Working Paper 9

Reforms to privilege laws

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THE POST OFFICE PROJECT

Ethics and justice lessons from the Horizon Scandal

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Executive Summary

In this document we:

- Set out some of the ways legal professional privilege problems appear to have manifested in evidence before the Horizon IT Inquiry.
- Rehearse the rationales for legal professional privilege and its relation with the rule of law.
- Explore how those rationales weaken in practice.
- Set out limited ways in which legal professional privilege can be reformed to better align the purpose of legal professional privilege with its practice.

A thorough review of legal privilege, considering it from first principles, and based on how privilege actually impacts on behaviour is needed, especially in corporate contexts.

In this document, we make suggestions short of a full review to suggest priority ways in which we think the operation of legal professional privilege could be improved whether or not such a review takes place.

In particular, we suggest:

1. The need to maintain a tightly defined notion of who the client is for the purposes of privilege.
2. Procedures for asserting privilege in litigation should apply the tests as set out in CPR 31 and applied consistently by the courts to avoid the blanketing of information in privilege and focus the minds of those claiming privilege when asserting it.
3. Reversing the current 'cautious' approach of courts to reviewing privilege claims including, in particular, greater use of inspection in camera by the courts or similar approaches for suitable cases.
4. Strengthening ethical standards and corporate governance rules to prevent abuse of privilege.
5. Privilege for corporations (and other organisations) should be qualified, allowing courts to perform a balancing exercise where a party seeking a document's production can show they have a genuine need for the materials and that their substantial equivalent cannot be obtained by other means without undue hardship.

Introduction: Privilege issues and the Post Office Scandal

Legal professional privilege issues are an important element of the Post Office Horizon IT Inquiry. Without engaging in a detailed analysis of each of these, the evidence suggests the following problems and allegations are being considered by the Inquiry:[1]

1. Managing legal professional privilege generally to minimise disclosure of adverse information in litigation and via FOI requests. This was a central element of the advice given by lawyers to the Post Office (POL).[2]
2. Litigation holds/document preservation notices/and other indications of advice that encouraged:
    a. not writing adverse information down to minimise the need to disclose adverse information;[3]
    b. the routine labelling of documents as legally privileged (by non-legal staff),
    c. the routing of documents through legal advisers for advice with a significant, main, or sole purpose of privilege being capable of asserted (whether successful or not);
    d. the documentation of adverse information in ways designed to make those documents *look like* they were drawn up as preparation for litigation.
3. Work being commissioned,[4] or "cleared",[5] through lawyers with the sole or main aim of asserting and securing legal professional privilege. On at least one significant occasion evidence suggests this was done retrospectively without any lawyer having been involved.[6]

[1] See also Closing Submissions; Phases 5, 6 & 7 on behalf of the Post Office, para. 68-100 and Inquiry Closing Submissions 9 December 2024 (Hudgell CP group) paras. 3.57-3.65.

[2] See, for Example Transcript 13 June 2024 – Andrew Parsons, for instance the passage on, "Legal Privilege = Vital to Success"

[3] See, for example. Transcript Simon Clarke regarding advice given by Andy Parsons and Emily Springford email, 20 October 2011 (POL00107696)

[4] Transcript 24 April 2024 – Chris Aujard

[5] Transcript 24 April 2024 – Susan Crichton.

[6] In the commissioning/production of an Internal Audit Report said, incorrectly, to have been reviewed by Deloittes. See Closing Submissions; Phases 5, 6 & 7 on behalf of the Post Office the para. 73

4. Document(s) being presented as legal advice that were not.[7]
5. Asymmetric management of the boundaries between civil and criminal litigation obligation of disclosure. Management of civil disclosure obligations asserted civil tests within the business (such as disclosure obligations only applying to written down information) but did not consider, cascade, emphasise or properly pursue more stringent obligations as regards criminal evidence (which may or did require adverse information to be disclosed whether written down or not).
6. Professionals asserting privilege without considering key relevant questions to the assertion of privilege, or only considering them in a cursory manner, such as:
    a. whether privilege can be asserted in material that is iniquitous;[8] or
    b. whether proceedings are genuinely in contemplation;[9] or
    c. whether written documents contain information that must be disclosed in and of itself (in criminal proceedings, such as the information that Gareth Jenkins' evidence was tainted); or
    d. whether disclosable information in privileged documents is likely to be contained in other, probably non-privileged documents that have not been disclosed (in either criminal or civil proceedings). Evidence of remote access being possible without SPM consent and without proper controls would be one such example.
7. General failures to understand privilege in the business[10] (arguably encouraged by legal advice).[11]
8. Confusion about privilege and division of labour,[12] or the exploitation of those, contributing to the failure to make proper disclosure to the CCRC and SPMs.

[7] Transcript 13 June 2024 – Andrew Parsons, see the discussion of the insurance notification which one of the Counsel to the Inquiry, Julian Blake suggests was "disguised as advice".

[8] Transcript 11 June 2024 – Anthony de Garr Robinson KC

[9] See, for example, the oral evidence of Rodric Williams.

[10] Transcript 18 October 2024 – Benjamin Foat

[11] See in particular advice given about matters not being written down via Emily Springford's email and in later manifestations.

[12] Between civil and criminal and junior and senior lawyers involved in the work.

9. Horizon Bugs/contested shortfalls being dealt with other than on a business-as-usual basis to try and bring them within the protection of privilege.[13] One example relates to disclosure of evidence about the full position on remote access (a critical vulnerability in the Post Office's handling of Horizon cases).[14]
10. Reduced disclosure to the Government (the sole owner of the business) including to the body managing the government's shareholder relationships, the UKGI.[15]
11. Reduced or nondisclosure of information to the Board, particularly the Swift Review.
12. Concerns about privilege may have inhibited or forestalled internal management review of problems, such as a proposed "lessons learned review" in 2013,[16] and follow-up work on the Swift Review's recommendations.
13. The stated desire to assert privilege over follow-up work in Swift that led to such work being subsumed within the Bates litigation and then stopped. Some evidence suggests this was part of a deliberate strategy to prevent such follow-up work continuing.
14. Privilege concerns may have shaped what is said about remote access, and historical knowledge about remote access, in ways that were, or were potentially, misleading.

The extent to which such allegations are made out, and the full implications of them, is a matter for the Inquiry, but as the Post Office indicated in its final submissions to the Inquiry, "The real issue is the extent to which… …from 2011 onwards… [POL sought] to use claims of legal professional privilege as a tool to cloak communication in privacy." They agreed there was a tendency to do that.[17]

The lawyers appearing before the Inquiry to defend the practices above sought, in the main, to suggest that their handling of legal professional privilege was a normal part of asserting their client's rights.

