Legal Professional Privilege and its Relevance to Corporations

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ABSTRACT

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This thesis examines the rationale for legal professional privilege (LPP) in relation to corporations, and seeks to identify the optimal scope of a corporate privilege at the beginning of the 21st century. It argues that there is a growing gap between the jurisprudence on LPP and the modern realities of corporate life. Too often courts explain the rationale for the privilege by reference to the needs and behaviour of individuals, and use questionable analogies to justify its extension to corporations. Accordingly, insufficient account is taken of the legal, economic and social realities in which corporations operate.

This has resulted in a privilege rule that rests on questionable foundations and is uncertain in scope. Even when the privilege rules are clear, its scope is often out of alignment with its rationale. This is unacceptable because the cost of a corporate privilege is substantial.

The thesis argues that while corporations are entitled to a right to prepare for litigation in private as part of the right to fair trial, the case for a corporate advice privilege unconnected with litigation is weak. Large private and public companies already have sufficient incentives to consult lawyers in order to obtain legal advice. Corporate governance rules effectively require directors to get advice on important legal matters affecting the company.

Directors of small private corporations, and individual employees of companies, may still need some additional incentive to take advice or talk candidly to corporate counsel in the form of a privilege. The thesis looks at ways of structuring the privilege to protect these groups. Above all, the thesis argues that rules on corporate advice privilege should be formulated in such a way that it helps rather than hinders the goal of increasing corporate compliance.

Word Count: 99, 900 words

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‘Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.’

US Supreme Court Justice Louis Brandeis, *Other People’s Money* (National Home Library Foundation, 1933) 62.

‘Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much.’

Vice-Chancellor Knight Bruce, Pearse v Pearse (1846) 63 ER 950 at 957.

Introduction

There are some legal precedents that do not wear well with age. Sometimes society’s values evolve to the point where the values underlying the precedent come to be viewed as an historical curiosity, or as morally indefensible. Sometimes the facts on the ground – the social, economic, political and legal realities of every day life – change so much that the precedent becomes redundant. Usually this process is a gradual one so the arguments for and against a legal rule are finely balanced although the changes in society that threaten to make the rule redundant have become a well established trend.

This is also true of a corporation's right to claim legal professional privilege at the beginning of the 21st century. The rule is slowly losing its supporting rationale.

Legal professional privilege (LPP) is the protection given to confidential communications between lawyers and their clients. In English law LPP is divided into two limbs. It provides immunity from compulsory disclosure of communications between a lawyer and a client made for the purposes of obtaining legal advice and preparatory materials thereto ('legal advice privilege'), and communications or documents made for the purpose of litigation ('litigation privilege'). The privilege allows clients to talk freely to a lawyer in the knowledge that their confidences will not be revealed without their consent. This promise of confidentiality is believed to encourage clients to seek legal assistance and speak candidly to their lawyer. Once fully apprised of a client's circumstances, the lawyer is able to 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, and can properly prepare and present their claim or defence in litigation. These are important ends in themselves, and underpin much of the jurisprudence declaring LPP to be a 'human right'.[1]

The privilege also has social benefits. By encouraging consultation with lawyers and greater candour in lawyer-client communications, the privilege helps foster legal compliance and a more efficient litigation process. Modern society is complex and

[1] *R (on application of Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax* [2002] UKHL 21; [2003] 1 A.C. 563 at [7]; *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49; (2002) 213 C.L.R. 543 at [85].

compliance with many laws is not always an instinctive matter and often requires detailed legal advice. The litigation process can be complex too, and often the skills of trained lawyers are needed if it is to be conducted fairly and proportionately to the interests at stake.[2]

While legal professional privilege is widely accepted as 'a fundamental and general principle of the common law'[3]… 'on which the administration of justice as a whole rests',[4] the privilege also has the capacity to undermine the administration of justice by enabling clients to keep sensitive information under a cloak of secrecy, and to suppress evidence relevant to legal investigations and proceedings. The consequence is to make it harder for law enforcement agencies to enforce the law and private litigants to enforce and defend their rights. In turn this can undermine public confidence in the correctness of court decisions and the rule of law.

