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IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 December 2016

Before :

THE HONOURABLE MR JUSTICE HILDYARD

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THE RBS RIGHTS ISSUE LITIGATION
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Jonathan Nash QC and **Hannah Glover** (instructed by **Signature Litigation LLP**) for the **SG Group of Claimants**
Sonia Tolaney QC, Adam Johnson and **Natasha Bennett** (instructed by **Herbert Smith Freehills LLP**) for the **Defendants**

Hearing dates: 7 and 8 November 2016
Supplemental written submissions 11 November 2016
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Judgment Approved

Mr Justice Hildyard :

Scope of this judgment

1. This judgment concerns three issues arising in the context of RBS's claim for privilege in respect of two categories of document of which the Claimants now seek specific disclosure and inspection. There is no dispute as to the relevance of the documents in question. Only 'legal advice privilege' and 'lawyers' working papers privilege' are claimed.

2. Broadly stated, the three issues are:

   (1) Whether, if English law, as the *lex fori*, applies to the issue, the decision and reasoning of the Court of Appeal in *Three Rivers District Council and others v Governor and Company of the Bank of England (No 5)* [2003] QB 1556 ("*Three Rivers (No 5)*") applies to preclude the claim for privilege: I shall call this "the *Three Rivers (No 5)* Point";

   (2) Whether RBS is entitled to rely on the federal law of the USA as the law applicable to the particular issue, and if so, whether under that law the claim of privilege is maintainable: I shall call this "the Applicable Law Point";

   (3) Whether, if under US federal law RBS would be entitled to maintain a claim of privilege, the English Court has a discretion and should exercise it to order that

disclosure or inspection may be withheld, even if the issue is governed by English law: I shall call this "the Discretion Point".

Context of these interlocutory applications

3. These interlocutory issues arise in the context of what has become known as "*the RBS Rights Issue Litigation*".

4. The litigation, which comprises various actions all subject to a GLO, concerns a rights issue of shares in the Royal Bank of Scotland ("RBS") which was taken up between 15 May 2008 and 6 June 2008 ("the Rights Issue").

5. By the various actions, shareholders in RBS seek to invoke statutory remedies against RBS under sections 87A, 87G and 90 of the Financial Services and Markets Act 2000 ("FSMA") whereby to recover substantial investment losses incurred further to the collapse of RBS shares on the grounds that the prospectus for the Rights Issue was not accurate or complete.

6. In some of the actions the Claimants also seek recovery against certain of the key RBS directors responsible for that prospectus.

7. Many of those who had subscribed for shares pursuant to the Rights Issue claim to have suffered losses amounting to most of the value of their investment in the Rights Issue shares. The amounts claimed are very considerable indeed.

8. The actions are due to be heard in March 2017.

The categories of documents for which the claim of privilege is made

9. The two categories of documents of which disclosure and inspection are sought and the claims for privilege are made are as follows:

   (1) Transcripts, notes or other records of interviews conducted by or on behalf of RBS with employees and ex-employees as part of 'Project Mortar', which was the name given by RBS to the investigation it undertook as part of RBS's response to two US Securities and Exchange Commission subpoenas relating (broadly) to RBS's sub-prime exposures; and

   (2) Transcripts, notes or other records of interviews conducted by or on behalf of RBS as part of its investigation into allegations made by Mr Victor Hong ("Mr Hong") concerning RBS Greenwich Capital's marketing of Super Senior CDOs and other matters of which Mr Hong became aware during his employment at RBS Greenwich (the "Hong Investigation").

10. The transcripts, notes or other records ("the Interview Notes") fall into two categories: (i) Hong Investigation Review Interview Notes and (ii) 126 Project Mortar Interview Notes.

11. As part of Project Mortar and the Hong Investigation RBS interviewed 124 individuals across a number of divisions, locations and levels of seniority. RBS has provided a list of its interviewees to the Claimants.

12. RBS's evidence is that the only documents in existence within these categories are Interview Notes prepared by RBS's in-house lawyers (in respect of the Hong Investigation) and variously by Wilmer Hale, Travers Smith (as agents for Wilmer Hale) and non-lawyers within the RBS Group Secretariat (also as agents for Wilmer Hale) in respect of Project Mortar, each of which is said to summarise those interviews.

13. In the case of Mr Hong, the interview was carried out by Dickstein Shapiro LLP who were retained as external counsel by RBS. Mr Hong had his own attorney at the interview.

14. There is no dispute that RBS authorised each of the interviewees to participate in the relevant interviews. That is so in the case of Mr Hong, who was obliged to participate at the request of RBS under the terms of the agreement relating to the termination of his employment, as it is in the case of the other interviewees.

15. Nor is there any dispute that the interviewees were told that the Interview Notes would be, and be kept, confidential and would be subject to what was apparently described to them as "attorney-client privilege". (This was not initially expressly stated in the evidence; but evidence expressly confirming this was filed by RBS without objection on the second day of the hearing.)

The claim for privilege in outline

16. RBS resists the disclosure and inspection of the Interview Notes on the basis that they are subject to legal advice privilege, alternatively (in respect of all but those of the Interview Notes prepared by members of the RBS Group Secretariat, for which such privilege is not asserted) that the Interview Notes are lawyers' privileged working papers. No claim is made to litigation privilege.

17. As previously indicated, RBS also resists disclosure on the basis that the Court ought to apply the federal law of the United States of America ("US law") under which the Interview Notes are said to be privileged. RBS submits, and it seems plain, that if (as the Claimants contend) the Interview Notes are not privileged under English law, then US law provides a wider protection which the Court should uphold.

The claims to legal advice privilege elaborated

18. The basis of RBS's claim to legal advice privilege is that each of the Interview Notes records a communication between a lawyer and a person authorised by RBS to give instructions to its lawyers, and that as such those communications are privileged. As indicated above, those persons included both employees of RBS and ex-employees.

19. In relation to 21 of the Project Mortar interviewees, RBS alleges that members of its Group Secretariat (who were not acting as lawyers) acted as agents or "channels of communication" through which the interviewees provided instructions to RBS's lawyers.

20. RBS does not assert that the Interview Notes were part of a communication between RBS and its lawyers in which advice was sought or given. It does not suggest that the interviewees were themselves seeking or being provided with legal advice.

21. RBS accepts that the Interview Notes and their communication comprised information gathered from employees or former employees at the instance of RBS's lawyers for the purpose of enabling RBS to seek legal advice from its external counsel. Thus, for example, in his witness statement dated 26 October 2016, Mr Paul Robert Eckert ("Mr Eckert"), a partner in Wilmer Hale, described his firm's role in this context (and the connections with the US, which may be relevant in the context of the Applicable Law Point) as follows:

> "Wilmer Hale's Washington DC office was instructed to advise RBS (including in the UK and in Connecticut) in respect of the first of these two investigations – Project Mortar. Without waiving privilege, Wilmer Hale's work in respect of this Project involved collecting relevant factual information from employees and former employees of RBS based in the United States of America and Europe. This information was collected for the purposes of advising RBS on their response to the two SEC subpoenas. Whilst Wilmer Hale were primarily responsible for advising RBS, RBS also instructed Travers Smith LLP in England…
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> …
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> …in order to collect the factual information necessary to advise RBS, interviews were conducted with certain current and former RBS employees. These interviews were carried out by Wilmer Hale in the US…and by Travers Smith (sometimes accompanied by a member of Wilmer Hale's team) and RBS Group Secretariat in the UK. The interviews carried out by Travers Smith and RBS Group Secretariat were conducted on the instructions and under the supervision of Wilmer Hale. I note for completeness that Dickstein Shapiro conducted the interview of Victor Hong in New York and that the prior internal review was conducted by RBS's US legal team in Connecticut."

22. RBS contends that, under English law as well as US law, any communication by an employee who is authorised to communicate with a legal adviser for the purpose of his or her employer seeking legal advice is privileged: and that it is no part of the test that the communication should consist of instructions rather than information.

23. Accordingly, RBS submits that the communication of factual information (in this case, evidenced in the Interview Notes) gathered by or for the purpose of being provided to its lawyers is privileged, provided that the person providing and communicating the information was authorised to do so by RBS.

Objection to RBS's claim to legal advice privilege

24. The Claimants submit that RBS's claim to legal advice privilege is misconceived. They submit that communication of *factual information* by an employee of the company to the legal adviser is not privileged and that legal advice privilege only covers communications between a client and his lawyer for the purpose of the lawyer giving and that client seeking or receiving legal advice.

25. Thus, the Claimants submit, the gathering and communication of information by a person who is not the client is not protected by privilege, even if the information is gathered and communicated by that person to his employer's lawyer with the authority and at the request of the client and/or its lawyers, and even if the client is that person's employer.

The relevant authorities on legal advice privilege

Three Rivers (No 5)

26. It is common ground that the leading authority for the purposes of this application and the determination of RBS's claim to legal advice privilege under English law is the Court of Appeal's decision in *Three Rivers (No 5).*

27. In *Three Rivers (No 5)* the Claimants, the liquidators and creditors of a bank ("BCCI"), brought an action against the Bank of England ("the Bank") for misfeasance in public office in respect of its supervision of BCCI before its collapse. The Claimants sought disclosure of numerous documents which had been produced for a private non-statutory inquiry into the Bank's supervision of BCCI conducted by Bingham LJ, as he then was ("the Bingham Inquiry").

28. In that case, a special unit had been specifically established to deal with inquiries and to seek and receive advice from Freshfields, namely the Bingham Inquiry Unit ("BIU"). The BIU comprised three Bank officials who had been appointed by the Governor of the Bank to deal with all communications between the Bank and the Bingham Inquiry.[1] All the BIU's communications with the Bingham Inquiry were the subject of extensive legal advice from Freshfields and counsel instructed by them. This advice covered all aspects of the preparation and presentation of the Bank's evidence and submissions to the Bingham Inquiry.

29. BCCI's application related to four categories of documents:

    (1) documents prepared by Bank employees which were intended to be sent to, and were in fact sent to, Freshfields;

    (2) documents prepared by Bank employees with the dominant purpose of the Bank's obtaining legal advice but not, in fact, sent to Freshfields;

    (3) documents prepared by Bank employees without the dominant purpose of obtaining legal advice but in fact sent to Freshfields;

    (4) documents prepared by Bank employees who by the date of the application for disclosure were no longer employed by the Bank.

[1] See paragraph 3 of the judgment for a description of the BIU.

30. BCCI did not seek disclosure of documents passing between the BIU and Freshfields, or vice versa, or of any of Freshfields' internal memoranda or drafts. Counsel for BCCI (Mr Pollock QC) accepted that the BIU was, for the purpose of the inquiry, the client of Freshfields and that communications passing between the BIU and Freshfields were lawyer/client communications and thus covered by legal advice privilege.

31. Accordingly (and it is a point much emphasised on behalf of RBS), the Bank's contested claim to privilege was in respect of what Counsel for RBS in this case described as "purely *internal* documents, that is, documents which Bank employees sent to other Bank employees (such as members of the BIU), not to Freshfields". The Bank's essential argument was that these internal documents were privileged because they had been prepared for the dominant purpose of obtaining legal advice.