Criticisms of that view might suggest, at the gentler end of the spectrum, that privilege was mismanaged or, to increase the level of criticism significantly, that privilege was over-claimed, blinding the Post Office

[13] See the evidence of Susan Crichton dated 23rd April 2024, discussing "a potential Horizon glitch" reported to Simon Baker, "managed subsequently directly with Rodric Williams and Steve Beddoe by [John Scott] in a manner to bring it under legal privilege as far as possible." And the evidence about a McColls branch

[14] Transcript 13 June 2024 – Andrew Parsons

[15] See, for example, Transcript Sir Alex Chisholm - 7 November 2024

[16] Transcript 13 June 2024 – Andrew Parsons

[17] Closing Submissions; Phases 5, 6 & 7 on behalf of the Post Office the para. 72.

(and its lawyers) to its other obligations to act with integrity, to not mislead others, or, to take the most adverse interpretation, that privilege was speciously asserted, even perhaps supporting a conspiracy to pervert the course of justice.

We state the range of possibilities rather than draw conclusions here but should also note what Mr Justice Fraser in the original Group Litigation said that helps us place the issue of privilege, and its mishandling or potential abuse, in a broader context. He said, POL's behaviour prior to and during the case:[18]

> was marked by "a culture of secrecy and excessive confidentiality generally within the Post Office, but particularly focused on Horizon."[19] This, "culture of excessive secrecy at the Post Office about the whole subject matter of this litigation," he says is, "directly contrary to how the Post Office should be conducting itself. I do not consider that there can be a sensible rational explanation…"[20]

The judge criticises various redactions, including the absurd redaction of a Working Group name, [21] and assertions of legal advice and litigation privilege for documents that did not bear the normal signs of privilege. [22] He also criticised redactions for data protection reasons, which may have disguised who knew about problems with Horizon, as well as reducing the ability of the claimants (and their lawyers) to make sense of disclosed information as well as redactions that had the effect of concealing Executive knowledge of Horizon flaws[23]

Whatever conclusion one draws, even if one leans towards a less sceptical position on the purpose and motives of those involved, legal professional privilege played a deeply problematic role.

What is needed is a thorough review of legal privilege considering it from first principles and based on how privilege actually impacts on behaviour, especially in corporate contexts.[24]

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[18] This passage is taken from the first Post Office Project Working Paper

[19] *Bates v Post Office Ltd (No.3: Common Issues)* [2019] EWHC 606 (QB) (15 March 2019) ["*Bates* No 3"], 36

[20] *Bates* No 3 560, 561

[21] *Bates* No *3*: 37, 39, 42, 120

[22] *Bates* No *3*: 37, 39

[23] *Bates v Post Office Ltd (No.6: Horizon Issues)* [2019] EWHC 3408 (QB) (16 December 2019) ["*Bates* No 6"], 246

[24] See Closing Submission on Behalf of Core Participants Represented by Howe & Co, 9 December 2024, para. 235 and Inquiry Closing Submissions 9 December 2024 (Hudgell CP group), para. 4.31 and Moorhead (2024) *Routes back to proper professionalism? Lucidity, morality and accountabilities, Hamlyn Lectures 2024*, forthcoming.

In what follows, we set out our analysis of the rationale for privilege and set out thoughts for its reform suggested, we would say, by the list of concerns we see above in the Post Office saga

We make suggestions short of a full review to suggest priority ways in which we think the operation of legal professional privilege could be improved whether or not such a review takes place.

The value of legal professional privilege

All major common law jurisdictions recognise that powerful reasons exist for protecting lawyer–client communications and preparatory materials for litigation from compulsory disclosure.

The privilege allows clients to talk freely to a lawyer, knowing that their confidences will not be revealed without their consent. This promise of confidentiality encourages clients to seek legal assistance and speak candidly to their lawyer, or more accurately, it removes a disincentive against clients speaking candidly to lawyers.

Once fully apprised of a client's circumstances, the lawyer can give accurate and relevant legal advice and provide the best possible representation. The result is that people obtain a better understanding of the law and their legal rights and obligations. These are important ends in themselves and underpin much of the jurisprudence declaring LPP to be a human right.[25]

The privilege also has wider social and rule of law benefits. By encouraging consultation with lawyers and greater candour in lawyer–client communications, the privilege should help foster legal compliance and a more efficient litigation process. Modern society is complex and achieving compliance with many laws often requires detailed legal advice. As Baroness Hale stated in *Three Rivers*:[26]

> 'It is in the interests of the whole community that lawyers give their clients sound advice, accurate as to the law and sensible as to their conduct.'

Whilst the rules on legal professional privilege emphasise absolute confidentiality as a necessary precondition of candour,[27] Hales' highlighting of *sensible* advice is a reminder that the policy justification of legal professional privilege is to enable lawyers to counsel their clients towards lawful and proper conduct. Litigation similarly depends on skilled

[25] *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 [7]; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 (HCA) [85].

[26] *Three Rivers DC v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610 [61].

[27] A claim arguably undermined by what little empirical evidence there is in the area

lawyers, properly instructed, if it is to be conducted fairly and proportionately to the interests at stake.[28] This extends beyond representation. Where lawyers are not fully apprised of their client's case, there is the danger of discouraging settlement or reasonable settlements, because neither side's counsel is fully cognizant of the strengths and weaknesses of their own side's case, let alone the opponents, until trial and therefore do not know whether to settle or on what terms.

The drawbacks of legal professional privilege

While legal professional privilege promotes the rule of law, it is also widely recognised that allowing people to suppress relevant evidence can undermine the administration of justice. This, in turn, can undermine public confidence in the correctness of court decisions and the rule of law. Thus, the dividing line between what is privileged and what is not matters a great deal.

To consider the pros and cons of privilege one needs to consider the counterfactual: what evidence, documents or communications would exist if there were no privilege?

If privilege were abolished, it is typically assumed that clients concerned about the disclosure of their confidential information may stop communicating this information to their lawyers.[29] If so, the evidence supposedly suppressed by the privilege would not exist without it. Even the fiercest critics of the privilege, such as Bentham, accepted the logic of this argument.[30]

Similarly, while lawyer–client communications and preparatory materials for litigation are protected from disclosure, a client or litigant's knowledge of the underlying facts remains compellable. In theory, therefore, the evidence suppressed by the privilege can always be obtained by other means even if it is more costly to do so.

However, few lawyers would doubt that, in practice, the outcome of a privilege dispute is often a zero-sum game: upholding a privilege claim often changes the course of investigations and legal proceedings, allowing the privilege holder to keep sensitive information under a cloak of secrecy and thereby avoid legal liability or assert claims to which they have no genuine entitlement.

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[28] *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 (CA) 649; R Assy, 'Can the Law Speak Directly to its Subjects? Law, Language and Access to Justice' (2011) 38 J L & Soc 376–404.

[29] Evidence on this is equivocal, for a range of reasons, but it is a useful starting point.

[30] J Bowring (ed), *The Works of Jeremy Bentham* (London, 1842) 473–9.

The drawbacks of LPP can arise whenever a privilege claim is made and regardless of the identity of the person claiming privilege. However, there is particular concern about the potential for corporations and public bodies to make very broad, and sometimes unmeritorious, privilege claims.