The costs of a corporate privilege are particularly significant for both practical and doctrinal reasons. First, the amount of evidence that is lost to a corporate privilege is potentially huge in comparison to the evidence that is lost when individuals assert the privilege. 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

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[2] R Assy, 'Can the Law Speak Directly to its Subjects? Law, Language and Access to Justice' (2011) *Journal of Law and Society* (forthcoming)

[3] *Baker v Campbell* (1983) 153 CLR 52 (HCA) 116-117 (Deane J).

[4] *R v Derby Magistrates' Court, ex p B* [1996] AC 487 (HL) 507 (Lord Taylor CJ).

over the top to describe large corporations as information processing bureaucracies. Accordingly corporations tend to acquire much more information and generate many more records than an individual does in the course of their lifetime. Furthermore corporate activities normally involve larger amounts of money than individual affairs, a broader range of legal issues and greater potential legal liability. As a consequence corporations have more need for legal services than individuals, and provide the bulk of the demand in the legal services market.[5] When these factors are taken together the number of records corporations are required to disclose under compulsory processes, and the number that they can claim privilege over tends to dwarf the disclosure obligations and privilege claims of individuals.

Second, while there are limits to the scope of privilege, which are designed to minimise the loss of evidence, these limits are far less effective when the client is a corporation. 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. By contrast, restricting the privilege to communications is much less effective in preventing corporations from suppressing evidence. In the case of corporations the line between *compellable knowledge* and *privileged communications* can be almost impossible to draw. Corporations can act only through their agents and typically acquire information in a purposeful manner. The

[5] M Galanter 'News from Nowhere: The Debased Debate on Civil Justice' (1993) 71 Denv UL Rev 77, 88.

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 purposes of creating a privilege claim over sensitive information held by the company.

In England & Wales cracks have now begun to appear in the judiciary's support for LPP for corporations, at least in relation to legal advice privilege. On the one hand the House of Lords' gave a resounding endorsement of legal advice privilege in *Three Rivers No 6* and stressed that the privilege was a right of all legal persons including corporations.[6] On the other hand the Court of Appeal gave a judgment in *Three Rivers No 5* which has the potential to limit substantially the scope of corporate advice privilege.[7] The Court of Appeal rejected privilege claims over documents prepared by Bank of England employees in preparation for an inquiry into the collapse of the BCCI. It ruled that the client for the purposes of the privilege was a special unit established by the Bank to manage its response to the inquiry, and thus documents prepared by ordinary Bank employees were not privileged. The implications of the decision, that not all employees of a corporation (or public body) will necessarily fall within the definition of the client, and thus their communications will not automatically qualify for advice

[6] *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48; [2005] 1 AC 610 [34] (*'Three Rivers No 6'*).

[7] *Three Rivers DC v Bank of England (No 5)* [2003] EWCA Civ 474; [2003] QB 1556 CA (*'Three Rivers No 5')*.

privilege, sent shockwaves through the legal community.[8] However the House of Lords refused leave from the decision in *Three Rivers No 5*, and declined to revisit the issue in *Three Rivers No 6* despite being urged to do so by the Law Society and the Bar Council whom had intervened in the appeal.[9] Thus the courts have affirmed the need for corporate advice privilege, whilst at the same time opening the possibility of limiting its scope.

The possibility that corporations could use the cloak of privilege to avoid disclosure of large amounts of sensitive information may have been one of the motivating factors for the Court of Appeal ruling in *Three Rivers No 5*. The 'corporation' in *Three Rivers No 5* was a major public body. It is apparent from the Court's judgment that it believed that a national institution like the Bank of England had a public duty to put all relevant information before a major inquiry established by the Government into the collapse of an important financial institution.[10] This highlights another important point. The value of a corporate privilege cannot be determined solely by reference to the effect of the privilege on corporations and corporate agents. Regard must also be had for the standards of conduct, transparency and accountability that can be reasonably expected of corporations and their agents (and public bodies and officials). If the principle is correct, that the closer we are watched the better we behave, it is also possible that the secrecy which the privilege confers on the lawyer-corporate

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[8] B Thanki (ed), *The Law of Privilege* (Oxford: OUP, 2006) 33.

[9] *Three Rivers No 6* (n 6) [46]-[48], [118].

[10] *Three Rivers No 5* (n 7) [35].

client relationship may lower the standards of behaviour of corporate agents and corporate counsel.

