual. Its aim is to ensure a fair and efficient market for trading of securities. APBL therefore had to reassure the investing public of what steps it was taking to protect APBL's financial interests. The MASNET announcement is used to announce facts, not speculate on possible claims against the company. They simply informed the shareholders of what they needed to know. They did not purport to define the scope or purpose of the PWC draft reports.

(d) The Reporting Procedure on Fraud merely sets out what should be done if fraud is discovered. It is then for the management to determine how to deal with the fraud, and if the management anticipates that litigation may follow, it must be permitted to take steps to ensure that any report produced is protected by privilege. In the present case, the senior management was already aware of the situation and took immediate steps to constitute the Special Committee. The Special Committee then took immediate steps to appoint D&N as its lawyers and PWC as special accountants to investigate the fraud. These steps were *not* taken in accordance with the Reporting Procedure on Fraud. The Reporting Procedure on Fraud therefore has no application. Further, even if the PWC draft reports were also for the purpose of complying with the Reporting Procedure on Fraud, this was a subsidiary purpose as, at that time, obtaining advice to fend of the appellant banks' claims was far more important that reviewing internal procedures. If the appellant banks' arguments are accepted, any responsible company which has a written policy which requires fraud to be investigated would be worse off claiming privilege than a company with no policy at all.

(e) The contents of the first MASNET announcement and the Reporting Procedure on Fraud merely constitute fundamental elements of any investigation of this nature, namely, to take steps such as identifying the fraudulent transactions, quantifying the loss and taking remedial action to prevent re-occurrence. But that does not preclude the PWC draft reports being privileged if they are or contain communications which are protected by legal advice privilege or are prepared for the dominant purpose of litigation.

Evaluation of parties' arguments

81 We agree with counsel for the appellant banks that a mere assertion of privilege is not sufficient to found privilege. We need to examine all the evidence before us. As Lord Denning MR observed in the English Court of Appeal decision of *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1972] 2 QB 102 (at 129):

> The affidavit should not be treated as conclusive, nor anything like it. A party cannot use the affidavit as a taboo or spell to prevent anyone looking at the documents.

82 Before evaluating the arguments of the parties, we should like to observe that they are substantially the same arguments that were put before the Judge. Accordingly, it would be useful to see how the Judge dealt with them.

83 The Judge found that the dominant purpose in the preparation of the PWC draft reports was for the purpose of litigation as, given the circumstances in which the reports were commissioned and prepared, litigation was contemplated by the respondent. Indeed, litigation was inevitable given the magnitude of the potential financial exposure of the respondent attendant upon the fraud of it chief financial officer over a period of more than four years. The objective facts and circumstances which the Judge took into account in arriving at her decision were as follows:

(a) On 5 September 2003, APBS, through D&N, had written to Hypo's lawyers on disavowing the unauthorised loans and accounts created by Chia, thus confirming its denial of liability, and making litigation inevitable.

(b) The prospect of litigation became a certainty by the time of the second MASNET announcement that the appellant banks' claims against APBS would be strenuously defended.

(c) The PWC draft reports were required for and also constituted the legal advice as to whether or not APBS's denial of liability could be maintained. The fact that these draft reports would aid in ascertaining the financial impact of the fraud on APBS was, in context, relevant for litigation as well.

(d) In the circumstances, recommendations, if any, on improving internal financial controls in APBS constituted a merely subsidiary purpose.

84 In our view we find that, on balance, the decision by the Judge that the dominant purpose of the reports was in aid of litigation is sustainable on the evidence. The facts of this case support the factual finding that the need for both legal and accounting advice was foremost in the minds of the directors of the respondent. Otherwise, there would have been little point in appointing D&N to undertake jointly with PWC the work that is referred to in the first MASNET announcement. As the Judge emphasised, PWC and D&N were required, *inter alia*, to quantify the financial impact of all the unauthorised transactions that were identified, their nature and the circumstances in which they had occurred. In this regard, we find the appellant banks' arguments with respect to the alleged inconsistencies in the various affidavits to be unpersuasive and agree with the reasoning of the Judge (see GD at [26]).