32. At first instance, Tomlinson J (as he then was) held (see para. 30 of the judgment, reported at [2002] EWHC 2730 (Comm)) that:

> "an internal confidential document, not being a communication with a third party, which was produced or brought into existence with the dominant purpose that it or its contents be used to obtain legal advice is privileged from production. The purpose must be that of the author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence. These internal documents were privileged because they had been prepared for the dominant purpose of obtaining legal advice."

33. According to Tomlinson J, the privilege covered (see para. 33):

> "…the continuing process of producing drafts or information required by the legal advisers to enable them to give advice to the Bank on the form of its submissions, evidence and responses to the Inquiry."

34. Tomlinson J recorded (see para. 34) that he did:

> "…not regard [his] decision as breaking any new ground…[it seeming to him]…likely that privilege has routinely been claimed and probably never challenged in relation to precisely similar or analogous exercises conducted in relation to statutory inquiries and other non-adversarial proceedings."

Nevertheless, he also noted (*ibid.)*, lest it be thought that this opened floodgates, that:

> "It is only on somewhat unusual facts and in the light of exceptionally cogent evidence that the dominant purpose test has in this case been satisfied in relation to a very considerable number of documents."

35. BCCI appealed. The Court of Appeal (Lord Phillips of Worth Matravers MR, Sedley and Longmore LJJ) in a single judgment of the Court (given by Longmore LJ),

concluded that the Bank was not entitled to privilege in any of the categories concerned, and allowed BCCI's appeal.

36. As RBS has expressly acknowledged, that decision is, of course, binding on me and, on one view, it is sufficient to consider it and any cases subsequent to it. However, *Three Rivers (No 5)* is a controversial decision; and the controversy here is as to its proper scope. In determining whether the decision is a departure from previous authority or confined to its own admittedly quite special facts, I think it of assistance to consider briefly its antecedents and certain key authorities on which the Court of Appeal based their judgment.

37. The substratum (if I may so describe it) of that judgment is its reconfirmation of the differences in English law, established in the nineteenth century and first clearly enunciated in *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, between legal advice privilege and litigation privilege.

38. Put shortly, litigation privilege protects the assembly and content of evidence for the purpose of litigation and thus focuses on the purpose for which the documentation has been obtained or assembled; whereas legal advice privilege applies only to the confidential communications between a party and his legal advisers for the purpose of enabling that party to obtain informed and professional legal advice, and thus is confined to confidential communications within that relationship and for the purpose of its fulfilment.

39. Thus, in *Anderson v Bank of British Columbia,* Mellish LJ stated (at page 659) that potential evidence obtained in order to decide whether to bring or defend an action may be privileged:

> "…but I cannot think that that ought to be held to apply to information which a principal asks his agent to give respecting the matters which the agent has done for and on account of the principal. That is information respecting matters which in point of law are the acts of the principal himself, and it is information respecting matters as to which the knowledge of the agent is the knowledge of the principal. In point of law, the principal is to be deemed to have known the facts before he has actually got personal information about them. I cannot but think that, as you are entitled to ask the principal what he knows respecting those facts, you must necessarily be entitled to the information which his agent has sent respecting them."

40. The "very limited character" of the protection provided by legal advice privilege, and the differences between that form of protection and the protection afforded by litigation privilege "in a very different class of cases", were emphasised by all three judges in the Court of Appeal in *Wheeler v Le Marchant* (1881) 17 Ch D 675.

41. They agreed that it was in substance "a rule established and maintained solely for the purpose of enabling a man to obtain legal advice with safety" (*per* Sir George Jessel MR at pp 682-683), and confined "entirely to communications which take place for the purpose of obtaining legal advice from professional persons" (*per* Brett LJ at p

683) and to "communicating with the solicitor to obtain legal advice" (*per* Cotton LJ at p 684). Cotton LJ added this:

> "It is said that as communications between a client and his legal advisers for the purpose of obtaining legal advice are privileged, therefore any communications 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 his 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 [Banks] comes to this, that all communications between a solicitor and a third person in the course of his advising the client are to be protected. It was conceded that 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 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 it is reasonable, because then the solicitor is preparing for the defence or 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 advice, that any privilege should be extended to communications such as these."

42. Turning to *Three Rivers (No 5)* itself, I agree with the Claimants that the key passage in the judgment of the Court of Appeal is at 1547G-H. There, having cited *Wheeler v Le Marchant* (1881) 17 Ch D 675 (in the Court of Appeal), and considered it in some detail, Longmore LJ said this:

> "This case [*Wheeler v Le Marchant* (1881) 17 Ch D 675] makes it clear that legal advice privilege does not extend to documents obtained by third parties to be shown to a solicitor for advice. Mr Stadlen [counsel for the Bank], of course,

> accepted this but said that communications from an employee are different. The reason he gave is that a corporation can only act through its employees; whilst that is true, it is not a consideration that can carry Mr Stadlen home. Indeed the passage cited from *Anderson's cas*e 2 Ch D 644 shows that information from an employee stands in the same position as information from an independent agent. It may, moreover, be a mere matter of chance whether a solicitor, in a legal advice privilege case, gets his information from an employee or an agent or other third party. It may also be problematical, in some cases, to decide whether an individual is an employee or an agent and undesirable that the presence or absence of privilege should depend on the answer." [My emphasis.]

43. Regarding that as the position settled by the end of the nineteenth century, the Court considered that it was not dislodged by any of the twentieth century cases, and was still appropriate for the present day.

44. As summarised by Chief Master Marsh in his very recent judgment in *Astex Therapeutics Limited v Astrazeneca AB* [2016] EWHC 2759 (which was handed down on the second day of the hearing in the present case):

> "The Court of Appeal concluded that the Bank is not entitled to privilege in any of the four categories summarised above and expressed the view that if the Governor himself of the Bank of England had noted down what he remembered in relation to the supervision of BCCI with the intention of giving it to the BIU for transmission to Freshfields, such a document would not be subject to legal advice privilege. Longmore LJ accepted the submission by Mr Pollock that on the evidence before the court … the BIU, which was established to deal with inquiries and to seek and receive Freshfields' advice, is for the purposes of this application, the client rather than any single officer however eminent he or she may be. It follows that no separate consideration need be given to the position of ex-employees who are, obviously, in no better position for the purpose of any claimed privilege.'"

45. The nub of the Court of Appeal's conclusions in *Three Rivers (No 5),* therefore, was that, in a corporate context, information gathered from an employee is no different for these purposes from information obtained from third parties, even if the information is collected by or in order to be shown to a solicitor to enable fully informed advice to be given to that solicitor's client, the corporate entity (represented in the *Three Rivers (No 5)* case by the BIU).

46. The Court of Appeal, in reaching those conclusions, thus refused to accept counsel for the Bank's primary argument that, in order to give full and modern effect to legal advice privilege in the context of a claim to it by a corporation, a corporation's employees cannot be regarded and should not be treated as third parties for the purposes of privilege: see page 1560E.

RBS's submissions and attempt to distinguish Three Rivers No 5

47. Having accepted that, at least at this level, *Three Rivers (No 5)* is binding authority, RBS had, inevitably, to focus its submissions on confining its application to its own particular facts, and demonstrating that the facts of the present case do not fall within it. RBS also sought in that context to justify confining its application by praying in aid academic criticism of the decision, and its disapproval in other jurisdictions, in particular in the Court of Appeal in Singapore.

48. RBS accordingly sought to depict *Three Rivers (No 5)* as a "rather unusual case" which should be confined in its application to the particular context where a special unit had been specifically established to be the sole and exclusive conduit for communications between the client Bank and the solicitors (Freshfields), precluding any direct communications between any other bank employee and the solicitors.

49. According to RBS's case, the distinguishing feature is that *Three Rivers (No 5)* concerned, and concerned only, communications within or internal to the client corporation (in that case the Bank of England) itself. It did not concern any communications directly with the corporation's lawyers: only the BIU could communicate with the solicitors, and none of the employees could or did or had any authority to do so.

50. Thus, *Three Rivers (No 5)* concerned the collation of documents by relevant employees (including some now ex-employees) of the Bank for onward reference to the BIU, in order to assist the BIU in the preparation of a subsequent communication between the BIU and the Bank's legal advisers. It was for that reason and in that sense that the Court of Appeal described the material as "preparatory" to, rather than qualifying as, privileged communications: or, as Tomlinson J had put it at first instance, "information which constitutes the antecedents of or the acts preparatory to the creation of a communication".

51. Accordingly, it is RBS's submission that the status in a corporate context of direct communication of information by an authorised employee (or ex-employee) to the corporation's legal adviser had not arisen and was not dealt with in *Three Rivers (No 5)*.

52. Further, RBS pointed out, in *Three Rivers (No 5)* the claimants had not sought to question the claim of legal advice privilege in respect of any documents passing between the BIU and Freshfields or vice-versa, nor of any of Freshfields' internal memoranda or drafts. RBS contrasted that with the present case, where the employees were interviewed by RBS's lawyers and they thus communicated directly; where legal advice privilege is challenged in respect of documents actually created by the corporation's legal advisers for the purpose of advising the corporation (RBS); and where the Interview Notes comprised, in terms of both process and effect, communications by or on behalf of a client, or an authorised emanation of the client, to its lawyer.

53. Before discussing the more elaborate details of RBS's submissions on the case in hand, I think it is convenient to consider, first, whether RBS is right in its analysis that *Three Rivers (No 5)* is restricted in its application to the peculiar facts of the case, or

whether it is authority of broader application, and secondly, whether, on its true application, RBS can maintain its claim to legal advice privilege.

Is Three Rivers (No 5) confined to its own facts? The tenor and effect of subsequent decisions and commentary

54. It is true that the facts in *Three Rivers (No 5)* were out of the ordinary, especially in that the BIU was designated as the sole body to be treated as the 'client', and it is a truism that cases are decided on their own facts. However, in my view, the decision in *Three Rivers (No 5)* is not confined to its own facts but is based on principles of general application, which (despite considerable criticism in some quarters) remain binding law in England.

55. This is confirmed by the way the decision was attacked by counsel and analysed by the House of Lords in *Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 ("*Three Rivers (No 6*)"), when a collateral attack was sought to be mounted against it.

56. In light of the circumstances in which the arguments came before it and the House of Lords' acceptance of the respondents' argument that "the issue simply does not arise on this appeal" (*per* Lord Scott of Foscote at p654B), the House of Lords declined the invitation to it to express a view on these fundamental issues.

57. However, I would accept the Claimants' submission in this case that the way the House of Lords defined and approached the matter leaves no room for doubt as to its view of the meaning and status of *Three Rivers (No 5).*

58. In particular:

(1) Lord Scott summarised (at §13) the decision of the Court of Appeal in *Three Rivers (No 5)* as having "accepted Mr Pollock's submission" that:

> "it was only communications between solicitor and client, and evidence of the content of such communications, that were privileged. Preparatory materials obtained before such communications, even if prepared for the dominant purpose of being shown to a client's solicitor, even if prepared at the solicitor's request and even if subsequently sent to the solicitor, did not come within the privilege."

(2) Lord Carswell interpreted the decision in the following terms at §72:

> "The Court accepted that Freshfields' client was the BIU, not the Bank itself or any individual officer, but its conclusions did not turn so much on the identity of the authors of the documents in question as on the more general point that in the court's view legal advice privilege, as distinct from litigation privilege, was restricted to communications between a client and his legal advisers, to documents evidencing such communications, and to documents that were intended to be such communications

> even if they were not in fact communicated… It rejected the Bank's argument that communications from an employee were so covered, even though it recognised that a corporation can only act through its employees."