Accordingly the debate on corporate privilege must take into account the broader legal, economic and social context in which companies operate. While the overwhelming majority of companies in the UK are small private companies, many large and publicly listed corporations wield extensive economic and social power, which they can use for both good and ill. They are also subject to extensive regulation designed to ensure that their power is exercised for good rather than ill. It is in everyone's interests that corporations are well governed, and comply with their legal obligations. A key question is whether a corporate privilege helps or hinders the attainment of these objectives. The privilege may provide an incentive (or at least remove a disincentive) for companies to obtain legal advice with the aim of voluntarily complying with the law. But the privilege also has the capacity to undermine enforcement measures designed to ensure that companies comply with their legal obligations.

Focus of the thesis

The purpose of this thesis is to critically examine the rationale and scope of legal professional privilege for corporations. Chapters one and two of the thesis are dedicated to examining the costs of corporate privilege. Chapter three assesses the rationale for

litigation privilege and its relevance to corporations, and chapter four then seeks to identify the optimal scope of litigation privilege. Chapters five and six engage in the same exercise in relation to legal advice privilege.

The thesis is principally focused on the law in England & Wales. It also draws on the laws of major common law jurisdictions including the United States, Australia and Canada. In particular it looks at alternative formulations of the privilege in these jurisdictions, and related legal developments that have affected the operation of the privilege.

It is also important to say a few words on what this thesis is not. First of all it does not purport to be a comprehensive treatise on the law or history of LPP. Nor does the thesis provide detailed treatment of corporate law or company regulation. Instead it seeks to identify the most convincing rationale for a corporate privilege at the beginning of the 21st century, and to draw out key principles to help law and policy makers to frame the privilege in a way that is consistent with this rationale. In so doing, this thesis strives to highlight the inter-relationship between corporate law and evidence and procedural law. It looks at how corporate law and governance rules affect the value of LPP to corporations and their agents, the role of LPP in promoting corporate compliance, and gives examples as to how the debate on LPP for corporations might influence the broader debate on how to promote good corporate governance.

An examination of the value of LPP to corporations is an exercise that could be extended to all artificial legal persons, from the local unincorporated football club, to trade unions, to the state. The case for recognising a privilege for these persons also raises important theoretical and practical questions. For reasons of space, the thesis is confined to considering the rationale and scope of privilege for natural persons and corporations, although parts of the analysis of the corporate privilege may be applicable to other artificial persons. In particular the discussion as to whether corporations need or should have a privilege, in light of the incentives they have to get legal advice and the standards we can reasonably expect of corporate agents, arguably applies with even greater force to the state and public officials.

Preliminary matters

Before turning to the inquiry, it is necessary to address a couple of preliminary matters. One threatens to make the inquiry redundant, while the other is designed to assist the reader follow the inquiry more easily.

(i) Anthropomorphising corporations

Anthropomorphising artificial legal persons is a method of equating the legal capacity of corporations with natural persons, without inquiring whether it is appropriate for the purposes of a particular rule. [11] Under that practice, the law treats

[11] P Birks (ed), *English Private Law* (Vol 1, OUP Oxford 2000), 147.

artificial entities *as if* they were natural persons, and have the same legal capacity as natural persons. The anthropomorphic model of artificial persons, which has been traced back at least to Blackstone,[12] has underpinned the law's treatment of artificial persons for centuries. Rather than develop a jurisprudence regarding the nature of artificial persons and the appropriate content and limits of their legal personality, the law developed a device, or fiction, by which artificial persons would be treated as if they were human beings.

At the time of its development the anthropomorphic model of artificial persons may have been justified on grounds of economy of effort. As Maitland observed: 'In a vast number of cases you can make a legal statement about x and y which will hold good whether these symbols stand for two men or for two corporations, or for a corporation and a man.'[13]

While the anthropomorphic model may allow lawyers to create neat legal propositions, it has the effect of concealing fundamental differences between human beings and corporations. Courts and legislatures often overlook these differences when they set about defining the rights and duties of natural and artificial persons. An artificial person like a corporation, that has no 'body to be kicked, or soul to be

[12] A Nekam *The Personality Conception of the Legal Entity* (Harvard University Press, Cambridge1938) 101.