85 The scope of this particular joint undertaking can be appreciated by examining the events that had occurred before the appointment was made. It will be recalled that on 2 September 2003, CAD informed the respondent that Chia had used bank accounts fraudulently opened in the name of APBS by using forged documents and resolutions to borrow money for his own use. This was a fraud of a very serious magnitude or order. On 3 September 2003, the respondent had informed SEB that Chia had no authority to operate accounts in its name, which was at least an implicit denial of any liability for the loans taken by Chia under than account. On the same day, the respondent wrote to Hypo, Mizuho and Sumitomo, to ascertain if there were accounts opened in its name, requested all account opening documents and statement in its name and instructing them to immediately suspend operation of the said accounts until further notice.

86 These events called for an immediate and urgent response from the respondent to take all necessary actions to uncover the extent of Chia's fraud in order to determine its financial impact on the respondent's business. This objective required the services of PWC and D&N to discover and quantify the financial impact of the fraud and to determine the potential liability of the respondent to the appellant banks for the fraud of Chia. Given the huge unauthorised loans that the respondent would be called upon to repay, it is simply unarguable that the respondent would not have concluded that litigation was bound to occur by the time it appointed PWC and D&N to investigate the

unauthorised loans and assess their financial impact. In this regard, we agree with the respondent's argument to the effect that the MASNET announcements ought to be construed in their proper context. In particular, we do not think that the contents of the first MASNET announcement are inconsistent with the dominant purpose of the PWC-D&N joint investigation being for the purpose of litigation as litigation was well within the contemplation of the respondent.

87 True enough, as submitted by counsel for the respondent, from 4 September 2003 onwards, letters, demands and disavowals flew fast and furious between the parties and/their respective solicitors. On 3 September 2003, Hypo informed the respondent what was due on its account and on 4 September 2003, Sumitomo made a demand for payment. By this time, both the banks would have sought legal advice on the recoverability of their loans since it would be contrary to commercial sense to believe that they had expected the respondent to admit liability for the loans. This would be the relevant legal context in which the appointment of D&N was made, as litigation was already a reasonable prospect by then.

88 It is therefore reasonable to conclude that by the time PWC and D&N set to work a few days later, litigation had gone beyond being a reasonable prospect: it had become a reality. Thus by the time the joint investigation by PWC and D&N really got going, the prospect of litigation would have been foremost in the mind of the respondent. In our view, certainly by this time too, what would have been more important to the respondent would have been to get the best legal advice to mount the best defence in court. The dominant purpose then would have been to see whether the internal controls existing as at 2 September 2003 were in such a bad state that the respondent could be held to have been culpably negligent in failing to prevent Chia's fraud which had taken place over a period of four years. It is reasonable to assume that PWC would have identified the review or supervisory lapses, *if any*, of the directors, and the weaknesses, *if any*, in the respondent's internal control procedures and system, such as the reporting of specific loans of a certain size to the directors. D&N on its part would have given its legal advice on whether any findings by PWC would render the respondent liable for the unauthorised loans and how, strategically and tactically, a legal defence might be mounted *when the appellant banks sought to enforce their loans by court action, as they were bound to do.*

89 Further, by the time the *second* MASNET announcement was made, three out of the four substantive claims mounted in the context of the present proceedings had been filed. Hypo filed its claim on 21 September 2003, while SEB and Mizuho filed its claim on 23 September 2003. In this context, it is perhaps understandable that this particular announcement refers to the contesting of the claims "vigorously". Some three days after the announcement, on 27 September 2003, Sumitomo commenced court action against APBS to recover its loan.