59. In my view, and even though counsel (Gordon Pollock QC) on behalf of BCCI submitted that *Three Rivers (No 5)* was "primarily concerned with the question whether a fact-gathering exercise that was undertaken for the purpose of an internal inquiry and where litigation, if contemplated at all, was certainly not the dominant purpose of the exercise could only be cloaked in privilege if subsequent litigation arose" (p 624*A*), the reasoning in *Three Rivers (No 5*) must be treated as resting on principles of general application.

60. That view of the case, and in particular the insistence on strictly confining legal advice privilege to communications between a lawyer and his client for the purpose of giving or receiving legal advice which is its fundamental basis, is consistent also with the other cases in England in which *Three Rivers (No 5)* has been considered: and see *United States v Philip Morris* [2003] EWHC 3028 (Comm) especially at para. 39 in the judgment of Moore-Bick J (as he then was) and the same case on appeal at [2004] EWHC Civ 330 at para. 81; *Winterthur Swiss Insurance Co v AG (Manchester) Ltd (in liquidation)* [2006] EWHC 839 (Comm); and *National Westminster Bank Plc v Rabobank Nederland* [2006] EWHC 2332 (Comm) (at para. 29). The most recent authority, the decision of Chief Master Marsh in *Astex Therapeutics* (see paragraph [44] above), has adopted the same view.

Criticisms of the decision in Three Rivers (No 5)

61. As indeed recognised by both Simon J in *National Westminster Bank Plc v Rabobank Nederland* and Chief Master Marsh in *Astex Therapeutics*, there is no doubt that the decision in *Three Rivers (No 5)* has attracted disquiet and not a little academic criticism. A different position has been taken in at least one other jurisdiction with an otherwise comparable approach to legal privilege (in addition to the USA).

62. Thus, the Singapore Court of Appeal in *Skandanavia Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and others* [2007] 2 SLR 367, encouraged to do so by its perception that "*Three Rivers No 5* has been almost universally criticised and often trenchantly" (see para. 38), has taken a different position. RBS cited this extract from their judgment:

> "[*Three Rivers (No 5)*] 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…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 that 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. 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."

63. There is, to my mind, force in these criticisms and attempts to confine the application of the decision in *Three Rivers (No 5)*. It may be that in a suitable case the Supreme Court will have to revisit the decision, and perhaps the fundamental question as to whether and to what extent the distinction between legal advice and litigation privilege on which *Three Rivers (No 5)* ultimately rests is really justified and appropriate (*cf* Mr Sumption QC's argument in *Three Rivers (No 6)* at pages 613 to 617).

64. But, especially given the clear direction of the House of Lords (in *Three Rivers No 6)* and as Simon J also noted in the *Rabobank* case, there can be no real doubt as to the present state of the law in this context in England: *Three Rivers (No 5)* confines legal advice privilege to communications between lawyer and client, and the fact that an employee may be authorised to communicate with the corporation's lawyer does not constitute that employee the client or a recognised emanation of the client.

RBS's submission that its case is not inconsistent with Three Rivers (No 5)

65. The crux of RBS's case now is that even accepting it to be correctly decided and, in any event, binding at this level, *Three Rivers (No 5)* did not address, still less define, what is required in a corporate context, where the corporation is the 'client', for an employee or any other individual also to be treated as a 'client' or at least a qualifying emanation of the corporate client.

66. It is RBS's submission that no English case does address that point: including the latest decision, that in *Astex Therapeutics*. RBS submits that its submission, to the effect that where the client is a corporation, statements made to the corporation's lawyer by employees authorised (as a matter of fact) by the corporation to make them on its behalf constitute lawyer-client '*communications*' for the purposes of legal advice privilege, is consistent with authority and is, or should be, English law.

67. This is a cogent submission, which (as indicated previously) has been espoused in more than one of the leading text books and which undoubtedly commands respect and requires careful analysis. I return to discuss it below.

68. However, before doing so, it is convenient to clear away what I regard as some distractions introduced in what were otherwise well presented and impressive submissions, and also briefly to assess RBS's understandable, but ultimately inaccurate, depiction of the Claimants' case as contrary to or in some way inconsistent with *Balabel and Another v Air India* [1988] 1 Ch 317 ("*Balabel"*).

69. What I have described as distractions were RBS's peripheral submissions to the following effect:

    (1) that *Three Rivers (No 5)* is (to quote Counsel's skeleton argument) "not authority for the proposition that only a specially constituted committee of the company can be the client in *every* case" and that "the Court of Appeal did not arrive at any universal definition or set out a test to be applied in all circumstances where the Court is asked to grapple with the issue of who the client is in a corporate context";

    (2) that the Claimants were attempting to put an unwarranted gloss on what the Court of Appeal said in *Three Rivers (No 5)* by suggesting, in answer to RBS's case that any employee properly authorised as above described could be treated as a 'client', that in a corporate context the 'client' can only be a "small number of identified company employees".

70. As to the first, the Claimants have never sought to maintain that in a corporate context only a committee may be 'the client': and to my mind such a proposition would be absurd, not least since (as is RBS's own case) such committees are, if not now a rarity, certainly far from invariable. The Claimants always accepted that 'the client' is the corporation, acting by its directors or other designated organ (including a committee constituted for that purpose).

71. The second point is based upon a phrase in the Claimants' skeleton argument (para. 21) in which they contend that "The authorities are clear that a company may only claim privilege in respect of communications between the 'client' and its legal advisers where the 'client' is a small number of identified company employees who are authorised to obtain legal advice."

72. I accept that the phrase may have been distracting; but I took it to signify (as Mr Nash QC confirmed in reply it was intended to signify) that a corporation would in the usual course only entrust the process of communication with a legal adviser for the purposes of seeking or receiving legal advice to a restricted, and in all probability small, number of persons. That seems plainly right in point of fact, even if it does not seem to me to assist in determining the scope of the privilege.

73. I should note, however, a related point: the more fundamental submission on behalf of the Claimants that as a matter of law the only individuals whose communications for these purposes will be treated as 'client' communications for the purpose of legal advice privilege are those who (whether as a matter of ordinary corporate theory of 'attribution', or by special designation, as in the case of the BIU in the case of the

Bank of England in *Three Rivers (No 5)*) can be treated as the "directing mind and will of the corporation". I return to that below.

74. Turning to *Balabel*, RBS sought to contend that the Claimants' case involves artificially limiting the concept of '*communication*' in *Three Rivers (No 5)* in order to distinguish between communications that provide instructions (which, RBS contends not entirely accurately, the Claimants accept are privileged) and communications that provide information (which the Claimants assert are not privileged).

75. The depiction was perhaps understandable because the Claimants did appear to put as separate requirements (for a communication to attract legal advice privilege) (1) that the communication be from or to a 'client' and (2) that such communication should be for the purpose of the client giving or receiving legal advice, and not merely for the purpose of providing information. However, I do not consider it accurate.

76. As Mr Nash clarified, the Claimants did not and could not dispute or distinguish the decision in *Balabel* and it was not in reality the Claimants' case to deny privilege to a communication of information between a client and its lawyer for the purposes of giving or receiving legal advice.

77. Indeed, I do not think that the *Balabel* question arises in this context. The decision in *Balabel* goes to the question of what material travelling between lawyer and client is privileged, whereas the prior question raised here is whether the communications were in the context of a lawyer/client relationship at all.

78. What I think the Claimants were truly getting at is that to warrant protection, where a corporation is the client, the communication must be to or from a person who on behalf of the corporation is authorised to seek and receive legal advice, and the communication must be for the purposes or in the course of that person giving or receiving legal advice. Such a communication is to be distinguished from the preparatory work of compiling information undertaken by persons with no authority to seek or receive legal advice for the purposes of enabling the client to seek and receive such advice: the Claimants' case being that communication of information, even at the request and with the authority of the corporation, by a person who is not the client and who has no authority (actual or implicit) to seek or obtain legal advice for the company, cannot be privileged; and that is consistent with *Balabel*.

RBS's substantial case

79. I return to what I consider to be the fundamental and most powerful part of RBS's case.

80. This is its submission to the effect (the following formulation below is my own synopsis) that it is not contrary to *Three Rivers (No 5)* that where an individual, with the authority of a corporation which is seeking legal advice, communicates to the corporation's legal advisers at their request either instructions or factual information, in confidence and for the purpose of enabling that corporation to seek or receive legal advice, that communication (including any factual information) should be treated as if the individual were part or an emanation of the client and protected by legal advice privilege accordingly. Indeed, RBS contends that such treatment is necessary in order to fulfil the purpose of the protection afforded by legal advice privilege.

81. Thus, breaking down each component, it is RBS's case that it is consistent with *Three Rivers (No 5)*, and to provide full content in a corporate context to the protection of legal advice privilege it is necessary, that:

    (1) Any confidential '*communication*' between a client and a lawyer for the purpose of giving or obtaining legal advice (and any evidence of such a '*communication*') is protected by legal advice privilege;

    (2) Where the client is a corporation, statements made to the corporation's lawyers by employees authorised (as a matter of fact) by the corporation to make them constitute lawyer-client '*communications*' for the purposes of legal advice privilege, rather than merely information gathering preparatory to such '*communications*';

    (3) That is so whether or not the employee concerned was authorised to seek or receive legal advice: it is the identity of the parties to the communication, not the nature of the communication which determines whether the material is 'preparatory' and whether in turn it is protected by legal advice privilege: as Ms Tolaney put it in her Speaking Note handed up to me on the second day of the hearing, "the moment the Court is satisfied that there was a communication directly to the solicitor from an authorised employee, the communication is by definition not preparatory material" [her emphasis], and on that footing, privileged.

82. RBS contends that, in the present case:

    (1) The interviews and the Interview Notes of them were confidential and their purpose was to enable RBS to obtain legal advice in respect of the matters to which they related;

    (2) Each of the interviewees was authorised by RBS to participate in the interviews and their answers and the Interview Notes comprise authorised '*communications*' as distinct from an 'internal' communication between employees (of whatever status) which is preparatory to communication with the body corporate's legal advisers and to which such legal advisers are not a party;

    (3) Each Interview Note comprises or records confidential communications by the employee concerned directly to RBS's lawyers accordingly. It is this direct communication to the solicitors which primarily distinguishes the case.

83. As previously rehearsed, there is no dispute as to the authority of the employees (and Mr Hong as a former employee) to participate in the information gathering process, including their interviews. On the other hand, it is not contended that any of them had any authority to, or did, seek or receive legal advice on behalf of RBS.

84. The essential question becomes: does either the fact of authority to participate in an information gathering process, as in this case, or the fact that the Interview Notes record a direct communication, distinguish the present case from *Three Rivers (No 5)* and suffice to justify the employees and the former employee being treated in such

circumstances as 'the client' or a qualifying emanation of the client, rather than 'third parties'?

85. *Astex Therapeutics* is of particular interest in this regard, in that it concerned a claim for privilege over notes made by in-house and external lawyers. Chief Master Marsh noted (in para. 48) that the case before him differed from *Three Rivers (No 5)* since in that case none of the classes of documents held not to be privileged had been produced by a lawyer. After a careful review of both the authorities and textbook criticism of some of them, the Chief Master applied *Three Rivers (No 5)* and concluded that the claim to legal advice privilege could not be supported.