[13] F Maitland ' Morality and Legal Personality' reproduced in D Runciman and M Ryan (eds) *Maitland: State, Trust and Corporation* (Cambridge University Press Cambridge 2003) 63- 64.

damned'[14] and that cannot think, act, testify or speak for itself, will still be treated as if it were a human being and permitted to invoke constitutionally guaranteed human rights, with little or no analysis about the purpose of the rule and the interests it is designed to protect. A good example is the US Supreme Court's decision in *Santa Clara County v Southern Pacific Railroad Co*, in which the Court held that corporations were entitled to invoke the equal protection clause in the Fourteenth Amendment to the Constitution.[15] Before argument was heard Chief Justice Morrison Waite issued the following statement:

> The Court does not want to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person…the equal protection of the laws, applies to…corporations. We are all of the opinion that it does.[16]

A nation went to war with itself over the subject matter of this clause. According to Dworkin it reflects a fundamental moral statement embodied in the Constitution regarding the relationship between individuals and the state, and requires judges to perform a moral function in interpreting it.[17] Yet the Supreme Court felt the question of whether it applied to corporations required a one word answer, and without the benefit of argument.

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[14] *Stepney Corporation v Osofsky* [1937] 3 All ER 289 (CA) 291 (Greer LJ) Glanville Williams traced this quotation to Lord Thurlow and an earlier variation to Coke: G Williams *Criminal Law: the General Part* (2nd Edition, Stevens London 1961) 856.

[15] 118 US 394 (1886), 6 SCt 1132.

[16] Ibid 396.

[17] R Dworkin *Taking Rights Seriously* (Duckworth London 1978) 147.

The 'insidious practice' of anthropomorphism has created significant difficulties in some areas of law,[18] and has led judges to make misleading statements that a body that is incorporated enjoys all 'the powers normally attendant on legal personality'. [19] Legal capacity is always rule specific.[20] When a human being or entity is said to be capable of enforcing a particular right, or of owing a particular duty, they can properly be described as a person *with that particular capacity*. This proposition is separate from the historical problem in corporate law as to whether a corporation's capacity is limited by its objects. That problem has largely been solved because it is no longer a requirement for a company to set out its objects.[21] But whether corporations have the legal capacity to exercise certain rights available to individuals including, for example, freedom of expression, a right to privacy or a privilege against self incrimination, are questions that need to be examined on a case by case basis: not by a hollow assertion that the company has 'full capacity.'

Anthropomorphism has had a discernible influence on the jurisprudence on corporate privilege. The first US court to hold that corporations could claim LPP was the Court of Appeals for the 7th circuit in the case of *Radiant Burners Inc v American*

[18] Notably corporate criminal liability. See the discussion in chapter 2.2.1.

[19] P Birks (ed), *English Private Law* (OUP Oxford 2000) Vol 1, 147. The quote comes from *NUGMW v Gillian* [1946] KB 81 (CA) 86. The body in that case was a trade union.

[20] Peter Birks (ed), *English Private Law* (OUP Oxford 2000) Vol 1, 146.

[21] P Davies, *Gower & Davies' Principles of Company Law* (8th edn Sweet & Maxwell, London 2008) 154.

Gas Association.[22] The court concluded its opinion by stating: 'A corporation is entitled to the same treatment as any other client, no more and no less.'[23]

There are also traces of anthropomorphism in the House of Lords decision in *Three Rivers No 6*. There was no suggestion in the judgment that corporations were by virtue of their status as legal persons entitled to the same rights as natural persons. However some of their Lordships appeared to adopt a slightly more nuanced version of the anthropomorphic model. This version centres on the fact that a corporation's agents and members are human beings,[24] and from this it follows that a corporation needs the same rights and privileges that a natural person needs. In a controversial decision in 2010 the Supreme Court of the United States recognised a corporation's constitutional right to free speech in part by using this line of reasoning.[25]

The House of Lords' decision in *Three Rivers No 6* is symptomatic of a gap between the jurisprudence on privilege and the modern realities of corporate life. Some of their Lordships justified legal advice privilege by considering its value to the individual, for example, a witness at an inquest or a testator making a will. But the person claiming privilege in that case was neither a witness nor a testator, but a central

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[22] (1963) 320 F2d 314, reversing the controversial decision of the District Court that corporations could not claim the privilege: 207 F Supp 771. Prior to this decision US courts had assumed, without deciding, that legal professional privilege was available to corporations: *United States v Louisville & Nashville R. Co* (1915) 236 US 318, 336.