In the case of governments, there is also concern that privilege claims are used to avoid disclosure of sensitive information of significant and legitimate public interest, and which the public would otherwise be entitled to access under freedom of information laws.

Points specific to corporate privilege

It is difficult to underestimate the value of lawyers giving wise counsel to their corporate clients, which is 'accurate as to the law and sensible as to their conduct'.[31]

Legal professional privilege is said to promote compliance and good governance by encouraging companies to get advice and order their affairs in a lawful manner. Corporations are subject to an increasing array of laws and regulations, and in many heavily regulated areas the line between prohibited conduct and legitimate commercial behaviour is not always an 'instinctive matter'.[32]

Compliance with these laws would be difficult without taking legal advice. Guaranteeing corporations the right to communicate in confidence with counsel is one way of encouraging corporations to get that advice. The American Bar Association claims that:

> Extending the privilege to corporations fosters an open dialogue between a corporation's management and corporate counsel, which can help ensure that the corporation complies with laws that might otherwise have been broken.[33]

Note again the praying in aid of the idea that privilege enables corporate clients to be counselled towards legality.

One should add that there also needs to be frank, if not open, dialogue between corporate counsel and ordinary corporate employees who have knowledge of the matters on which the company needs advice.

As we can see in the 'charge sheet' of privilege related problems above, privilege interrelates with the culture of the organisation. Arguably, in those examples, privilege supported a less than frank culture. There are

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[31] *Three Rivers DC v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610 [61] (Baroness Hale).

[32] *Upjohn Co v United States* 449 US 383, 392–3, 101 S Ct 677 (1981).

[33] American Bar Association, 'Taskforce on Attorney Client Privilege Report' (2005) http://www.abanet.org/buslaw/attorneyclient/home.shtml

lots of influences on the candour and accuracy of such communication,[34] but one especially germane to a discussion of privilege is that the company's employees may 'hold back half the truth' for fear that frank communications with corporate counsel could be disclosed or used to their prejudice

The risk of compulsory disclosure of lawyer–corporate client communications will create hard choices for at least some corporate employees in some situations. Whilst it is always in the company's interests to get accurate advice on legal matters affecting the company, disclosure of that advice can prejudice the company's position in litigation and expose it and individual agents to civil claims or regulatory action, as well as undermine the company's commercial position. The employees' and the company's interests are not always aligned; there are strong incentives towards telling the Company what they want to hear that privilege does not assist with.[35]

Faced with these risks, there are bound to be some corporate agents who decide not to consult lawyers, or to be selective or even mislead corporate counsel when communicating with them. In turn, this will make it harder for company management to achieve legal compliance.

This legal and commercial reality suggests there is a case for giving some protection to lawyer–corporate client communications. Conversely, employees making non-risky disclosures do not need the incentive of the privilege; they just need an instruction from their superiors and a corporate culture that encourages transparency. Nonetheless corporate agents who are contemplating consulting legal advisers, and the corporate agents who will be communicating with them, may benefit from clearer boundaries for the privilege so that they can have a high degree of confidence that their communications will be kept confidential, and be able to predict the circumstances in which that confidentiality may be lost.

Particular drawbacks of corporate privilege

While the value of companies having uninhibited access to sound legal advice is clear, we can already see its influence on the accuracy of information sharing by its employees is more complicated.

There are other ways in which the drawbacks of corporate privilege are greater than those attributable to a privilege for individuals. This is partly

[34] See R. Moorhead (2024) Can legal logic pollute institutions? Extraordinary Orthodoxies and Legality Illusions - Hamlyn Lectures 2024 , forthcoming, and the discussion of Donald Langevoort's work, e.g., ; DC Langevoort, 'Chasing the Greased Pig Down Wall Street: A Gatekeeper's Guide to the Psychology, Culture, and Ethics of Financial Risk Taking' (2010) 96 Cornell L. Rev. 1209; DC Langevoort, 'Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis' [2012] Wis. L. Rev. 495.

[35] Ibid.

a product of scale and partly a product of the difficulties in applying a rule designed for individuals to legal entities who can only acquire information, take advice, and act through their agents.

Large corporations tend to acquire much more information and generate many more records than an individual does. Accordingly, the number of records corporations are required to disclose under compulsory processes, and the number they can claim privilege over tends to dwarf the disclosure obligations and privilege claims of individuals.

Corporations enjoy perpetual succession, can be registered in multiple jurisdictions at the same time, and can have thousands of agents in numerous locations. Most large corporations generate voluminous internal communications, and communications with third parties, as part of their day-to-day activities. It would not be over the top to describe large corporations as information-processing bureaucracies.

Relatedly, the consequences of a privilege claim by a corporation potentially have a greater impact on law enforcement investigations and court proceedings than a claim by individuals. The capacity for individuals to suppress evidence is limited principally because the privilege applies only to what is *communicated* between lawyer and client. The client's *knowledge* of the underlying facts remains compellable. The individual client can only communicate what she knows, and such knowledge can be compelled directly from the individual, and with minimal cost. A client giving evidence is subject to cross examination on what they know, did, said, saw etcetera independently of any communications with their lawyer.

By contrast, restricting the privilege to communications is much less effective in preventing corporations from suppressing evidence. The line between *compellable knowledge* and *privileged communications* for corporations can be almost impossible to draw. Corporations can act only through their agents and typically acquire information in a purposeful manner. The company's 'knowledge' is principally found in the records obtained or generated by its agents: normally in the form of communications from third parties, or communications to other agents in the corporation. It is not difficult to see the temptation for corporate managers to have company records generated by lawyers, or routed through them, for the purpose of creating a privilege claim over sensitive information held by the company.

One way for investigators or opponents in litigation to get around this problem is to compel the information from the corporate employee who communicated it to the company lawyer. However, this strategy has two notable limitations.

First, law enforcement agencies and opponents face the practical difficulty of identifying the employees who might hold such information.

The employee may no longer work for the entity or may no longer be available. This is often the situation where the events under investigation or in dispute occurred years or decades earlier. Trying to ascertain which employee or former employee in a large corporation holds the relevant information can be like finding the proverbial needle in the haystack. Finding that needle also depends typically on the full cooperation of the corporation in identifying the likely current or former employees.

Secondly, in some instances, companies can funnel information directly through their legal advisers so that only corporate 'knowledge' on a particular subject can be found in privileged communications.

While it is impossible to know how common the practice of information funnelling is, there is evidence that some corporations and some advisers are prepared to engage in this behaviour.[36] As we can see above, this seems to have been a central part of the legal strategy for managing adverse information about Horizon, remote access, and Horizon prosecutions in the Post Office Scandal.

Keeping LPP within sensible boundaries and inhibiting abuse

Some aspects of the law and practice are particularly important in setting the boundaries of privilege, especially for corporations and public bodies.

We set out controls that are part of the existing law and those that would benefit from introduction or improvement. We believe these will better keep the boundaries of LPP within fair limits and prevent unmeritorious privilege claims.