90 Counsel for SEB and Mizuho, Mr Steven Chong SC, argued vigorously that the dominant purpose of the PWC draft reports was primarily *fact-finding*, and that this factual inquiry was conducted pursuant to APBS's own internal standard operating procedure, *viz*, the Reporting Procedure on Fraud, not merely to ascertain what had happened in fact but also to utilise such findings in order to devise a better system in order to prevent future transgressions. In our view, this argument does not take the appellants' case very far. Of course, the joint investigation would certainly lead to *factual findings,* but they could and would also lead to *legal findings* by D&N. What is *legally* material or significant is the *purpose* for which the factual findings would be *used.* In our view, the only issue is whether the PWC draft reports were commissioned and prepared for the dominant purpose of litigation. On this issue, we are of the view that the dominant purpose was litigation for the reasons we have given earlier. That the reports had other purposes, that of ascertaining the potential financial exposure of the respondent and of putting in place a more reliable system to prevent future frauds cannot be denied. However, in the context of this case, they were but

subsidiary purposes. Indeed, the former purpose constituted an integral part of the above *factual* backdrop against which the *legal* findings by D&N would be made.

91 Where, of course, a particular report is made as a matter of *routine* in the course of one's daily duty *and not* with reference to any litigation at all, then it would obviously not be privileged (see the English decision of *Cook v North Metropolitan Tramway Company* (1889–90) 6 TLR 22). This is *clearly not* the case in so far as the present proceedings are concerned.

92 One might, in fact, usefully contrast the situation in the present proceedings with that in *Waugh* ([75] *supra*). In that case, the relevant affidavit of the party claiming litigation privilege actually *conceded or admitted* that the two purposes contained therein – for the purpose of routine returns and for contemplated litigation – were of *equal* importance. Hence, the "dominant purpose" requirement was not, *ex hypothesi*, satisfied. The material part of the affidavit in *Waugh* itself read as follows:

> 3. The general manager of the Eastern Region is required (as are the general managers of the other railways regions) to submit returns to the Department of [the] Environment in respect of accidents occurring on or about any railway … 6. It has long been the practice of the board [the British Railways Board] and its predecessors to require that returns and reports on all accidents occurring on the railway and joint internal departmental inquiries into the causes of the said accident be made by the local officers of the board who would forward them to their superiors in order to assist in establishing the cause of such accidents. 7. Such reports and the statements of witnesses to such accidents are made *for the purposes mentioned in* paragraphs 3 and 6 of this affidavit *and equally for the purpose of* being submitted to the board's solicitor as material upon which he can advise the board upon its legal liability and for the purpose of conducting on behalf of the board any proceedings arising out of such accidents … 11. The internal inquiry report in fact states on the face of it that it has *finally* to be sent to the solicitor for the purpose of enabling him to advise the board. [emphasis added]

93 Lord Wilberforce, in the case itself, observed thus ([75] *supra* at 531):

> *[T]he affidavit* makes it clear that the report was prepared for *a dual purpose*: for what may be called railway operation and safety purposes and for the purpose of obtaining legal advice in anticipation of litigation, *the first being more immediate than the second, but both* being described as *of equal rank or weight*. [emphasis added]

94 It should, of course, be borne in mind that prior to the holding of the House itself in *Waugh*, it was *unclear* what the law with respect to this particular aspect of litigation privilege was. It is therefore highly improbable or unlikely that we will find such admissions or concessions in future cases now that *Waugh* has laid down – in no uncertain terms – the "dominant purpose" requirement (as to which, see generally [74]–[77] above).

95 However, one thing is clear: Much will depend on the actual factual matrix concerned. In the context of the present proceedings, for example, the appellant banks sought to rely on *Price Waterhouse* ([52] *supra*). However, Millett J (as he then was) made an express finding that the dominant purpose of the investigation in that case was to establish the facts necessary to enable the defendant bank's financial position to be determined. As we have already pointed out above, the dominant purpose in these proceedings is quite different and was clearly related to contemplated litigation.

96 In our view, the second MASNET announcement made on 24 September 2003 that legal

advice had been sought and that APBL had been advised that the respondent was not liable to the banks was merely the *culmination* of the joint undertaking. Between 3 September 2003 and 24 September 2003, D&N would have been working jointly with PWC to prepare the report, and it is in our view not unreasonable to conclude that the draft reports were substantially the basis of the respondent's statement in the second MASNET announcement that it was not liable for the unauthorised loans and would "contest [the claims of the appellant banks] vigorously".