[23] Ibid 324.

[24] Though the phenomenon of corporate groups is so widespread that often a company's members will be other companies.

[25] *Citizen United v Federal Electoral Commission* 130 S. Ct. 876 (2010), See also the canadian case *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199, 127 DLR (4th) 1 where a tobacco company successfully argued that Government health warnings about the dangers of smoking breached the company's right to freedom of expression.

bank. Their Lordships did not explain how a testator's needs supported a privilege for all artificial persons, from the state to one-person companies. Perhaps their Lordships assumed by way of analogy that corporations needed a privilege because they are dependent on their agents to obtain advice. If a company or public body's agents are not willing to consult a lawyer or to be completely candid when doing so, this will make it more difficult for the entity to get accurate legal advice.

Some of the pitfalls of this reasoning are obvious when the analogy between natural and artificial persons does not hold. Corporations cannot make wills and enjoy perpetual succession, nor can they testify in person. Of greater significance, is that this mode of reasoning can lead courts to ignore the laws that specifically regulate those legal persons, for example the Companies Act 2006, and the effect they have on the case for a privilege.

Assessing the case for a corporate privilege requires an examination of whether the rationale for the rule and whether it applies to corporations, or whether there may be a corporate specific rationale that would support a privilege. Treating corporations 'as if' they were natural persons is not a satisfactory method in theory or practice for according corporations important rights at the beginning of the 21st century.

An examination focused specifically on corporations is a timely one in light of a recent change in the courts' understanding of the rationale for LPP. For most of the 19th and 20th centuries the privilege was treated as a rule of evidence in aid of litigation, yet

in recent decades superior courts in common law jurisdictions have talked about LPP in the language of rights, describing that right as 'fundamental' and/or 'human'.[26] If LPP is a human right then one needs to consider whether it should be available to artificial legal persons and, if so, on what grounds. In her book on privilege McNicol argues that the human rights rationale for LPP is based on a 'libertarian philosophy that individual rights and interests should be protected against undue interference from the law.'[27] Whether this libertarian philosophy justifies a corporate privilege deserves consideration.[28]

Legal professional privilege: the basic principles

In order to help the reader understand the discussion that follows it may be convenient to outline here the privilege rule and its essential features. As previously mentioned, legal professional privilege provides immunity from compulsory disclosure of communications between lawyer and client for the purposes of giving legal advice and preparatory materials thereto, and any communications or materials brought into existence for the purposes of preparing for anticipated or pending legal proceedings. Hence there are **two limbs of privilege:** legal advice and litigation privilege.

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[26] *R v Derby Magistrates' Court, ex p B* [1996] AC 487 (HL) 507; *R (on application of Morgan Grenfell & Co Ltd v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 [7]; *Baker v Campbell* [1983] HCA 39, 153 CLR 52; *Descoteaux v Mierzwinski* (1982) 141 DLR 3rd 590 (SCA).

[27] S McNicol *Law of Privilege* (Law Book Co, Sydney 1992) 1.

[28] The reverse approach could also be taken. McNicol has suggested that the fact that the privilege is available to corporations means that the human rights rationale for the privilege needs clarification: S McNicol 'Implications of the Human Rights Rationale for Legal Professional Privilege – The Demise of Implied Statutory Obligation?' in P Mirfield and R Smith (eds) *Essays for Colin Tapper* (Lexisnexis UK, 2003) 48, 62-3.

The statutory formulation of LPP found in section 10(1) of the Police and Criminal Evidence Act 1984 has been authoritatively stated to reproduce the common law.[29] It provides:

> (1) Subject to subsection (2) below[30] in this Act 'items subject to legal privilege' means –
>
> (a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;
>
> (b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and
>
> (c) items enclosed with or referred to in such communications and made –
>
> (i) in connection with the giving of legal advice; or
>
> (ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; when they are in the possession of a person who is entitled to possession of them.

[29] *R v Central Criminal Court, ex p Francis & Francis* [1989] AC 346, 392.

[30] Which refers to communications for a criminal purpose.

The main difference between the two limbs of privilege is that with litigation privilege communications with third parties – witnesses, experts etc – are brought into the privilege net. For legal advice privilege only communications between lawyer and client are protected.