Two that are settled are the dominant purpose test and the iniquity exception to LPP.

Third, is the narrow definition of the corporate client for the purposes of legal advice privilege.[37] This control device is established in English law, but has been strongly criticised by the Court of Appeal and some academic commentators on the basis that it disadvantages large and multi-national corporations.

Fourth, are the procedures for claiming and challenging legal professional privilege to prevent the making of unmeritorious privilege claims. In our view, these should be applied more robustly.

[36] C Wright and K Graham (eds), *Federal Practice and Procedure* (vol 24, 2nd edn, West Publishing, St Paul, MN 1986) S 5476; V Alexander, 'The Corporate Attorney–Client Privilege: A Study of the Participants' (1989) 63 St John's L Rev 191; A Higgins, 'Corporate Abuse of Legal Professional Privilege' (2008) 27 CJQ 377.

[37] Three Rivers No 5

Fifth, we believe there is a need to strengthen the ethical rules and corporate governance rules designed to ensure that corporations do not assert unmeritorious privilege claims.

Sixth, we set out below why we believe the law should be changed so the courts can expressly qualify the privilege to override claims by corporations (and public bodies)[38] in appropriate circumstances during litigation or by court application.

Adopting a qualified privilege would help ensure that critical evidence, which is not reasonably obtainable by other means, can still compelled by law enforcement agencies or the courts notwithstanding its prima facie privileged status.

Each of these control devices will be addressed in turn.

The dominant purpose test

A document or communication will only attract privilege if:

a) a client or litigant's purpose in making or procuring it was to obtain legal advice or prepare for pending or reasonably anticipated litigation; and,
b) these legal purposes were the dominant or predominant purpose of the communication.

The dominant purpose test is vital.

It aims to deal with the mischief, apparent in allegations before the Post Office Inquiry, of clients avoiding disclosure of sensitive information merely by transmitting it to their lawyer or having lawyers present when the information is communicated.

The dominant purpose test is designed to strike a balance between denying protection to material that has only an incidental legal purpose and giving protection to material principally legal in purpose but with incidental commercial purposes.

The test can be difficult to apply in practice. It is very fact-sensitive and can lead to decisions that appear to be inconsistent. We might surmise from some of the Post Office evidence that it was applied self-servingly by them and their lawyers, if it is considered at all.

However, the device has been an important mechanism, both in litigation and legal advice privilege contexts, to prevent corporations and public bodies from asserting privilege over documents that would have existed even without a privilege.[39]

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[38] Similar arguments could be applied to other organisations including trade unions and charities.

[39] See eg *Waugh v British Railways Board* [1980] AC 521; *R (Jet2.com Ltd) v Civil Aviation Authority* [2020] EWCA Civ 35, [2020] QB 1027

The crime-fraud or iniquity exception

All jurisdictions deny legal privilege to communications made in furtherance of crimes and some civil wrongs.

The principle that it is no part of a lawyer's role to assist in the commission of wrongdoing is universally accepted. In England, it includes abuse of statutory power, and in Australia conduct amounting to 'a fraud on justice'.[40] It clearly applies to legal wrongs which involve dishonesty.[41]

In *Eustice v Barclays Bank*, the Court of Appeal went further, holding the exception can apply to wrongs where the client's conduct is sufficiently 'iniquitous' that the public interest requires its disclosure.[42] Despite occasional obiter criticism, and some judgments overlooking it entirely,[43] the decision is still good law and remains an important safeguard against attempts by any client, but especially corporate clients, to use their lawyers' offices to evade their legal obligations.

There are obvious public policy benefits in deterring candid lawyer–client communications in furtherance of iniquitous purposes. Schiemann LJ, who delivered the court's judgment, acknowledged that the effect of the decision was that those wishing to engage in sharp practice might be discouraged from seeking advice, and the opportunity for lawyers to dissuade them from the sharp practice would be lost. However, he said it had 'the undoubted public advantage that the absence of lawyers will make it more difficult for them to carry out their sharp practice'.[44] Furthermore clients approaching lawyers for advice on a potentially iniquitous scheme in good faith would not face the risk of exposure if they follow advice to not advance the scheme.

A narrow definition of the corporate client

Unlike litigation privilege, legal advice privilege only protects confidential communications between the client and their legal adviser (and at least some preparatory materials thereto).

In corporate contexts, it is necessary to identify which agents of the company are considered to be, or speak for, the 'corporate client' for the purpose of advice privilege.

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[40] *A-G for the Northern Territory v Kearney* (1985) 158 CLR 510 (HCA) [17]

[41] *Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd* [1972] Ch 553

[42] *Eustice v Barclays Bank plc* [1995] 4 All ER 511, [1995] 1 WLR 1238

[43] See eg *Al Sadeq v Dechert & Ors* [2024] EWCA Civ 28

[44] *Eustice v Barclays Bank* [1995] 1 WLR 1156 (CA), [1995] 2 BCLC 630, 645..

In England the issue emerged in the *Three Rivers* litigation. The litigation is complex, and useful summaries can be found elsewhere.[45] For present purposes, it suffices to say that the effect of the decision of *Three Rivers No 5* is that not all employees will be treated as part of the corporate client for the purposes of the privilege.

There were technical problems with the Court's treatment of the client question. The Court did not lay down general guidelines that would provide a rule of attribution (or identification) as to who is and who is not speaking for the corporate client and in what circumstances. And their analysis of who the client was on the facts of the case itself was sparse.[46]

However, the lower courts have started to flesh out the parameters of the *Three Rivers* approach, especially Mr Justice Hildyard in the *RBS Rights Issue Litigation*, in a way that has now produced a tolerably clear and workable test. Put simply, only those capable in law of seeking and receiving legal advice as a duly authorised organ of the corporation – sometimes referred to as the company's 'control group' – will be deemed to be part of the corporate client for the purposes of the privilege.[47]

Nonetheless, in ENRC and other recent decisions the Court of Appeal has been highly critical of the decision in *Three Rivers No 5*.[48] Whilst accepting only the Supreme Court can overturn the decision, the court suggested the 19th Century case law on which *Three Rivers No 5* is based belongs to another less complex era in which the knowledge of an employee of a company could be equated with the knowledge of an independent agent and treated as distinct from knowledge of the company. The Court suggested a need to develop the privilege rule in a way that took account of the modern world.

We agree, but, unfortunately, the Court overlooked wider realities of corporate law and practice. Some of these suggest corporations do not require a privilege for the policy aim of privilege to be effective. Or that, as evidence before the Post Office Inquiry suggests, too wide or firm a form of privilege may be harmful to the interests of justice that are its ultimate goal.

Their inclinations on privilege are based on narrow understandings of how privilege interacts with corporate culture and pay insufficient attention to the point that corporate privilege does not provide corporate agents with

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[45] See eg A Higgins, Legal Professional Privilege for Corporations: A Guide to Four Major Common Law Jurisdictions (OUP 2014) [3.02]-[3.39]; *ENRC v SFO* (CA) [67]-[85].