97 With respect to the appellants' argument that the purpose of the PWC-D&N undertaking was always fact finding, we find that it does not accord with the law. It is common ground that the question of dominant purpose is to be determined by the purpose at the time when the documents were created. Counsel for the respondent has submitted that case law has recognised that the motive for procuring a report may well change over time (see the Alberta Court of Queen's Bench decision in *Blair v Wawanesa Mutual Insurance Co* [1998] ABQB 1025 (CanLII)). So, when was the first draft report created? On the evidence it could only have been created within a reasonable period after 4 September 2003. Counsel for the respondent in the court below informed the Judge, in response to her question, that the first draft report was prepared two weeks after the appointment of the Special Committee. Counsel has asserted that he was in a position to provide the information as D&N was involved in the preparation of the report. We have no reason to doubt this, and neither have the appellants made an issue of this.

Legal Advice Privilege

98 In view of our conclusion that litigation privilege applies to the PWC draft reports, it must also follow that legal advice privilege also applies to any legal advice embedded in or which forms an integral part of the reports, even though the reports themselves might have been drafted by PWC and forwarded to the respondent by PWC directly. In our view, we do not place much significance on these two factors so long as it is clear that D&N had joint authorship of the reports. In this connection, we have no reason to disbelieve the sworn statement of Anthony Cheong that D&N was indeed a co-author of the report. The question here is whether the legal advice is so embedded or has become such an integral part of the reports that it cannot be redacted from them. In this regard, the Judge has found, as follows (see GD at [41]):

> [T]he 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.

99 We have no reason to disagree with the Judge on this particular finding. Even if the PWC draft reports did, *literally*, contain *ostensibly* non-privileged material, such material would form the *backdrop* against which the legal advice as to how the respondent should mount the best legal defence against the appellants' claims: (see also *Re Highgrade Traders Ltd* ([52] *supra* at 173–174) as well as *In re Sarah C Getty Trust* [1985] QB 956). As has been aptly observed by a leading author (Hollander ([52] *supra* at para 12-07)):

> Where part of a document contains privileged matter, and the remaining unprivileged, it is not necessary to disclose the privileged matter. *If the document deals with a single subject-matter*

and can be said to have been brought into existence either for the purpose of giving or getting legal advice or for the dominant purpose of gathering evidence, it is permissible to claim privilege for the entire document. *If the document does not satisfy this test, then the document is not privileged as a whole but if part of the document refers to privileged matters, the privileged part may be blanked out*. This analysis can be stated as a result of the [English] Court of Appeal decision in *GE Capital Corporate Finance v Bankers Trust Company* [[1995] 1 WLR 172] as explained by Rix J. in *The Sagheera*. [emphasis added]

100 However, in situations where part of the document contains privileged material, and the remaining part is unprivileged, *and* where the *unprivileged part is separable from, and is not integral to,* the privileged part of the document, then redaction of the privileged parts may be carried out and the rest of the document revealed to the opposing party through the usual discovery process. Similarly, mere references to legal advice in otherwise unprivileged documents can be redacted (see Hollander ([52] *supra* at para 12-09)). In short, parties should be slow to claim privilege for entire documents where there is only partial or even trifling reference to legal advice or communications leading to the giving or obtaining of legal advice, *and/or (and this is of particular importance) where the ostensibly non-privileged parts do not play an integral role in the context of the relevant legal analysis*

Should the Judge have inspected the PWC draft reports?

101 We will now address the appellants' argument (at [79] above) that the Judge was wrong in not exercising her discretion to inspect the PWC draft reports to determine whether or not they contain legal advice, and if so whether such advice could be redacted from the reports. It is clear to us that the Judge decided against inspection because she was satisfied that the evidence before her showed that the said reports were prepared for the dominant purpose of litigation. Since we have agreed with her finding on this issue, it follows that this argument must be rejected.