It is important to note that there are other possible definitions of legal advice and litigation privilege. Some commentators have noted that all communications between lawyer and client, both for the purposes of litigation and for legal advice unconnected with legal proceedings, can be grouped under the heading 'legal advice' privilege. What sets litigation privilege apart, they argue, is that it applies to communications with third parties, and that litigation privilege should be defined as relating *only* to communications between lawyers and third parties. Thanki, for example, has used this alternative definition to argue that there is no substantive difference in lawyer-client communications within and outside legal proceedings, and that judicial re-examination of 'legal advice' privilege – as occurred in the *Three Rivers* litigation – was unnecessary and misguided.[31]

The Canadian courts define litigation privilege as covering all qualifying materials prepared for litigation which are **not** communications between lawyer and client.[32] While this alternative definition bears some relationship to the historical

[31] B Thanki (ed) *The Law of Privilege* (OUP, Oxford 2006) 50.

[32] *Blank v Canada* [2006] 2 SCR 319, 2006 SCC 39 (Supreme Court of Canada).

development of the privilege,[33] the English courts continue to define litigation privilege as extending to materials between a client and her legal representative, and communications between either the client or her representative and third parties for the purposes of litigation. [34] Furthermore, resorting to definitional classifications to defend the scope of 'legal advice' privilege is hardly a satisfactory approach to examining the rationale for any legal rule, let alone one that has such significance in practice.

Thanki is right to argue that communications with third parties require separate consideration. This is a controversial aspect of legal professional privilege, and a number of distinguished commentators and judges have suggested it should be restricted.[35] Likewise, lawyer-client communications for the purposes of legal proceedings, and lawyer-client communications unconnected with legal proceedings, also require separate consideration.

There are a number of principles that mark the boundaries or scope of legal professional privilege. In brief form, the main principles are:

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[33] This head of privilege was distinguished later from that for legal advice: Cross & Tapper on Evidence (12th ed Oxford OUP 2010), 451.

[34] Tapper (n 33) 2010, 435.

[35] *Three Rivers No 6* (n 6) [28] (Lord Scott).

- The privilege is a **fundamental substantive right**.[36]

The privilege was traditionally classified as a rule of evidence, though the debate as to the difference between an 'ordinary' rule of evidence and substantive rights has been described by Lord Scott as sterile.[37] The important point is that the privilege applies not only to prevent compulsory disclosure in legal proceedings; it also confers a right to resist compulsory disclosure in any context, be it search warrant, subpoena or notice to produce documents from a regulator.[38]

- The privilege is **absolute.**

It is not qualified or subject to a balancing exercise whereby the court weighs the interest in maintaining the confidentiality of the material against the interest in favour of its disclosure. Accordingly, the privilege cannot be overridden against the privilege holder's wishes no matter how compelling the need for an exception may be in any individual case.[39]

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[36] *R v Derby* (n 4).

[37] *Three Rivers No 6* (n 6) [26].

[38] *Morgan Grenfell* (n 1).

[39] *R v Derby* (n 4).

- The privilege can be **abrogated** by statute in some contexts.

This principle derives from the sovereignty of parliament. Because privilege is a fundamental right, the statute must use clear words to abrogate the privilege, or do so by necessary implication. [40] The fact that the privilege is also recognised as a human right, protected by the right to fair trial under Art 6 of the ECHR places limits on when, and the purposes for which, the state can abrogate privilege.

- The privilege is a rule of **compellability,** not **admissibility.**

The privilege provides a right to resist *disclosure* only of confidential material. Material that is publicly available or has *already* been disclosed is not confidential and not protected by privilege.[41] This rule is said to flow from the basic rationale for the privilege: while the client needs a guarantee of confidentiality in order to talk freely to the lawyer, no such guarantee is needed for information that is already in the public domain or that the client does not treat as confidential.

Instances where privileged material is inadvertently disclosed, leaked or stolen without the privilege holder's authorisation, causes considerable difficulties for the courts due to conflicting authorities, and uncertainty about the

[40] *Morgan Grenfell* (n 1).

[41] *Ventouris v Mountain (The Italia Express)* [1991] 1 WLR 607 (CA).

status of such documents and the extent to which their use is governed by common law or equitable principles.

- **The client is free to waive the privilege.**

The client can waive the privilege, and for whatever reason. The effect of waiver is that information becomes subject to disclosure in accordance with the rules of evidence and procedure, or statutes which provide law enforcement agencies with the power to order compulsory disclosure.