[46] For further discussion see A Higgins, ibid [3.16]-[3.28], [3.88]-[3.109]

[47] *RBS Rights Issue Litigation* [2016] EWHC 3161 [94]-[96]

[48] *Director of the Serious Fraud Office v Eurasian Natural Resources Corpn Ltd* [2018] EWCA Civ 2006, [2019] 1 WLR 791, [123]–[130]; *R (Jet2.com Ltd) v Civil Aviation Authority* [2020] EWCA Civ 35, [2020] QB 1027 [47]–[58].

the guarantee of absolute confidentiality on which the rationale for privilege is based.

Let us explore this in more detail by first considering legal dealings with "ordinary employees" who are plainly not within the definition of the corporate client for the purposes of LPP in England. Is it necessary to give their communications with lawyers for the business privileged status?

Employees with no personal involvement in the incident or transactions being dealt with, arguably need no more incentive to talk to corporate counsel than an instruction from their superiors to do so. The same analysis arguably applies to employees who may be personally involved in the matter but not personally liable for it.

Such persons may be reluctant for their superiors to know what they have done, but the risk of disclosure to outsiders of what they have done is likely to be a peripheral consideration in their thinking. For some, disclosing 'on the record' rather than under the cloak of privilege will encourage disclosure.

What really concerns such employees is how the company will respond once it has the relevant information, or how the company will respond if the employee fails to provide the information or discovers that the information provided by the employee is misleading. These are questions of good corporate governance, not legal professional privilege.

Finally, for those employees who do have some personal involvement in, and potential liability for, acts under investigation, the Court of Appeal in the *ENRC* case never makes clear why it believes such persons would be willing to make a full and frank disclosure to the company's lawyers with the knowledge that it is those in control of the company at any point in time, and not the employee, who decide what the company does with the information.

The ability to treat that information as privileged does not protect the employee from disclosure but makes that disclosure contingent on the preferences of their managers because of waiver (see below). Managers can choose between acting on the information or burying the information under the privilege cloak. It follows that privilege increases the manager's choices, not the likelihood of the employee volunteering the information. As an example, in Royal Mail Group's lawyer (Emily Springford's) document retention and creation email, employees were discouraged from writing down adverse material and only as a last resort encouraged to seek to render it subject to privilege.[49]

If the scope of the corporate privilege were properly explained to individual employees in situations where a promise of confidentiality is

[49] POL00107696, https://www.postofficehorizoninquiry.org.uk/evidence/pol00107696-email-emily-b-springford-helen-watson-re-jfsa-claims-disclosure-and-evidence

most needed, this explanation is likely to make them less, not more, willing to talk candidly to corporate counsel about the company's affairs.

Given the fate of corporate privileged communications rests with the Board, or future boards, or future administrators, there is a real possibility that an individual agent who is genuinely worried about their own legal liability (or their continuing employment) would refuse to cooperate, or cooperate tendentiously, in any internal investigation by the company.

Understandable caution on the part of "implicated" employees would be dramatically heightened when the Company seriously considers participating in self-reporting/deferred prosecution processes. Companies are typically required and/or rewarded for waiving privilege over documents related to an internal investigation and hand them over to law enforcement agencies.

It borders on wishful thinking to believe that well-informed employees, who may be guilty of, or even just blamed for wrongdoing and therefore reluctant to discuss the matter without an assurance of confidentially, would choose to provide full and frank disclosures to counsel acting for a company because of the existence of legal professional privilege if there was some possibility of the employer throwing the employee under the proverbial bus.

It is, we think, reasonable to conclude that privilege plays at best a secondary role and more likely no, or only a dubious, role in encouraging ordinary employees to talk candidly to their employer's lawyers or investigators. That strongly suggests the desirability of confining legal professional privilege in organisational contexts.

Might its real value lie in encouraging directors and senior managers to require any kind of investigation in the first place?

The Court of Appeal clearly thought there was a very real risk of inhibiting investigations if litigation privilege or legal advice privilege was interpreted narrowly. The Court stated:

> It is…obviously in the public interest that companies should be prepared to investigate allegations from whistle blowers or investigative journalists, prior to going to a prosecutor such as the SFO, without losing the benefit of legal professional privilege for the work product and consequences of their investigation. Were they to do so, the temptation might well be not to investigate at all, for fear of being forced to reveal what had been uncovered whatever might be agreed (or not agreed) with a prosecuting authority. [50]

[50] *SFO v ENRC* (CA) [116]

In the Horizon IT Inquiry, there are some examples of investigations being discouraged or reshaped on the basis they would not be privileged (the lessons learned review in the aftermath of Second Sight's Interim report and follow up work on the Swift Review) or that they would give rise to evidence which have to be disclosed (criminal lawyer Rob Wilson's intervention prior to what became the Ismay Report). This may suggest some merit in the Court of Appeal's concern.

Equally, in the Post Office cases, reasons other than legal privilege were given for not conducting reviews (such as when Richard Morgan was asked to advise on the merits of conducting an independent investigation into Horizon). Follow-up work on the Swift review,[51] that would not have been privileged, was redirected so that it could be conducted as preparation for Bates litigation. The evidence suggests that this was not just so that it would have the protection of privilege but also so that it could provide an excuse for it to be stopped. The overall lesson again appears to be investigation decisions were taken on purely tactical grounds, legal privilege (or its absence) might be said to be a tactical resource or secondary consideration rather than it being fundamental.

The Court of Appeal's statement in *ENRC* overlooks how corporate law effectively requires companies to actively monitor legal compliance, investigate potential wrongdoing and obtain expert legal advice when appropriate. In addition, major corporate scandals have provided the impetus for the development of voluntary but influential corporate governance codes which require inter alia the adoption of internal risk management and audit systems.[52]

This shift substantially reduces the need for a broad corporate privilege because corporations and their agents already have sufficient incentives to obtain accurate legal advice even without a privilege. It is regrettable that the Court of Appeal in *ENRC* overlooked these modern world realities when suggesting that a narrow corporate privilege was not suited to the modern world.

While the authorities demonstrate a strong reluctance to prescribe the content of a director's diligence duty in the abstract, it is readily apparent from the detail of these guidelines that getting regular and accurate legal advice can be a practical necessity for the reasonable director.[53]

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[51] A Review by Jonathon Swift QC and Christopher Knight advised several investigatory steps be taken to look at matters associated with remote access, in particular, as well as advice on the conduct of prosecutions.

[52] In England see Financial Reporting Council, 'The UK Corporate Governance Code' (July 2018).