86. The Chief Master held that notwithstanding the direct involvement of the corporation's lawyers in gathering the information, it not being suggested of any of the employees from whom the information was obtained that they "could be regarded as forming part of a class of persons authorised to give instructions to the lawyers" (see para.48), they could not be regarded as "the client" and in consequence had to "be treated as third parties for these purposes" (see paras. 48 and 49). The crux of his decision is at para. 49:

> "In my judgment, none of these attendance notes can be the subject of legal advice privilege. They do not fall within the generally understood confines of legal advice privilege, even as extended by *Balabel Air v India*, because it is not apt to cover an information gathering exercise of the type which will normally be conducted in relation to litigation but undertaken before a dispute is reasonably in contemplation."

87. In their Note on the decision provided (at my invitation) after the hearing, RBS pounced on the fact that in *Astex Therapeutics* the respondents did not argue that the employees and ex-employees who had been interviewed were authorised to give 'instructions' to lawyers and submitted that the case could be distinguished on this basis. Indeed, RBS went further, and submitted that *Astex Therapeutics* supports RBS's interpretation of *Three Rivers (No 5)*: this on the basis that the Chief Master had (see paras. 48 and 54(iv) of his judgment) framed the test of whether someone was to be treated as a "client" as being whether he could be "regarded as part of a class of persons authorised to give instructions to the lawyers" [emphasis added].

88. The fact that in *Astex Therapeutics* it was not contended that the employees were authorised "to give instructions" is appropriately noted: its significance is that the case cannot be taken as determining who is and who is not to be treated as, or as an emanation of, "the client". However, I do not think the Chief Master contemplated any such equation as RBS seem to suggest between the provision of information (in an interview or otherwise) and the instruction of lawyers for the purpose of obtaining legal advice.

89. Contrary to RBS's submission, it is plain from the Chief Master's judgment that he did not consider that it would suffice if the individual had the company's permission to provide information; and I would interpret his reference to "a class of persons authorised to give instructions" as being a reference to persons authorised to seek legal advice by way of instructions on the corporation's behalf, whether as a matter of

corporate governance or by express provision (as was the BIU in *Three Rivers (No 5)*).

90. As the Claimants in their submissions on the case responded, although the Chief Master had not had to decide the point, he expressed his clear view (at §50) that it "is unlikely, in most circumstances" where a corporation is "seeking information" from employees and former employees that persons who merely provide that information will be the 'client' for the purposes of *Three Rivers (No 5)*. Having dealt with the position under litigation privilege, the Chief Master held:

> "By contrast, where there is no dispute, the review of a contract by seeking information from employees, and former employees, is unlikely, in most circumstances, to be protected by legal advice privilege. In one sense this conclusion is a surprising one because it might be though [sic] that the involvement of lawyers in the review clothes the review in privilege. But that is not the legal position if the lawyers are obtaining information from persons who are, for these purposes, third parties because they are not 'the client'."

91. I agree with the Claimants that this conclusion must follow logically from the two facets of the decision in *Three Rivers (No 5)*, namely (1) that the client for the purposes of privilege consists only of those employees authorised to seek and receive legal advice from the lawyer and (2) that legal advice privilege does not extend to information provided by employees and ex-employees to or for the purpose of being placed before a lawyer.

92. Applied to this case, that reasoning is, in my judgment, fatal to RBS's claim of legal advice privilege for the Interview Notes in question.

93. In summary, I consider and hold that the Interview Notes, albeit that they record direct communications with RBS's lawyers, comprise information gathering from employees or former employees preparatory to and for the purpose of enabling RBS, through its directors or other persons authorised to do so on its behalf, to seek and receive legal advice. It is clear from the judgment in *Three Rivers (No 5)* that "information from an employee stands in the same position as information from an independent agent" (see p1574H). The individuals interviewed were providers of information as employees and not clients: and the Interview Notes were not communications between client and legal adviser. I do not consider that any sufficient basis has been demonstrated for not applying *Three Rivers (No 5)*. Further, I agree with the analysis in *Astex Therapeutic.*

94. It may also be that in a corporate context only individuals singly or together constituting part of the directing mind and will of the corporation can be treated for the purpose of legal advice privilege as being, or being a qualifying emanation of, the 'client'. This is the 'attribution' argument foreshadowed in paragraph 73 above. It is supported by a footnote in a decision of Aikens J (as he then was) in *Winterthur Swiss Insurance Company and others v AG (Manchester) Limited (in liquidation) and others* [2006] EWHC 839 (Comm), in which he interpreted *Three Rivers (No 5)* as follows:

> "In *Three Rivers (No 5)* the Court of Appeal held that, in the case of a corporate client, in relation to 'legal advice privilege' the privilege could not attach to communications to the legal adviser by either employees who were not part of the directing mind and will of 'the client' or by others who were not 'the client'."

95. RBS submitted that "introducing the requirement of being the directing mind and will *for the purposes of receiving advice* would impose an undesirable restriction on the scope of legal advice privilege available to corporate bodies, go beyond the findings in *Three Rivers (No 5)* and undermine the policy underlying legal advice privilege restated by the House of Lords in *Three Rivers (No 6)*". As to that latter point, Ms Tolaney QC on its behalf also submitted that the limitation implied by adopting the test would be inconsistent with *Balabel*, on the basis that "if communication of information satisfies the *Balabel* test, the availability of privilege should not depend on whether that communication was made by a natural person or a company".

96. Since, for the reasons I have given, I have concluded that the nature of the authorised communications and the purpose for which they took place combine to preclude the availability of legal advice privilege in this case, I do not think it is necessary for me to determine whether a further corollary or implication of the decision in *Three Rivers (No 5)* is to restrict the meaning of 'client' in the manner suggested by Aikens J. However, I suspect that such a restriction will often reflect reality: a corporation is unlikely to authorise an individual to seek and receive legal advice on its behalf to an individual or body which is not its directing mind and will. Further, in my view, there are good reasons for it not doing so, and for the law not extending privilege if it does. So I do incline to the view that only communications with an individual capable in law of seeking and receiving legal advice as a duly authorised organ of the corporation should be given the protection of legal advice privilege. (I appreciate that a different view has been taken in US law, where the "control group" restriction, which is probably analogous, has been rejected as being "unpredictable" and as tending to "frustrate the very purpose of the privilege": but then the US rules are different, as later discussed.)

97. In any event, in my judgment, for the reasons I have given RBS's claim to legal advice privilege fails, at least if English law applies.

RBS's alternative claim that the Interview Notes are privileged "lawyers' working papers"

98. The next question is whether any of the Interview Notes fall within the category of "lawyers' working papers" and are privileged on that alternative basis: RBS claims privilege on that basis for all the Interview Notes except the 20 Project Mortar Interview Notes produced by RBS Group Secretariat.

The law as to the basis and scope of lawyers' working paper privilege

99. It is common ground that in English law, lawyers' working papers are privileged under the legal professional privilege doctrine: see the Court of Appeal in *Balabel* and *Three Rivers (No 5)* at para. 30, although it does appear (as the Claimants noted) that in each case the point was assumed without any principled discussion.

100. The justification for withholding such documents given by the Court of Appeal in *Lyell v Kennedy (No 3)* (1884) 27 Ch D 1 (itself taken by the Supreme Court of Victoria in *Telebooth v Telstra* [1994] 1 VR 337 to be the origin of the lawyers' working papers doctrine) was that disclosure of them would be (*per* Cotton LJ at 26):

> "giving [the party requesting disclosure] a clue to the advice which had been given by the solicitor and giving them the benefit of the professional opinion which had been formed by the solicitor."

101. The Court of Appeal in *Ventouris v Mountain* [1991] 1 WLR 607 considered the decision in Lyell, holding (per Bingham LJ at 615F) that the

> "ratio of the decision is, I think, that where the selection of documents which a solicitor has copied or assembled betrays the trend of advice which he is giving the client the documents are privileged."

102. Similarly Eady J in *Imerman v Tchenguiz* [2009] EWHC 2902 (QB) held (at §16), in the context of a dispute as to whether annotations on a document held by counsel would be privileged, that the test was whether the documents if disclosed would "*give a clue*" to the trend of advice being proffered:

> "I do not accept the proposition that underlining or highlighting of documents would, in themselves, give rise to legal professional privilege. The appropriate test to apply is that of whether or not the markings in question would 'give a clue' to the trend of advice being proffered to the clients by the lawyers."

103. A particular feature to be noted in the present case (as was emphasised by the Claimants) is that if, as I have held for the reasons set out above, RBS is not entitled to claim legal advice privilege in relation to the Interview Notes, it must follow that the starting point of the analysis in relation to the lawyers' working papers point is that the interviews themselves were not privileged communications.

104. It follows, and I did not take it to be disputed, that verbatim transcripts of unprivileged interviews would also themselves not be privileged. As Birss J recently held in *Property Alliance Group v RBS (No 3)* [2015] EWHC 3341 (Ch) (at §24):

> "a record of a non-privileged conversation, whether in the form of a verbatim note or a transcript, cannot itself be privileged if the underlying conversation was not privileged."

105. Thus, RBS must demonstrate some attribute of or addition to the relevant Interview Notes which distinguishes them from *verbatim* transcripts or reveals from an evident process of selection the trend of legal advice being given, and is such as to trigger their protection as lawyers' working papers.

106. In this context, Warren J in *Stax Claimants v Bank of Nova Scotia* [2007] EWHC 1153 (Ch) contrasted (at §10) a note which "records the substance of a conversation"

(which would not be privileged) with a note which also records "the note-taker's own thoughts and comments on what he is recording with a view to advising his client" (which almost certainly would be privileged).

107. The claim thus involves proving facts which demonstrate that the documentation for which privilege is asserted does have some attribute or addition such as to betray or at least give a clue as to the trend of advice being given to the client by its lawyer.

108. The burden of demonstrating this is upon RBS. It is axiomatic that the burden of proving privilege falls on the party claiming it. The relevant principles are found in *West London Pipeline v Total* [2008] EWHC 1729 (Comm) *per* Beatson J (as he then was) at §86. In particular:

(1) A claim for privilege is an unusual claim in that the party claiming privilege and their legal advisers are judges in their own case, subject of course to the power of the Court to inspect the documents.

(2) For that reason, the Court must be particularly careful to consider the basis on which the claim for privilege is made.

(3) Evidence filed in support of a claim to privilege should be as specific as possible without making disclosure of the very matters that the claim for privilege is designed to protect.