The privilege holder can waive the privilege expressly or impliedly by conduct. Normally waiver by conduct involves disclosing part or all of the privileged material, although assessing whether there has been an implied waiver raises a number of difficult questions. Does *disclosure* of the material mean physical disclosure, or does it include disclosing the substance of a communication or document? Where the client discloses part of a document or communication, or one document in a series of related documents, does the waiver extend to the related material? Can a privilege holder disclose privilege for a limited purpose, and maintain the privilege for all other purposes?[42]

[42] For a good discussion of the issue see H Malek (ed), *Phipson on Evidence* (17th revised edn Sweet & Maxwell, London 2010), Chapter 26.

- For a communication or document to qualify for privilege it must have been made for the **dominant purpose** of preparing for litigation or obtaining legal advice.[43] Even if a particular communication was not made for the dominant purpose of obtaining advice, it will still attract privilege if it is part of the necessary exchange of information whose object is the giving of legal advice.[44]

- For the purposes of the privilege **legal advice** means advice on legal rights and obligations and on what a client should prudently and sensibly do in a relevant legal context.[45]

- In order to qualify for litigation privilege, a document or communication must have been made at **a time when litigation was pending or reasonably anticipated**. Litigation is reasonably anticipated if there is a real prospect of litigation, as opposed to a mere possibility.[46]

- A document **need not be communicated** to qualify for privilege. Privilege can apply to documents whether or not they are communicated between a party and her representatives, provided they were made for the dominant purpose of preparing for litigation or obtaining advice. Accordingly,

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[43] *Waugh v British Railways Board* [1980] AC 521 (HL).

[44] *Balabel v Air India* [1988] Ch 317 (CA).

[45] *Three Rivers No 6* (n 6).

[46] *USA v Philip Morris Inc* [2004] EWCA Civ 330, [2004] 1 CLC 811.

workings notes and memoranda, and like preparatory materials to litigation or the giving of advice, can qualify for privilege.[47]

- **The privilege protects only legitimate communications**.

Communications between lawyer and client for the purposes of furthering a crime of fraud are not protected by privilege, even if the lawyer is unaware of the illegitimate purpose, because it is no part of the lawyer's role to facilitate unlawful conduct.[48]

- **The common law privilege is confined to the lawyer-client relationship.**

At common law in England & Wales 'lawyer' encompasses any professional legal adviser acting in that capacity, whether independent or in-house counsel. However for the purposes of EU law, the ECJ has ruled that privilege will not attach to communications with in-house counsel because they lack independence from the client.[49]

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[47] *Three Rivers DC v Governor of the Bank of England (No 5)* [2002] EWHC 2730 (Comm) (Tomlinson J); The Court of Appeal overturned this decision on a different point.

[48] *R v Cox and Railton* (1884-85) LR 14 QBD 153 (CA).

[49] *Akzo Nobel Chemicals Ltd v European Commission* (Case C-550/07 P) (2010) 5 C.M.L.R. 1143 ECJ.

Any person, or entity, who is the subject of legal rights and obligations can be a client for the purposes of the privilege. In other words all legal persons presently have the right to assert the privilege.

In England & Wales the authorities have been uniformly against extending the privilege to other relationships,[50] whether professional or personal, even if the purpose of the relationship is to give legal advice, for example in the case of accountants giving advice on tax.[51] There is a spousal privilege in the form of a right not to testify against one's spouse, as opposed to a right to resist compulsory disclosure of communications between spouses.[52] There are some limited statutory privileges covering information outside the lawyer-client relationship, including the work product of accountants, and communications with patent and trade mark agents.[53]

- Quite apart from the privilege, **lawyers have professional, contractual, statutory and equitable duties to maintain the confidences** of their clients.

The privilege is a right to resist disclosure pursuant to the compulsory processes of the state. There are other laws designed to protect the confidential

[50] C Tapper, *Cross & Tapper on Evidence* (12th ed Oxford OUP 2010) 464.

[51] *R (on the application of Prudential plc and another) v Special Commissioner of income tax and another* [2010] EWCA Civ 1094.

[52] P Murphy, *Murphy on Evidence* (OUP Oxford 11th edn, 2009) 485-487, 512.