[53] In *Daniels v Anderson* (1995) 37 NSWLR 438 (New South Wales CA) 500-505 the New South Wales Court of Appeal sought to outline the level of diligence, skill, and care reasonably required of a director. The requirements that can be discerned from the judgment include: (i) become familiar with the business of the company; (ii) guide and

Directors' Duties at common law have subsequently been codified under the Companies Act 2006, but in interpreting the content of these duties, the Courts have drawn on the existing case law. Palmer's *Company Law* summarises the current law as follows:

> The general duty of care and skill, by its very nature, means that on occasions the directors will need to seek expert advice, and indeed will be considered negligent if they do not first obtain such advice before proceeding....Where directors reasonably rely on experts, such as lawyers,[1] they may escape claims of breach of duty of care, and in any event may have grounds for being excused under Companies Act 2006 s.1157.[54]

Conclusion on the scope of the Corporate Client

The ultimate question is how can we design corporate privilege in a way that the benefits of the privilege outweigh its drawbacks?

The narrow approach to the corporate client in *Three Rivers No 5* better accords with the legal obligations on (and legitimate expectations of) corporations and public bodies than the 'commercial' approach favoured by the Court of Appeal in *ENRC*.

It strikes a fair balance between corporate access to confidential legal advice on the one hand, and disclosure of documentary evidence relevant to legal proceedings or legal investigations on the other hand. It gives a corporation's board and senior management a secure and inviolable space *to provide instructions to the company's legal advisers* (whether in house or external counsel) and receive confidential advice about any legal matters affecting the company. Equally, however, it means no information *provided to the Board by its employees*, i.e. the knowledge of the company and its agents, can be kept secret under the privilege cloak. And where litigation is pending, or reasonably anticipated – and hence

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monitor the management of the company; (iii) get outside specialist advice on issues of substantial importance; (iv) understand the regulatory environment in which the company operates and measures taken to comply with that environment, and (v) do not 'shut eyes' to corporate misconduct. These requirements cannot be discharged without directors obtaining accurate legal advice, at least in relation to important matters affecting the company that have a legal dimension. The decision in *Daniels* has been endorsed by the High Court of England & Wales as accurately reflecting the law in England: *Re Barings (No 5), Secretary of State for Trade and Industry v Baker and ors (No 5)* [1999] 1 BCLC 433 (Ch) 488-489 (Parker J). The statement was approved by the Court of Appeal in the subsequent appeal: *Re Barings plc and ors (No 5), Secretary of State for Trade and Industry v Baker and ors (No 5)* [2000] 1 BCLC 523 (CA) 535.

[54] G Morse, *Palmer's Company Law* (Release 160, Sweet and Maxwell, London 2018) [8.2813]

corporate communications may attract litigation privilege - a company can obtain any information it needs from all its employees, or from third party experts, provided the communications were for the sole or dominant purpose of preparing for the litigation.

With a narrow corporate advice privilege, there remains a risk that corporations could elect to stick their head in the sand rather than conduct internal investigations into possible wrongdoing. But in the cases of reputable corporations led by professional and reasonable directors, alive to their duties under the Companies Act and good corporate governance and risk management practices, that risk is more apparent than real. For corporate managers that do not respond to legal duties, corporate governance codes and commercial incentives to obtain accurate and relevant expert advice, the idea that a privilege may be a game changer in encouraging them to achieve compliance voluntarily seems dangerously naïve.[55]

Whether it is naïve or not, evidence before the Inquiry suggests a more likely scenario is that legal professional privilege will be exploited tactically and sometimes inappropriately by those leading or working in poor corporate cultures. Privilege as operated there manifested as a logic of cover-up, whether deliberate or not.

Procedures for determining privilege claims

In *Bank Austria Aktiengesellschaft v Price Waterhouse*, Neuberger J stated: 'A claim for privilege is an unusual claim in the sense that the legal advisers to the party claiming privilege are, subject to [the power of the courts to inspect the documents] the judges in their own client's cause'.[56]

Procedures for claiming and challenging privilege must provide a person with a reasonable opportunity to exercise their right to withhold privileged material from compulsory disclosure, whilst also ensuring that opponents and the court can be satisfied the claim is properly made.[57]

In seeking to strike the right balance between protecting privilege and ensuring it is not abused, English courts have generally erred in favour of protecting the privilege. Theoretically, the person claiming privilege bears the burden of proving the claim, but normally they need only supply limited particulars of the claim, and the court will only go behind the privilege claim to review its merits in limited circumstances.

The procedure for claiming privilege in civil proceedings when giving disclosure is set out in CPR 31 and the accompanying practice direction.

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[55] J Sexton, 'A Post Upjohn Consideration of the Corporate Attorney-Client Privilege' (1982) 57 NYU L Rev 443, 469–70.

[56] *Bank Austria Aktiengesellscaft v Price Waterhouse* (Unreported Neuberger J, HC 16 April 1997).

[57] Case C-155/79 *AM & S Europe Ltd v Commission of the European Communities* [1982] ECR 1575

A party must provide a certified list identifying all the relevant documents and list the documents in respect of which privilege is claimed and the grounds on which it is claimed (CPR 31.10 (3)–(4); 31.19 (3)–(4)). The rules and practice directions contemplate that a document or part of a document that is withheld from inspection is ordinarily identified individually.[58]

In practice however, privilege holders typically provide significantly less information than the rules require, and this has become an acceptable practice.[59]'

The requirement in CPR 31 PD 31A [3.2] to list documents individually is reserved for 'an exceptional case, where the claim for privilege has been shown to be unsatisfactory, in order to better judge whether the claim for privilege can be supported'.

This overlooks the question of how a claim for privilege can be 'shown to be unsatisfactory' before the privilege holder has identified the document or communication it asserts is privileged. Where privileged documents are not identified with sufficient specificity, an opponent cannot possibly challenge the claim.

CPR 31 and the accompanying Practice Directions should, therefore, be given their ordinary meaning and applied consistently by the courts. This should also focus the minds of those claiming privilege when asserting it.

Going behind a privilege claim

A further question that deserves attention concerns the circumstances in which the court should look beyond the assertion of privilege in a disclosure statement.

The US and Australian Canadian highest courts have called for a robust approach to reviewing privilege claims, including in-camera inspections of

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[58] The mandatory practice form supplied for standard disclosure instructs parties claiming privilege to list and number the documents (or bundles of documents if of the same nature) in their control, which they object to being inspected. The information that must be provided about privileged documents is the same information that must be provided for non-privileged documents which a party is disclosing. PD 31A [3.2] states:

> It will normally be necessary to list the documents in date order, to number them consecutively and to give each a concise description (e.g. letter, claimant to defendant). Where there is a large number of documents all falling into a particular category the disclosing party may list those documents as a category rather than individually.

See also CPR 31 PD 31B Disclosure of Electronic Documents [30].

[59] The editors of *Phipson on Evidence* state that 'the practice of listing privileged documents generically was always a rule of practice . . . Whatever the strict wording of the rule, in any normal case the court will respect that and not order a more specific list of privileged documents: Malek, *Phipson on Evidence* [23-64]-[23-65] (*Phipson on Evidence* (17th edn, Sweet & Maxwell, London 2012)).

privileged material.[60]The English courts have expressly been more cautious in their approach to the reviewing privilege claims.