The evidence put forward by RBS

109. Turning, then, to the evidence put forward by RBS, Mr Norris-Jones (a partner in Herbert Smith Freehills LLP ("HSF"), solicitors to RBS) explained in his witness statement (his ninth in these proceedings) that:

(1) All of the Interview Notes in issue had been "reviewed by HSF in the context of the assertion by RBS of privilege over them", and a number had also been reviewed "by members of RBS's senior counsel team in these proceedings";

(2) On the basis of their review, "RBS's legal team (both HSF and Counsel) consider the Notes to be privileged as a matter of English law both on the basis of the test set out in *Three Rivers (No 5)* and (with the exception of the interviews conducted by RBS Group Secretariat) on the basis that they are lawyers' working papers";

(3) The basis for the assertion of privilege had been addressed in correspondence, which was to the following effect as regards the head of privilege now under consideration:

a) The Interview Notes except for those in respect of interviews conducted by RBS Group Secretariat and Mr Hong's interview had been prepared by Wilmer Hale (RBS's US attorneys) and Travers Smith as their agents: Mr Hong's interview notes had been prepared by Dickstein Shapiro LLP also as external counsel to RBS;

b) The purpose of the Interview Notes was "not to create transcripts of the interviews but rather documents that would assist in providing legal advice to RBS";

c) Thus, the Interview Notes concerned "are not simply verbatim recitals of the interviews" but "evidence the impressions of the lawyer with a view to advising the client";

d) Further, Wilmer Hale had noted that the "notes state on their face that they reflect external counsel's *'mental impressions'*" (it is not clear to me whether the same rubric is included in the notes of Mr Hong's interview);

e) "In broad terms, they reflect the lawyers' impressions in the sense that they reflect both the work undertaken in preparation for the interviews (i.e. they reveal the lawyers' train of inquiry), and in the sense that they are a note not a transcript, and therefore to some greater or lesser extent reflect a selection by the author of the points to be recorded."

110. In a further (tenth) witness statement, filed on the second day of the hearing (8 November 2016) and admitted into evidence without objection, Mr Norris-Jones added to this (in response to matters raised on the first day of the hearing) that:

(1) Mr Hong had not (contrary to the suggestion of Mr Nash QC) given his interview voluntarily but under an obligation imposed on him as part of his severance or separation agreement ("the Hong Agreement");

(2) The Hong Agreement provided that his interview was not to be "*recorded or transcribed in any manner*" and no audio recording or verbatim transcript was prepared;

(3) As to the understanding of the interviewees, and in response to a question from the Court, a number of the Interview Notes (but not apparently all) "record that the attention of the relevant interviewee was drawn to the fact that the interview was subject to attorney-client privilege. The interviewee's acknowledgement of this is also often recorded."

The Claimants' contention that RBS's evidence goes nowhere

111. The Claimants contend that even taking RBS's case at its highest the Interview Notes do not fall within the lawyers' working papers principle. They sought to make this contention good by taking in turn each of the respects in which it is said by RBS that the Interview Notes reflect the work of lawyers:

112. First, they submit that the assertion that the Interview Notes "reveal the lawyers' train of inquiry" (see paragraph [105](3)(e) above) "comes nowhere near to meeting the threshold established in the authorities, namely whether the [Interview] Notes if disclosed would give a clue as to the advice given". More particularly they submitted that:

(1) There is a principled distinction between a document which reveals the train of inquiry as at the time of interview (i.e. at a time at which the lawyers are collecting information with a view to later considering it and then providing advice to RBS) and a document which itself reveals that advice.

(2) This principled distinction has been expressly recognised by the Court in *Sumitomo Corporation v Credit Lyonnais Rouse* [2001] CP Rep 72. The Court there was concerned with whether Sumitomo could claim privilege in English translations of disclosable Japanese documents on the basis that the selection of documents for translation would itself "*give a clue to and betray the general trend of PW's advice in the sense that it would disclose the direction of their enquiries and their areas of focus and concern*". Andrew Smith J rejected the claim to privilege on the basis (at §31) that "*neither the legal advisers whose advice or thinking is in question, PW, nor the clients who are receiving the advice and assistance, Sumitomo, have asserted a belief that the advice or thinking might be betrayed*". The distinction was noted by the Court of Appeal in *Sumitomo* [2001] EWCA Civ 1152 (*per* Jonathan Parker LJ at §68) in the course of upholding the first instance decision.

(3) Moreover, if the "*train of inquiry*" test (notwithstanding that the underlying conversation was unprivileged) were the appropriate one to apply, a verbatim transcript of the conversation which discloses the questions asked by the lawyers would attract privilege under the lawyers' working papers test; but the Court has expressly (*per* Birss J in *Property Alliance Group v RBS (No 3)*) rejected the submission that such a transcript is privileged.

113. Secondly, they submitted that RBS's assertion that the *selection* of material for inclusion in the Interview Notes brings the Note within the scope of the lawyers' working papers principle was not made good on either the facts or the law. As to the facts, RBS has provided no guidance as to how extensive that selection is. As to the law, the Claimants contended that in any event the claim is contrary to the authorities, submitting that:

(1) The Court of Appeal held in *Sumitomo* that a party cannot claim privilege in respect of a selection of documents that would otherwise fall to be disclosed by claiming that the fact of selection itself renders those documents privileged:

> "We think that the question can be tested in this way. Imagine that a solicitor made a selection from his client's disclosable documents in order to obtain the advice of counsel on a point of particular concern. And imagine that the remainder of the disclosable documents were destroyed in a fire. We do not believe that it would be right to extend the principle in *Lyell v Kennedy* 27 Ch D 1 to cloak with privilege the remaining documents."

(2) It is not in dispute that, in circumstances where the legal advice privilege claim has failed, full transcripts of the interviews would be disclosable if they existed. Those documents fall directly within the scope of the *Sumitomo* decision as "own client documents" (per the Court of Appeal's definition at §71.)

(3) The effect of the *Sumitomo* decision is that RBS cannot claim privilege over the selection that its lawyers have made from those full interviews: the fact of selection itself is insufficient to "cloak" the selected information with privilege.

114. The Claimants relied also on the decision of the Court of Appeal in *Parry v News Group Newspapers* [1990] 141 NLJ 1719 (CA) where, in the context of a discussion of a solicitor's note of an unprivileged conversation, Bingham LJ, having noted that a solicitor's memorandum "inevitably amounts to a précis of what was said and therefore involves a process of distillation or selection", stated that a

> "bare record of what passed is in my view entitled to no legal professional privilege, whether it is a solicitor's memorandum, a transcript, or an exchange of letters."

RBS's response

115. RBS sought to answer these points as follows.

116. First, Ms Tolaney submitted that *Sumitomo* did not suggest that there was the "principled distinction" relied on by the Claimants between a document which may reveal the trend of inquiry and one which reveals the trend of advice or gives a clue as to its content.

117. She pointed out that in *Sumitomo* the claim for privilege related to the English translations of a selection from a pool of "unprivileged" Japanese documents and suggested that the true basis of decision was that the claim failed not only because such a selection could not logically without more reveal a clue as to advice given, but also because the evidence provided in that case was so deficient. She noted Andrew Smith J's statement that it was not even asserted that those claiming the privilege believed that the documents might betray the legal advice or thinking (see *Sumitomo* at first instance at para. 31) and his apparent view that the number and nature of documents for which privilege was claimed suggested that they may well have misconceived the scope and nature of the privilege (see para 34) and that they "had not addressed [their] mind with precision to whether a claim for privilege in respect of each of the 700 translations [was] justified" (see para. 39). In other words, she suggested that *Sumitomo* did not reflect or establish any "principled distinction" but was an exceptional case decided on its own peculiar facts.

118. Secondly, she sought to distinguish *Sumitomo* on the basis that in this case the most careful thought had been given by HSF, Counsel and Wilmer Hale, and on the further ground that in that case all that in reality could be contended was that the choice of documents for English translation gave a clue as the trend of advice; whereas in the present case, she submitted,

> "disclosing an interview note would reveal the trend of advice, give a clue, because of the contents of the note and the lawyer's own selection of which points to record…"

119. Ms Tolaney submitted that *Parry v News Group Newspapers* is a very different case, since it related to an attendance note of communications between the two parties'

solicitors which were not confidential. In the present case, the Interview Notes were of interviews which were accepted to be confidential vis-à-vis the Claimants. Further, the Defendants in that case accepted, and the basis of their application rested on the fact that the memorandum was no more than a factual record of what the solicitor believed to have passed on the telephone. Ms Tolaney drew attention to Bingham LJ's observation in that case that:

> "Had that record formed part of a communication to the client, or had it contained [the solicitor's] analysis of, or views upon, his client's case, the defendant's contention might have some substance…"

Whereas in this case, Ms Tolaney stated, "the point is that they are a summary prepared by the lawyers, not a factual record…"

120. On all these grounds, Ms Tolaney submitted that RBS had discharged the burden of demonstrating that the Interview Notes comprised working papers prepared with the input of competent legal advisers, and this input, and the process of selection inevitable where a note is an incomplete and personal account rather than a verbatim record, would be likely (and had been verified by legal advisers as likely) to offer a sufficient clue as to the lawyers' train of inquiry (which she suggested was ultimately little different from trend of advice, or at least "rather similar") to warrant the protection of privilege.

My assessment and decision on the working papers claim

121. In my view, the question is ultimately an evidential one: has the likelihood sufficiently been demonstrated that the Internal Notes would by reason of the legal input they reflect give a clue as to legal advice (or some aspect of the legal advice) given to RBS?

122. In determining the answer, I accept that full account must be taken of the fact that

(1) Careful consideration has been given to the documents and whether they properly attract privilege by responsible and respected solicitors, attorneys and senior Counsel.

(2) Any notes of an interview, as distinct from a bare transcript, are likely to reflect, even if only to a limited extent, the particular interests, lines of inquiry and perception of the relative importance of the points covered (including those omitted) of the person making the note.

(3) To that extent at least, such notes may be taken to reflect the note-maker's "mental impressions".

(4) Wilmer Hale have expressly confirmed that (a) the purpose of the Interview Notes was not to create transcripts but rather documents which would assist in providing legal advice to RBS and that (b) the Interview Notes in question in this case state on their face that they reflect external counsel's "mental impressions".

123. However, it must also be borne in mind that

(1) As was observed by Neuberger J (as he then was) in *Bank of Austria Aktiengesellschaft v Price Waterhouse* (unreported, 16 April 1997) as quoted by Andrew Smith J in *Sumitomo* (at para. 30),

> "because a claim for privilege is an unusual claim in the sense that legal advisers to the party claiming privilege are the judges in their own client's cause, the Court must be particularly careful to consider how the claim for privilege is made out."

(2) As Andrew Smith J went on to observe in the same case (in para. 39):

> "Any evidence in support of a claim for privilege may have to be couched in careful terms so as not to make disclosure of the very confidentialities that the claim for privilege is designed to protect. However, an affidavit of this kind should be specific enough to show something of the deponent's analysis of the documents and the claim for privilege."

(3) In other words, conclusory statements may well not suffice: and see also the most useful summary of the position in this regard at para. 86 in the judgment of Beatson J (as he then was) in *West London Pipeline and Storage Ltd and others v Total UK Ltd and others* [2008] EWHC 1729 (Comm).

(4) Further, although the annotation that the Interview Notes reflect the "mental impressions" of Counsel is of relevance, the context in which such an annotation is routinely made in the US must also be appreciated. It appears plain from *Upjohn Co et al. v United States et al.* in the Supreme Court of the United States *(1981) 449 U.S. 383* ("*Upjohn*") that the rubric is used to invoke the limited protection conferred by the US *Federal Rule of Civil Procedure 26(b) (3)* against the general rule in the US that a party may obtain discovery of any documents of which he *"has substantial need…in the preparation of his case"* in circumstances where *"he is unable without undue hardship to obtain the substantial equivalent of the material by other means"*.