102 Nevertheless, we wish to make some observations for the guidance of judges and judicial officers who may be faced with the same problem in future cases. One of the major difficulties facing the court in situations involving a claim of either legal advice privilege and/or litigation privilege is the fact that the claim is invariably based on affidavit evidence. Much time and argument are then devoted by the parties to persuading the court as to what the true factual position is, and what the law is in relation to that factual position, as has happened in this case. An inspection by the judge, pursuant to s 164 of the Act, would quickly solve the dispute between the parties, thus saving time and money for the parties: see also Jeffrey Pinsler, *Singapore Court Practice 2006* (LexisNexis, 2006) at para 24/13/3. Such an approach might be an effective and practical "middle ground" which ensures that the claim to legal professional privilege is not abused, hence ensuring that the competing public policy that all available evidence ought to be disclosed is fulfilled to the fullest extent possible.

103 We agree with this approach. As Woodhouse P put it in the New Zealand Court of Appeal decision of *Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290 at 295, for the court to proceed otherwise without the benefit of inspection of the documents concerned would "often" result in the court depending "on processes of sheer speculation, leaving the Judge himself grasping at air". In the learned judge's view (and we agree), "[t]hat cannot be sensible nor is it necessary when by the simple act of judicial reconnaissance a reasonably confident decision could be given one way or the other" (see *id*).

104 However, there is also a case for using this approach only in cases where the judge has a real doubt about the claim of the party seeking to resist discovery on the ground of legal professional privilege. In the English Court of Appeal decision of *Westminster Airways Ltd v Kuwait Oil Co Ltd*

[1951] 1 KB 134, Jenkins LJ observed thus (at 146):

> [T]here is nothing in the rule, or in the authorities, to constrain the court to hold that, in every case where a claim to privilege is made and disputed, the party seeking production is entitled to come to the court and (as it were) demand as of right that the court should go behind the oath of the opposite party and itself inspect the documents. The question whether the court should inspect the documents is one which is a matter for the discretion of the court, and primarily for the judge of first instance. Each case must depend on its own circumstances; but if, looking at the affidavit, the court finds that the claim to privilege is formally correct, and that the documents in respect of which it is made are sufficiently identified and are such that, prima facie, the claim to privilege would appear to be properly made in respect of them, then, in my judgment, the court should, generally speaking, accept the affidavit as sufficiently justifying the claim without going further and inspecting the documents.

This approach was accepted by the New Zealand Court of Appeal in *Taranaki Co-operative Diary Company Limited v Rowe* [1970] NZLR 895, where Turner J, delivering the judgment of court said (at 904), "[t]he jurisdiction to inspect the documents of one party without disclosing what is in them to the other is perhaps one to be *conservatively exercised*" [emphasis added]. Subsequently, Cooke J (as he then was), in the New Zealand Court of Appeal decision of *Guardian Royal Assurance v Stuart* ([76] *supra*) observed thus (at 599):

> As in previous cases in this Court (see *Konia v Morley, Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 2)* [1981] 1 NZLR 153 and *Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290) *inspection of the documents by the Judges has proved illuminating. High Court Judges now appear to be adopting this practice quite commonly in disputed privilege claims. Experience suggests that its advantage in being likely to lead to a more just decision outweighs the disadvantage that only the Judge and not* the other side sees the documents if the claim to privilege is upheld. Accordingly, in the field of legal professional privilege at least, I think that *in general a Judge who is in any real doubt and is asked by one of the parties to inspect should not hesitate to do so.* [emphasis added]

Conclusion

105 For the reasons we have given, we agree with the Judge and find that on the facts of this case and given the relevant legal context, both litigation as well as legal advice privilege would apply with regard to the PWC draft reports. Accordingly, the appeals are dismissed with costs.

Addendum to judgment

8 March 2007

Andrew Phang Boon Leong JA:

106 After this judgment was delivered, it was brought to our attention that there was a factual error in [89] in that the claims referred to therein were not filed on the stated dates. However, the claims were *made* before the date of the second MASNET Announcement and [89] was intended to convey that fact.