The matter was considered in *West London Pipeline and Storage Ltd v Total UK Ltd*.[61] The issue was whether an accident investigation report compiled in the immediate aftermath of a massive explosion at the Buncefield Oil Terminal in Hertfordshire was made for the dominant purpose of preparing for litigation, rather than for the purpose of determining what had happened.

Beatson J reviewed the authorities and concluded that the court should not go behind a disclosure affidavit (now the disclosure statement) asserting privilege, unless it was reasonably certain from:

> (a) the statements of the party making it that he has erroneously represented or has misconceived the character of the documents in respect of which privilege is claimed . . .
>
> (b) the evidence of the person who . . . directed the creation of the communications or documents over which privilege is claimed that the affidavit is incorrect . . .
>
> (c) the other evidence before the court that the affidavit is incorrect or incomplete on the material points . . .

Beatson J went on to explain that where the court was not satisfied, on the basis of the affidavit and the other evidence before it, that the right to withhold inspection is established, there were four options open to it:

> (a) It may conclude that the evidence does not establish a legal right to withhold inspection and order inspection.
>
> (b) It may order a further affidavit to deal with matters which the earlier affidavit does not cover or on which it is unsatisfactory.
>
> (c) It may inspect the documents in accordance with CPR 31.19(6).
>
> (d) At an interlocutory stage a court may, in certain circumstances, order cross-examination of a person who has sworn an affidavit.[62]

Beatson J followed earlier authorities in holding that a court should inspect a document only as a last resort and where there was no reasonably

[60] *Grant v Downs* (1976) 135 CLR 674 (HCA) 689; *United States v Zolin* 491 US 544, 109 S Ct 2619 (1989); *Blank v Canada* 2006 SCC 39, [2006] 2 SCR 319.

[61] *West London Pipeline and Storage Ltd v Total UK* [2008] EWHC 1729 ("West London Pipeline")

[62] *West London Pipeline* [86]

practical alternative.[63] In addition, cross-examination on a disclosure statement, which according to some authorities was not permitted at all under the old RSC in relation to discovery affidavits,[64] should be reserved for 'extreme cases'.[65]

In the important decision of *WH Holding Limited v E20 Stadium LLP* [2018] EWCA Civ 2652 the Court of Appeal, in comments that were strictly obiter, expressly rejected the narrow approach to inspecting privileged documents outlined in *West London Pipeline*.[66] Instead, the Court stated whether the Court should carry out an inspection was a matter for its general discretion. The Court should exercise its discretion in accordance with the overriding objective including resolving cases justly and proportionately. Factors that were relevant to the exercise of discretion included the nature of the privilege claimed, the number of documents, and the potential relevance of those documents to the dispute. The Court should still be 'cautious' before conducting an inspection and should be alive to the dangers of looking at documents out of context.

Although the dicta of the Court of Appeal in *WH Holding* is welcome, the current 'cautious' approach to reviewing privilege claims is still regrettable and runs the risk of allowing many unmeritorious claims to go unchallenged.

While inspection in camera by the courts is an obvious intrusion into the privilege holder's confidentiality, it is a sensible compromise between protecting the interests of the privilege holder, whose primary concern is surely to ensure the communication is not publicly disclosed and/or used against them, and ensuring all evidence that ought to be before the court is available.

The real limitation with this option is that it cannot be used more often because of the strain it would put on court resources, but in an appropriate case it is a crucial safeguard that should be readily exercised by the court.

Strengthening ethical standards and governance rules to prevent abuse of privilege

One of the features of the evidence before the Post Office Inquiry has been a passing of the buck when it comes to responsibility for disclosure decisions, between General Counsel, civil litigation leads in-house and at

[63] *National Westminster plc v Rabobank Nederland* [2006] All ER (D) 11 (Oct); *Atos Consulting Ltd v Avis plc* [2007] All ER (D) 07 (May); *Bank Austria Aktiengesellscaft v Price Waterhouse* (Unreported Neuberger J, HC 16 April 1997).

[64] P Matthews and H Malek (eds), *Disclosure* (3rd edn, Sweet & Maxwell, London 2007) [6-44] .

[65] *West London Pipeline* [88]

[66] *West London Pipeline* [86]

instructed solicitors, and lawyers instructed on criminal matters including the CK sift and General Review.

One of us has suggested separately the need to improve the governance of disclosure and related matters relevant to our discussion here of privilege.[67] The germane recommendations there are:

- The giving of privileged advice and litigation assistance be a reserved matter, to ensure that in-house legal teams that giving privileged advice are regulated by legal service regulators in this country.
- Privilege could be dependent on advice or litigation help being given independently with regulators defining the conditions of independence necessary for private and in-house practice.[68]
- Improved accountability mechanisms for parties and legal teams threatening or bringing litigation. There may be a general case for much firmer regulation of litigation as a reserved service. In particular, requiring a nominated separate disclosure officer, and documented responsibility and sign-off around privilege, disclosure, and redaction, might improve the handling of disclosure and associated activities for litigation.
- A senior figure within an organisation would be required to take overall responsibility and be accountable for disclosure decisions (and the privileging of information)
- Disclosure problems could be subject to a failure to prevent type obligation including responsibility for the proper management of legal privilege.

These suggestions are made to bolster the quality and independence of decisions about what is privileged or not with clear lines of accountability to better ensure responsible decision-making and avoid buck passing.

Qualifying the privilege

A company, like any legal person, is entitled to take legal advice and prepare for litigation in private free from intrusion by others. But given the significant drawbacks associated with corporate privilege, and the fact that corporations, especially large and publicly listed corporations, have strong incentives to obtain legal advice even in the absence of the

[67] Moorhead (2024) *Routes back to proper professionalism? Lucidity, morality and accountabilities, Hamlyn Lectures 2024*, forthcoming.

[68] Such guidance should cover appropriate lines of management and channels of communication between the business and its legal advisers (in-house and outside counsel). This should include the ability of, and obligations on, senior legal advisers to access an organisation's senior decision-makers when dealing with matters of serious concern.

privilege, a strong case can be made for qualifying the privilege to ensure that relevant corporate records are not lost to the law enforcement process or legal proceedings.

A qualified privilege is the controlling device on which comparable common law jurisdictions are most divided.

Canada has qualified the privilege so that in exceptional cases it will give way where it clashes with, and would defeat, the exercise of other fundamental rights.[69] The United States also qualifies the privilege over work product in connection with litigation to ensure relevant evidence is not lost to legal proceedings.[70]

Qualifying the privilege is one means of avoiding the injustices that may occur by upholding privilege in every circumstance no matter how prejudicial the effects of non-disclosure may be to the administration of justice and the rights of others, or how minor the impact of disclosure may be to the privilege holder.