(5) Especially where the claim to privilege is maintained to a material extent on the assertion that the documentation of which disclosure is sought has been carefully considered by reference to the applicable rules, the Court is entitled to assume that the party claiming privilege has also considered carefully what evidence, cautiously framed, is required to justify and substantiate the claim, and has put it forward. Likewise, the Court in assessing the claim is entitled and obliged to scrutinise the evidence, not least as to what it does not say, as well as what it does.

124. As it seems to me, that last consideration is of particular relevance in this case, as it was (albeit more unanswerably) in *Sumitomo*. In my view, the evidence put forward on behalf of RBS is revealing for what it does not cover or say, despite the care and attention to the relevant principles asserted.

125. In particular, to my mind:

(1) RBS's evidence is conclusory in nature and based on the assumption that it follows from the fact the Interview Notes were not verbatim that therefore they must contain legal input or selection justifying the claim to privilege. It does not address the objection that it cannot be that the mere fact that a note is not verbatim, and therefore may betray some selection or line of enquiry (as recognised above), suffices. Something more is required to distinguish the case from the norm: and nothing beyond mere conclusory assertion is offered.

(2) For example, RBS's evidence does not show anything substantial of its legal team's "analysis of the documents" nor even in the most general and careful terms give examples of the sort of legal input said to justify and be capable of justifying the claim of privilege: as Mr Nash pointed out, examples of the sort of detail which might be offered are set out in footnote 8 of the *Upjohn* case as follows:

> "Thomas described his notes of the interviews as containing 'what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere'."

(3) Even the reliance on the annotation that the Interview Notes reflect "mental impressions" is not backed up by any assertion that such Interview Notes do in fact, upon careful review, contain material that would or could reveal the trend of advice. This, as Mr Nash also emphasised, is of particular concern and relevance given that the Claimants' solicitors repeatedly sought a proper explanation of (the quotation is from a letter from Stewarts Law to HSF dated 28 September 2016)

> "what is meant by the statement that the notes evidence the lawyers' impressions? Does this mean that they contain (for example) commentary on what was said, comparative analysis of what others have said or other kind of text other than a record of what was said?",

but received only the following by way of response:

> "In broad terms, they reflect the lawyers' impressions in the sense that they reflect both the work undertaken in preparation for the interviews (i.e. they reveal the lawyers' train of inquiry), and in the sense that they are a note not a transcript, and therefore to some greater or lesser extent reflect a selection by the author of the points to be recorded…
>
> …

> the reflections of the lawyers are integrated into the notes and the train of inquiry pursued by the lawyers as evidenced in the structure of the interview and the questions asked during the course of the interview."

(4) In short, all that has really been offered by way of discharging the burden on RBS is that (a) the Interview Notes carry the annotation as to "mental impressions" described above because (b) they reflect preparation which reveals the lawyers' "train of inquiry" and because (c) being a note not a transcript, some greater or lesser degree of selection is reflected.

126. This, in my judgment, is not sufficient: the evidence is not such as to substantiate the claim to privilege on the basis of "lawyers' working papers". My conclusion is reinforced by the consideration that there is a real difference between reflecting "a train of inquiry" and reflecting or giving a clue as to the trend of legal *advice*, and indeed that this difference was recognised and approved in *Sumitomo* in the Court of Appeal.

127. I have considered whether in such circumstances it would be appropriate to permit RBS further to supplement its evidence, or take the "solution of last resort" (as it was described by Beatson J in the *West London Pipeline and Storage Ltd* case) of ordering inspection of the document (by the Chief Master or another judge). In the circumstances, I do not consider that fairness requires this, nor that it would be proportionate and appropriate. The matter has been argued out; RBS has been prompted by close questioning in the correspondence and had every opportunity to advance its case; and implicit in its general submissions is that it has carefully considered the position and what is required to substantiate it at the highest legal level.

128. Accordingly, in my judgment, this alternative basis for RBS's claim to privilege under English law fails also.

RBS's contention that the applicable law is not English but US law

129. That brings me to the question whether, as RBS submits, the applicable law is not English law but US law, and that under US law the claim to privilege would be made out.

130. Two primary questions arise:

(1) Whether there is a proper basis for the application of US law ("the choice of law question"); and

(2) What would be the effect if US law is applicable ("the US law question")?

The choice of law question

131. Stressing the US law connections in this case (which I have indicated by reference to Mr Eckert's witness statement previously) and that under US law every person has a right to legal privilege arising out of the confidential relationship between lawyer and client, Mr Adam Johnson of HSF (who presented this part of the case for RBS)

submitted that the modern concept of legal professional privilege as a fundamental human right, rather than an aspect of the law of evidence, renders inappropriate and obsolete the old established rule that it is the *lex fori* which governs issues of privilege.

132. This is a bold submission. The rule has been generally thought to be well settled. In Dicey, Morris & Collins *'The Conflict of Laws'* (15th ed.) the application of the *lex fori* is confirmed; and, for example, in Thanki *'The Law of Privilege'* (2nd ed.) it is stated (at para. 4.84) that:

> "The cases demonstrate that the English courts apply the simple rule under English conflict of law rules that it is the *lex fori* that applies to determine whether a communication is privileged."

133. However, in the same work the author goes on to suggest (at para. 4.86) that:

> "The basis for the general rule that the *lex fori* applies has never been properly explained or analysed by the courts."

134. Charles Hollander QC, in his book *'Documentary Evidence'* (11th ed), suggests (at para. 13-10) that

> "…there are strong grounds for reconsideration of the principle."

135. RBS submits, further, that the limited analysis in the case law has concerned the position, the obverse of the present case, where the foreign right is more limited or has been waived, and that a situation where a party has sought to rely on a broader foreign right to privilege, as in the present case, has never been considered.

136. On that basis, it is RBS's position that the Court is not bound by authority to apply the *lex fori* to issues of legal professional privilege and there is no justification for it doing so in the present case.

137. RBS proposes a new choice of law rule, which would apply the law of the place with which the engagement or instructions, pursuant to which the documents came into existence or the communications arose, have their closest connection, and would, in this case, result in the application of US law to the issue of whether the Interview Notes are privileged. RBS's proposed rule would read as follows:

> "Save where to do so would be contrary to English public policy, the English court should apply the law of the jurisdiction with which the engagement or instructions, pursuant to which the documents came into existence or the communications arose, are most closely connected."

138. In its well-presented submissions, RBS addressed the following issues in turn:

(1) Summary of US law on legal professional privilege;

(2) Proposed choice of law rule;

(3) Rationale for proposed choice of law rule;

(4) English authority relating to the relevant choice of law rule; and

(5) Residual relevance of US law under the *lex fori*.

139. As to issue (1), it does appear likely from the evidence of US law and in particular the decision of the US Supreme Court in *Upjohn* (which it has been confirmed to me is still binding), and for present purposes I am prepared to assume, that under US law the Interview Notes would be privileged. In *Upjohn*, as indicated previously, the US Supreme Court rejected the "control group test" as unpredictable, excessively restrictive of what in English law would be regarded as legal advice privilege, and preferred to extend its equivalent privilege to the process of information gathering and sharing within a corporation.

140. However, the preliminary question is whether there is any proper basis for the application of US law in this case. I propose, therefore, to start with issue (4) in RBS's list: the English authority relating to the relevant choice of law rule. I shall deal with the other issues thereafter, but more briefly in light of my view that, although it is not entirely satisfactory, there is no sufficient basis for disturbing what I consider to be the well-established convention or practice of the English Court in proceedings in England as to the application of the *lex fori*, which can be mitigated in appropriate circumstances by the Court's discretion to decline to order inspection.

Relevant English law authority on choice of law rule

141. The first English case where it was decided that the English rules of privilege, being the *lex fori*, should be applied to determine whether a document is privileged from production in English proceedings is (so far as I am aware) *Lawrence v Campbell* [1859] 4 Drew 485.

142. That case concerned an action by the claimant for the return of a sum of money allegedly held on trust for him, which had been transferred by the defendant (Mr Campbell) to a Scottish firm of solicitors (Robertson & Simson) practising in London (though not admitted as English solicitors). The claimant sought disclosure of the correspondence between Mr Campbell and Robertson & Simson, which he said would prove that the money had been held on trust for him. In support of his application for disclosure, the claimant relied on the fact that under Scottish law the communications, "containing as they did the *res gestae* of the litigation" (see page 187), would not have been privileged.

143. The Court held, applying the English law on legal professional privilege, that the communications were privileged. Sir Richard Kindersley V.-C., at the conclusion of his judgment, stated this:

> "A question has been raised as to whether the privilege in the present case is an English or a Scotch privilege; but sitting in an English Court, I can only apply the English rule as to privilege, and I think that the English rule as to privilege applies to a Scotch solicitor and law agent practising in London, and

> therefore the letters in question are privileged from production."

144. Mr Johnson submitted that the case was not authority for any general proposition that the *lex fori* invariably governs issues of legal professional privilege in the English Court and is distinguishable on its facts. He relied on three main points.

145. First, Mr Johnson submitted that a key factor in the determination, emphasised in submissions and reflected in the judgment, was the fact that the Scottish solicitor was practising in London and the relevant advice was given there. It was a case where the law applicable to the engagement and the *lex fori* coincided.

146. Secondly, Mr Johnson relied on the fact that it was a case where the foreign law (Scottish law), on which the claimant in that case was seeking to rely was narrower than the English law of privilege; no one was seeking to rely on a foreign law right of privilege. Mr Johnson submitted that in such circumstances the Court may understandably be reluctant to apply the foreign law, since to do so would strip the client of rights which are commonly accepted as standard under English law and be contrary to English public policy.

147. Thirdly, as well as describing the conclusion the learned Vice-Chancellor reached as being based on "very little explanation or analysis", Mr Johnson submitted that if the real rationale was that privilege was regarded, at that time at least, as a rule of evidence to be governed as such by the *lex fori*, the same rationale should not be applicable nowadays, now that it is recognised that legal professional privilege is a fundamental substantive right, rather than a mere rule of evidence. Mr Johnson also urged me to remember that the case was decided in the mid-19th century, a time when multi-jurisdictional litigation was not commonplace and the courts were less accustomed to applying foreign laws in English courts.[2]

148. In my view, there is something in each of these points; but none is sufficient to upset the conventional understanding of its overall determination that in an English Court the *lex fori* applies to issues of privilege.

149. As to the first point, Kindersley V.-C. does appear to have put some emphasis on the fact that the solicitor was practising in London and the advice was given there. However, the ultimate deciding factor appears plainly to have been the learned judge's conviction that sitting in England he could only apply English law. Furthermore, as on behalf of the Claimants Mr Nash pointed out, in the later case of *Re Duncan* (1968) P. 306 (as to which see further below) Ormrod J (as he then was) considered that the fact that the Scottish firm was practising in England "was clearly not a relevant consideration".

150. The second point is well made: in *Lawrence v Campbell* the rival law of privilege, Scottish law, was narrower in its scope and its application would have resulted in the claim to privilege being denied. It is a point of distinction. However, that begs the question whether there is any less rationale for applying the *lex fori* where the

[2] Dicey & Morris, *'The Conflict of Laws'* (15th ed.), Vol 1 at paragraph 1-018 in this regard notes: "*It has not been easy for the conflicts of laws to adapt itself to the changes in social and commercial life which the 20th century has witnessed. Many of its rules were first laid down in the 19th century and seem better suited to 19th century conditions than those of the 20th century*."

privilege would not be available under English law; or, put the other way round, whether there is any logic for the application of the foreign privilege rule when it protects documents from disclosure, but not when it requires disclosure.

151. The third point, as to the changing perception of privilege from regarding it as essentially a rule of evidence and thus a procedural matter to acknowledging its status as a substantive right, depends on an assumption for which there is less basis than might first appear. The assumption is that privilege was in days past regarded as a rule of evidence. But in truth there is little basis for it, and there is a real possibility that the assumption is derived from, rather than being the rationale of, the convention of applying the *lex fori.* Certainly the way in which, even in *Lawrence v Campbell*, the issue of privilege was described does not support any thesis that the perception of its importance has altered over time. After all, Kindersley V.-C. described privilege as follows (at page 188):

> "The general principle is founded upon this, that the exigencies of mankind require that in matters of business, which may lead to litigation, men should be enabled to communicate freely with their professional advisers, and their communications should be held confidential and sacred, and that none should have the right to their production. The reason is that the exigencies of mankind require it…"

That is not the language of mere process; it is the language of basic right.

152. Moving on in time, *Re Duncan* (*supra*) begins the line of modern authority to the effect that the English Court will apply the English rules of legal professional privilege to communications with foreign lawyers.

153. This case concerned a dispute between the claimant, who had been appointed as the executor of the first two wills of the deceased (Sir Oliver Duncan) and the defendant, who had been appointed as the executor of Sir Oliver Duncan's third will, which had been made in Rome by Sir Oliver Duncan. The claimant brought the action to revoke the defendant's grant of administration, on the basis that the defendant and her associates had persuaded Sir Oliver Duncan to execute the third will by fraud, undue influence and compulsion.

154. The defendant applied to court for an order requiring the claimant to disclose *inter alia* correspondence between the claimant and his foreign legal advisers, touching the questions in issue. The documents were privileged under English law but were not privileged under the laws in the jurisdictions in which the foreign lawyers practised. The defendant argued (see page 310B) that "if a foreign lawyer's own court insists on disclosure of communications between him and his client in litigation in that country, this court will not regard such communications as privileged in litigation in this country".

155. Ormrod J held (see page 310C) that the Defendant's argument was based on no authority and

> "inconsistent with the tenor of the judgment of the decision of Sir Richard Kindersley V-C in Lawrence v Campbell."

156. Mr Johnson, having submitted that the judgment contained no real analysis as to why Sir Richard Kindersley V.-C.'s decision was correct or why as a matter of principle the *lex fori* should be applied in such a context, sought to distinguish *Re Duncan* on substantially the same grounds as he had submitted distinguished *Lawrence v Campbell*. I do not think it is necessary for me to go beyond my previous assessment of those grounds.

157. The next case to consider is *Bourns Inc v Raychem Corp* [1999] 3 All ER 154. Bourns Inc and Raychem Corp had been involved in litigation in England. Raychem Corp sought permission from the English Court to rely in proceedings in the US on documents produced by Bourns Inc in a taxation of their costs of the English proceedings, such as vouchers for counsel's fees and other professional fees and disbursements. Bourns Inc resisted the application on the basis that (i) the documents were privileged and (ii) privilege had only been waived to enable them to be used in the taxation proceedings, not for any other collateral purpose. The Court of Appeal dismissed Raychem Corp's appeal on the basis that it was possible to waive privilege for a specific purpose and in a specific context without waiving it for any other purpose or context.

158. A number of grounds were advanced on behalf of RBS in support of the proposition that *Bourns Inc v Raychem Corp* is not really a decision on the application of the *lex fori,* even if sometimes regarded as if it were (as, for example, in *Australia Crime Commission v Stewart* [2012] F.C.A. 29 in the Federal Court of Australia). Beyond noting the point that no reference is made in the decision to "*lex fori*" or to the earlier cases of *Lawrence v Campbell* and *Re Duncan*, I need not rehearse them at length, since I think it is clear that neither party was seeking to rely upon a right to privilege under a foreign law, and the only question raising an issue of conflict of laws was whether privilege had been waived by Bourns Inc by the evidence of their expert witness in the US proceedings. As to this there was no substantial dispute, for, as explained by Aldous LJ (at page 167*g-h*), with whose judgment the other two members of the Court (Swinton Thomas LJ and Sir Stephen Brown P.) agreed:

> "Raychem do not suggest that under English law privilege is lost in England because privilege cannot be claimed for documents in another country."

159. However, I agree with the submission of the Claimants that what Aldous LJ went on to say immediately after that, in support of what had been agreed, is of relevance. At pages 167*h* – 168*a* he gave his reasons as follows:

> "To suggest otherwise would mean that a court, when deciding whether to uphold a claim for privilege, would need to be informed as to whether privilege could be claimed in all the countries of the world. 'Our system of civil procedure is founded on the rule that the interests of justice are best served if parties to litigation are obliged to disclose and produce for the other party's inspection all documents in their possession, custody or power relating to the issues in the action.' (See *Ventouris v Mountain, The Italia Express* [1991] 3 All ER 472 at 476, [1991] 1 WLR 607 at 611 per Bingham LJ.) Privilege is an exception to that rule justified on the ground of public

> interest. It involves a right to keep confidential the document and the information in it. The fact that under foreign law the document is not privileged or that the privilege that existed is deemed to have been waived is irrelevant. The crucial consideration is whether the document and its information remain confidential in the sense that it is not properly available for use. If it is, then privilege in this country can be claimed and that claim, if properly made, will be enforced."

160. Although I accept RBS's point that Aldous LJ's statement does not address the initial question of whether foreign law or English law is the applicable law to issues of privilege involving a foreign lawyer, nor is it authority for the proposition that whether a document is privileged under foreign law is always irrelevant in the English Courts, I consider (in agreement with the Claimants) that the statement is important for its recognition that the English law of privilege ultimately reflects a public policy decision as to how justice is best served between the parties and a balance between the conflict between a private right and the public interest in the determination of factual matters on the basis of full disclosure is best struck.

161. *British American Tobacco (Investments) Limited v United States of America* [2004] EWCA Civ 1064, like *Bourns v Raychem*, was concerned with the issue of whether privilege had been waived; in particular whether privilege in certain documents included in the bundle of documents prepared for the examination of a witness in England (at the request of the US courts) had been waived in the course of proceedings in the US and/or as a result of the terms of a Consent Judgment in the Minnesota Court.

162. The decision does not really go further than *Bourns v Raychem*, and in effect simply confirms the correctness of that decision, which is cited at paragraph 38 of Mummery LJ's judgment (with which the other two members of the Court, Brooke LJ and Sir Martin Nourse, agreed) as authority for the proposition that privilege is not lost under English law because it cannot be claimed in another country. Neither party had in fact contended to the contrary.

163. However, there is one small passage, to which Mr Nash drew my attention, in Mummery LJ's judgment which neatly reflects the conventional attitude of the English Court that rules of privilege are matters for the court in which the protection is relied on. He said this (at para. 38):

> "As for the ruling in the US courts and the Australian courts that privilege has been waived, that depends on the domestic law of those countries as interpreted and applied by their courts."

164. The last of the cases specifically referred to is *Rochester Resources Limited v Lebedev* [2014] EWHC 2185 (Comm).

165. In that case, the defendant applied to exclude documents from evidence filed by the claimants in support of their application for an anti-suit injunction on the grounds that the document was covered by "without prejudice" privilege. The documents in question were draft proceedings headed "for settlement purposes only" for issue in the

New York court and accompanying documents. The claimants argued that New York law was relevant to the English Court's decision, and that under New York law the documents were not covered by New York "settlement privilege".

166. Blair J accepted that New York law was relevant to give meaning to certain of the references in the document. However, he held that:

> "when the question arises in English proceedings, the rule is that the question of whether or not a document is privileged is to be determined by English law, for reasons which are partly practical (see *Bourns v Raychem Corp.*…"

and accordingly:

> "there was no reason…for [him] to decide whether or not the draft Complaint (and accompanying communications) would actually be privileged under New York law."

167. Again, Mr Johnson sought on behalf of RBS to distinguish that case on grounds substantially similar to those relied on in respect of *Lawrence v Campbell* and *Re Duncan*, but adding the further point of distinction that *Rochester Resources* related to without prejudice privilege, rather than legal professional privilege. In that latter context, Mr Johnson referred me to para. 13-12 in Hollander *'Documentary Evidence'* (12th ed.) which notes that without prejudice privilege does not engage fundamental rights in the same way that legal professional privilege does. For example, whereas legal professional privilege can now generally be asserted in answer to any demand for documents by a public or other authority,[3] without prejudice privilege is generally accepted to be a rule of evidence.[4]

168. I would accept that there may be such a distinction; but whilst it may provide some basis for distinguishing the case, it does not seem to me to go any distance towards undermining the more general convention or practice of treating issues of privilege as for the *lex fori*; and I note that the way Blair J stated his approach was not dependent on the particular basis of privilege claimed (see paragraph [152] above).

169. To conclude my review of the relevant English cases, it seems to me clear that whether described as a rule, a convention or practice, it is the approach of the English Court to apply the *lex fori* to issues of privilege, and has been so since the mid-19th century.

170. It is probably true that in each of the cases in which the rule, convention or practice has been applied, the context has been that the foreign privilege rule would have required disclosure while the English rule would have afforded protection, whereas the opposite is true in the present case. However, it does not seem to me implicit in any of the cases or rational or appropriate to have one rule in the one case and another in the other.

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[3] See Thanki, *'The Law of Privilege'* (2nd ed.), paragraph 1.06.
[4] See for example, paragraph 13-12 of Hollander, *'Documentary Evidence'* (12th ed.).

171. I doubt myself that the *lex fori* has been adopted because the issue has accurately (if at all) been regarded as one of procedure, and in any event I doubt that that would be an accurate or realistic basis for it in the future. In my view, it is an aspect of English public policy, as I elaborate later: the balance to be struck between disclosure and privilege in the course of a trial is always a difficult one, and ultimately is a public policy decision.

172. In any event, I do not think the recognition that legal professional privilege is a substantive right, nor the fact that multi-jurisdictional litigation is now a regular occurrence in a way that it was not previously (including at the time of *Re Duncan*), can justify a departure at this level from well settled rule, convention or practice.

173. In my judgment, it would be altogether too drastic and unsupported a departure to adopt an entirely new "choice of law rule".

174. In such circumstances it may be pretentious for me to attempt any analysis as to the justification and merits or otherwise of the (to my mind) settled position. However, at the risk of that, I would offer the following:

(1) As indicated above, I doubt that any answer lies to the conflict of law issue in seeking to determine whether privilege is to be regarded as a rule of evidence or a matter of substantial right. The difficulty of doing so, and the anomalies it involves, are amply demonstrated by efforts along those lines in other jurisdictions: in Garnett, *'Substance and Procedure in Private International law'* (OUP), *Kennedy v Wallace* (2004) 213 ALR 108 (Fed Ct) in Australia is given as an example, where the court assumed the privilege was procedural despite describing it as a "substantive right" (and other similar cases in Canada and Hong Kong are also instanced).