Both England and Australia have rejected a qualified privilege, although Australia's uniform evidence legislation does codify a number of general exceptions to the privilege where asserting a claim would have the effect of defeating a legal right or preventing the enforcement of a court order.[71]

In *Re Derby Magistrates*, perhaps the most important articulation of the rationale for privilege in England in modern times, the House of Lords held that the privilege cannot be the subject of a balancing exercise weighing up competing interests in individual cases; the rule itself is the product of this balancing exercise.[72]

There are strong reasons for thinking that the logic that underpins the House of Lords decision in *Re Derby Magistrates* – that for the privilege to perform its intended function clients need an absolute guarantee of confidence – does not apply to corporations. This is because company employees and company officeholders never have a guarantee that their communications with the company's lawyers will be kept confidential because the client company can waive it.

[69] See para 2.62.

[70] Federal Rules of Civil Procedure, r 26(b)(3).

[71] Evidence Act 1995 (Cth) s 121; Evidence Act 1995 (NSW) s 121; Evidence Act 2008 (Vic) s 121.

[72] *R v Derby Magistrates' Court, ex p B* [1996] AC 487 (HL).

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Several prominent US scholars have advocated a qualified privilege for corporations, including Imwinkelreid[73] and Alexander.[74]

It is doubtful whether a company, or specifically those in control of it, needs *an absolute* assurance that the company's case preparation will not be disclosed to pursue or defend the company's legal interests successfully.

An important finding of Alexander's empirical study on the effects of corporate privilege was that counsel frequently advised their corporate clients that the privilege may not be held for one reason or another. Yet the counsel who gave such warnings and the corporate executives who were surveyed still believed that the privilege promoted candour even if the participants knew the privilege might not be upheld.[75]

Perhaps this can be explained by the fact that probabilities strongly influence the behaviour of rational agents. A client who is told there is a 95 per cent chance his communication will be disclosed may communicate in a much more guarded way than a client who is told there is only a 5 per cent chance his communication will be disclosed. Rational corporate managers will normally calculate that the value of getting the best possible legal representation, which can only be secured by fully disclosing all relevant matters to their lawyers, far outweighs the relatively small risk that their communications could be disclosed.

Importantly, the risk of disclosure of preparatory materials for litigation under a qualified privilege need not be a matter of chance. A qualified privilege can provide a degree of certainty if the principles governing its exercise are clear and its application to a given set of facts is reasonably predictable.

In *R v Derby Magistrates*, their Lordships were obviously concerned that recognizing that the public interest in disclosure outweighed the interest in maintaining confidentiality of lawyer–client communications in *some cases* would lead to the court performing a balancing exercise in *every* case as to whether the privilege should be upheld, or overridden.[76] This wrongly assumes all exceptions to privilege operate in the same way.

The qualified attorney work product doctrine in the US, rather than requiring a balancing exercise in individual cases, clearly specifies the

[73] E Imwinkelreid, *The New Wigmore: A Treatise on Evidence* (2nd edn, Aspen Law & Business, New York 2010) 227 ; : V Alexander, 'The Corporate Attorney–Client Privilege: A Study of the Participants' (1989) 63 St John's L Rev 191, 377 .

[74] Alexander, 'The Corporate Attorney–Client Privilege' 377, 380 .

[75] Alexander, 'The Corporate Attorney–Client Privilege, 266 (n 29).

[76] *R v Derby Magistrates' Court, ex p B* (n 44).

circumstances in which privilege can be overridden. The doctrine was developed by the US Supreme Court, in *Hickman v Taylor*.[77]

The Supreme Court accepted that proper preparation of a client's case demands that information be assembled and sifted, legal theories be prepared, and strategy be planned 'without undue and needless interference'.[78] On the other hand the administration of justice requires disclosure where relevant and non-privileged facts, necessary for preparation of the opposing party's case, remain hidden, or the witness is unavailable.

The rule has been codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure. It states that discovery of 'documents and tangible things' . . . 'prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative' could be obtained only 'upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means'.

The burden of satisfying 26(b)(3) rests on the party seeking disclosure. It follows that showing that the documents are relevant to a party's case is not sufficient, nor is the fact that a party will incur expense or inconvenience in getting the information by other means.

The greater the forensic importance of the document and the greater the difficulty in obtaining its substantial equivalent, the more likely a court will order disclosure of the work product

Even with a rule-based exception like 26(b)(3), there will still be borderline or difficult cases, but this is also true of the privilege in its current form. For example, some courts have indicated that a substantial passage of time may be sufficient reason to order the disclosure of an earlier witness statement, because the earlier statement is a more contemporaneous account of the relevant events.[79]

In sum, a qualified privilege for the corporation could look something like this:

> (a) In the case of a corporation any communication or document made for the dominant purpose of obtaining advice or preparing for litigation would be privileged from disclosure, unless the party seeking its production can show they have a

[77] *Hickman v Taylor* 329 US 495, 67 S Ct 385 (1947).

[78] *Hickman v Taylor* 511 (n 48).

[79] *McDougall v Dunn* (1972) F2d 468 (Court of Appeals for the Fourth Circuit); *Rexford v Olczak* (1997) 176 FRD 90 (District Court of New York); cf *First Wisconsin Mortgage Trust v First Wisconsin Corporation* (1980) 86 FRD 160 (District Court of Wisconsin).

> genuine need for the materials and that their substantial equivalent cannot be obtained by other means without undue hardship; and
>
> (b) If disclosure of a document or communication is ordered, it can be used only in the litigation in which its production is sought; and unless it enters the public record by being read or admitted in evidence, it remains privileged for all other purposes.

While the attorney work product was developed for the purpose of litigation, it would be possible to adapt the rule to disclosure sought by regulators outside of legal proceedings; the requirement of 'genuine need' in subparagraph (a) would amount to a need to properly investigate the matter, rather than the correct disposal of litigation.

Conclusions

Evidence before the Horizon IT Inquiry is consistent with legal professional privilege presenting significant problems of principle and practice.

There is a case for a thoroughgoing, first principles review of legal privilege and its operation in organisational contexts in particular. Both the *Three Rivers* decision and the responses it has provoked suggest the inadequacy of judicial, case-based consideration of these matters.

This submission makes suggestions short of a full review to suggest priority ways in which we think the operation of legal professional privilege could be improved whether or not such a full review took place.

We suggest:

- The need to maintain a tightly defined notion of who the client is for the purposes of privilege.
- Procedures for asserting privilege in litigation should apply the tests as set out in CPR 31 and applied consistently by the courts to avoid the blanketing information in privilege and focus the minds of those claiming privilege when asserting it.
- Reversing the current 'cautious' approach of courts to reviewing privilege claims including, in particular, developing inspection in camera by the courts or similar approaches for suitable cases.
- Strengthening ethical standards and corporate governance rules to prevent abuse of privilege.
- Privilege for corporations (and other organisations) could be qualified, allowing courts to perform a balancing exercise where a party seeking a document's production can show they have a genuine need for the materials and that their substantial equivalent cannot be obtained by other means without undue hardship