(2) As mentioned above, the reality in my view is that the question of privilege has long been recognised to be a substantive right, based and justified on "the exigencies of mankind" and inevitably in conflict to some degree with the opposing policy that decisions should be based on the fullest available record. The conflict is such as to require a balance to be struck as a matter of public policy in the forum in which it arises.

(3) I do not myself see that this is, as it is sometimes suggested to be, hostile to comity: public policy has always been recognised, in many other jurisdictions as well as this, as a paradigm of a matter for the *lex fori.*

(4) Further, there are difficulties, both practical and theoretical, with other suggested approaches, including the newly fashioned rule proposed by RBS (which seems to me to be largely derived, though none the worse for that, from the "*most significant relationship*" test in the US).

(5) Even in a federal system such as the US, the application of the test has had its difficulties, not least because to some extent it simply re-brands the essential problem, which is as to which is to be given the greatest weight as between admission of evidence and a fully informed decision, on the one hand, and, on the other hand, privilege rights.

(6) The practical difficulties of applying some other law than the *lex fori* are fairly obvious: it was recognised in *Re Duncan* that any solution but the application of the *lex fori* requires determination of the application and content of foreign law, and even the identification of the relevant foreign law may be difficult according to the stage and context in which the issue arises. Those difficulties are compounded where, in multi-jurisdictional cases involving several parties, there is the potential for a variety of different putatively applicable laws, and the prospect of having to determine them at an interlocutory stage, with cross-examination of experts if there is a disagreement.

(7) In short, a convention may often be a reflection of both pragmatism and overall policy. In my assessment, it may well be that application of the *lex fori*, with a discretionary override, is the least objectionable course.

The Discretion Point

175. I turn, therefore, to consider what is in effect Issue (5) in RBS's list (see paragraph 138 above) in the context of the broader question in effect raised as to the discretion in the Court to refuse or place restrictions upon inspection (the Discretion Point as identified in paragraph 2(3) above).

176. There is no doubt, as Bingham LJ explained in the conclusion of his judgment in *Ventouris v Mountain* [1991] 1 WLR 497, and as emphasised again by the Court of Appeal in *Sumitomo* (see para. 79), that:

> "where a party resists production of a selection made from own client documents, it is a matter for the court's discretion whether to order production."

177. Further, *CPR 31.19* provides a procedure for objecting to disclosure and inspection. Although *CPR 31.19(1)* reads confusingly because it refers expressly only to "withholding disclosure…on the ground that disclosure would damage the public interest", the rest of the rule appears to be intended to deal compendiously with all objections to disclosure and inspection.

178. *CPR 31.19(3)* provides:

> "A person who wishes to claim that he has a right or a duty to withhold inspection of a document, or part of a document, must state in writing –
>
> (a) That he has such a right or duty; and
>
> (b) The grounds on which he claims that right or duty."

179. Mr Johnson on behalf of RBS cited the decision of Neuberger J (as he then was) in *Morris v Banque Arabe et Internationale d'Investissement SA* [2000] C.P. Rep 65 as confirming that the words "right" and "duty" in *CPR 31.19(3)* are broad enough to cover a right or duty under foreign law.

180. He prayed in aid the rule and the inherent discretion of the Court, in urging the exercise of the Court's discretion to prevent inspection of the Interview Notes. He relied especially on the following reasons:

(1) Under US law RBS has a right to withhold inspection of the interview notes. Ordering inspection would breach that right.

(2) If a client instructs a lawyer qualified in a particular jurisdiction in respect of a matter governed by the laws of that jurisdiction, the client is likely to expect that communications which arise or documents which come into existence, pursuant to that engagement, which are privileged under the laws of that jurisdiction, will remain privileged in subsequent litigation. RBS had a reasonable expectation that the Interview Notes would be and remain privileged. To order inspection would be contrary to that expectation and would prejudice RBS.

(3) The US privilege rules in question are in reality closely aligned to the English rules, in the sense that they are directed towards the same basic end, and are not so far removed from our own conception of fairness and proper conduct as to be disregarded.

181. The Claimants submitted that this argument is misconceived on the basis that the right to withhold a document must be determined by English law. It is simply irrelevant that under a foreign law a party might be entitled to withhold disclosure if that is not the case under the relevant applicable law (i.e. English law). Mr Nash submitted that to hold otherwise would be to say that the English Court has an inherent jurisdiction or discretion to disapply the law.

182. I do not agree with Mr Nash on this point. There is no question of disapplying the law; only of exercising a recognised discretion to prevent disclosure or inspection notwithstanding that the document is disclosable. Furthermore, in my view, the discretion is a salutary one, not least in the context of a case where legitimate expectations may also need, in all fairness, to be taken into account in striking a balance. As Bingham LJ put it in *Ventouris v Mountain* (*supra*, at page 622C-E):

> "[the party seeking disclosure's] argument appeared to assume that there was no choice between a finding of legal professional privilege and an order of immediate disclosure and inspection. In my judgment, this is not so. The process of discovery is not an uncontrollable juggernaut…
>
> …
>
> In *Science Research Council v Nasse* [1980] AC 1028 the House of Lords and in *Dolling-Baker v Merrett* [1990] 1 WLR 1205 the Court of Appeal made plain that production and inspection are not automatic once relevance and the absence of entitlement to privilege are established. While the court's ultimate concern must always be to ensure the fair disposal of the cause or matter, it need not be unmindful of other legitimate

> concerns nor is it powerless to control the terms upon which production and inspection may be ordered."

183. Of course, any such discretion must be exercised judicially. It is worth noting that in *Ventouris v Mountain* it was being argued that production of the documents "could lead to violence, intimidation, interference with witnesses and destruction of evidence" (page 622B-C). The Court is likely to lean heavily in favour of disclosure unless compelling grounds are provided to suggest that the public interest and private entitlement to trial on all the disclosable evidence must yield to some exceptional concern.

184. Where what is relied on is a particular and proven legitimate expectation under foreign law the hurdle is the higher if, as I think, it is primarily on public policy grounds that the Court has applied its own law in preference. But I do not think it inconceivable that, in a special case, the general public policy will yield to the particular private right albeit under another law.

185. I must therefore consider whether this is such a special case. Although troubled by the apparent assurances given to the interviewees, and what may have been RBS's own expectations, I have concluded that it is not, and that I should not exercise what I have described as the 'overriding discretion.'

186. The factual context is not quite clear; but it appears to tell against RBS's plea. It is true that the interviews were part of an investigation associated with two SEC subpoenas and/or allegations made by Mr Hong in March 2008. However, the subject matter of the subpoenas and Mr Hong's allegations related to RBS's 2007 Accounts and in particular RBS's determination of its US sub-prime exposures and other matters central to the prospectus which is the subject-matter of these proceedings ("the Prospectus"). (Those US sub-prime exposures form a central part of the Relevant Exposures in dispute in the present proceedings and the 2007 Accounts form the baseline for the Credit Market Exposure ("CME") Table in the Prospectus.) The Prospectus was subject to English law and any dispute in respect of it would be likely to be governed by English law and the FSMA. It is not clear to me whether at the time of the interviews, the possibility of legal action in England in relation to the Prospectus was actively envisaged; but it cannot have been thought altogether unlikely. HSF accepted in correspondence that their initial assumption was that English rules of privilege would apply in any such dispute. Any legitimate expectations of protection under US law must be read subject to, and are in my view mitigated by, such considerations.

187. Moreover, even if that were not so, I do not consider the circumstances such as to justify special release of the disclosure obligation. I decline, therefore, to exercise my overriding discretion to prevent disclosure and inspection or make conditions in respect of them.

RBS's Points (2) and (3): proposed choice of law rule and its rationale

188. In the light of these conclusions I do not think it necessary or appropriate to address at any length the remaining points in RBS's submissions on Choice of Law, that is to say points (2) and (3) which (respectively) elaborate RBS's proposed choice of law rule and its rationale.

189. I have indicated above certain potential problems with the proposed rule, whilst acknowledging the rationale of the "*most significant relationship*" test in the US from which I surmise it is in part derived, and the usual and salutary objective of fulfilling the reasonable expectations of the parties.

190. In terms of drafting, the opening saving provision, to the effect that the "most closely connected" test is not to be applied where to do so would be contrary to English public policy, is no doubt necessary, but its necessity confirms a conundrum given that the law of privilege is rooted in and justified by public policy. There is, in my view, something unsatisfactory and counter-intuitive about a proposed rule which seems intended to adopt a starting point of subordinating English public policy to the rules of another jurisdiction, whilst at the second stage enabling English public policy to be reasserted according, presumably, to the extent or severity of the other jurisdiction's departure from English norms.

191. Further, as the Claimants have pointed out, the intended effect of the proposed rule is to permit the adoption of whichever is the "broader" right. That is a deeper inroad into English public policy, and inherently questionable.

192. There are also difficulties, in my view, inherent in identifying the "reasonable expectations" of the parties, especially in the very sort of multi-jurisdictional cases the proposed rule is meant to provide an answer for, and where (as in the present case) the individuals whose expectations are being assessed may be working in one country, resident in another, and working for a corporation which is incorporated in a third country and is a subsidiary of a parent corporation incorporated in a fourth country or legal system. The US test or this derivation of it is easier and more logical to apply in a federal system, especially one where "interest analysis" is the guiding principle and is well known.

193. The novelty of the proposed rule also tells against it, not by any means conclusively, but because it has no real root in authority and, as with any concept of its kind, is almost bound to give rise to uncertainty in its understanding and application.

194. I have mentioned already, but repeat, my concern that the practical difficulties of the twin difficulty of measuring reasonable expectations of persons operating in different and possibly conflicting jurisdictions, and then of establishing the true public policy or established rule in such jurisdictions. It may call for findings of fact on the basis of expert evidence in an interlocutory context: that is by no means to be welcomed.

195. As my last observation, the discretion vested in the English Court as I have described it would seem to provide a less controversial way of ensuring that the English rules of privilege, and the public policy on which they are based, may be mitigated in a special and deserving case.

Conclusion

196. In conclusion, for the reasons I have attempted to state, my judgment is that

    (1) RBS's claim to the protection of legal advice privilege for the Interview Notes fails.

(2) RBS's claim to the protection of the privilege extended to "lawyers' working papers" also fails.

(3) Although it seems likely, and my working assumption is, that US law would afford protection on either or both grounds, English law is the applicable law, as the *lex fori*.

(4) The choice of law rule proposed by RBS is intriguing; but there are arguments against it powerful enough that I do not consider it workable, even if there were justification and warrant for its introduction, which, in my view, there is not.

(5) I accept that the Court has discretion to prevent disclosure and inspection, or impose conditions, in an exceptional case where (in effect) it considers that there are such special features as to require a different striking of the balance, as a matter of overall justice and to prevent its process itself being the cause of real and serious harm. But I have not been persuaded that this is such a case.

(6) I do not think that in all the circumstances there is a need and justification for a further round of evidence or for Court inspection of the Interview Notes. The issues were well ventilated in correspondence; RBS was permitted to supplement its evidence previously. The present record must be the basis of adjudication.

197. I am grateful to all Counsel for their (and their respective teams') valuable assistance.

198. I would ask Counsel to seek to agree a form of Order.

199. Any consequential matters can be dealt with at or (if there are contentious matter and a short interval for reflection is required) at a further hearing shortly after the hand-down hearing (though, given the urgency of the matter and the imminence of the PTR, I stress that any interval must be short).