[53] Finance Act 2008 Schedule 36, Part 4; Patents Act 1977 s 104, the Trade Marks Act 1994 s 87.

information of clients from disclosure by third parties, be it the client's lawyer or anyone else who is privy to the information. Lawyers, like most professionals, have professional obligations to protect the confidences of their clients.[54] They are also subject to a range of equitable, common law and statutory duties restricting their ability to disclose or use confidential information.[55] Material which is subject to compulsory disclosure is also protected by laws governing its use. For example a party who obtains documents from an opponent as part of the disclosure process in proceedings is subject to an implied undertaking not to use the documents for any collateral purpose nor to disclose them to third parties.[56] Statutes conferring law enforcement agencies with power to order the disclosure of information can also place restrictions on the use to which the information can be put.

It is a mistake to suppose that in relation to materials connected with obtaining legal advice or preparing for litigation the basic policy choice is between complete secrecy on the one hand and disclosure without restriction on the other. Instead the policy choice for law makers is whether to recognise a right to resist compulsory disclosure of such materials or to allow the general law to determine the circumstances in which this material may, may not, or must be, disclosed pursuant to law.

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[54] See, eg, Solicitors Code of Conduct 2007, r 4.

[55] For example the equitable duty of confidence, express or implied obligations of confidence in contract and statutory obligations under the Data Protection Act 1988.

[56] CPR 31.22.

A brief glossary

Finally it may be helpful to set out some points on definition and the way in which terms are used in this thesis. In most of the academic scholarship on this subject the term *costs* is used to refer to all the negative effects of the privilege rather than to financial costs per se, and it is used in the same sense in this thesis.

This thesis uses the term *law enforcement process* to encompass both the criminal and civil processes. The term law enforcement is typically used in the context of the criminal process. However when litigants commence or defend civil proceedings they are seeking to enforce or vindicate the rights accorded to them by law, or to prevent others from acting unlawfully, as is sometimes the case in administrative law. Accordingly it is appropriate to use the term law enforcement in the context of civil proceedings also. At this point it is also worth noting that virtually all treatises on evidence adopt the same convention for discussing the privilege. The rationale and scope of the rule is discussed at the general level, without a specific treatment of the issue by reference to the type of investigations or proceedings (civil or criminal) in which the material qualifying for privilege may be sought. This thesis adopts the same convention, although it must be acknowledged that the rules of disclosure are different

for the criminal and civil processes. As such, some aspects of the privilege may be relevant to only one type of proceeding.

The thesis frequently refers to the value of the privilege, and its effects, on *corporate agents*. Unless otherwise stated, the term corporate agents is used to refer to all employees and office holders of a corporation, e.g. directors. In certain situations the privilege can apply to communications made by third parties acting as agents, whether on behalf of an individual or of an artificial legal person; where the position of these agents is discussed the term independent agent is used.

To avoid repetition the terms privilege and LPP are used interchangeably. All of the possessive pronouns his, her, their and its are used for reasons of gender sensitivity and because many of the legal persons described in this thesis are entities.

Principal argument and recommendations of the thesis

In his famous treatise on the law of evidence Wigmore insisted that a privilege was justified only if the benefits of a privilege outweighed its costs.[57] He also argued that the privilege 'ought to be strictly confined within the narrowest possible limits

[57] J Wigmore, *On Evidence* (McNaughton Revision, Little Brown & Co, Boston 1961) 527.

consistent with the logic of its principle'.[58] The central argument of this thesis has been that corporate privilege in its current form fails both tests.

Part of the problem is that, like most rules of evidence of great antiquity, LPP was originally designed for individuals. The courts continue to discuss the rationale for privilege, and its scope, by reference to the needs and behaviour of individuals. Accordingly much of the jurisprudence on LPP has limited relevance to corporations. This has resulted in a privilege rule that rests on questionable foundations and is uncertain in scope. For example, there is still no definition of the 'corporate client' in English law, which is a major shortcoming given that LPP is designed to protect the confidentiality of lawyer-client communications.

Even when the privilege rules are clear, its scope is often out of alignment with its rationale. This is unacceptable because the costs of a corporate privilege are substantial. LPP can undermine law enforcement processes and public confidence in the rule of law because it allows corporations to suppress evidence relevant to legal investigations or proceedings. The secrecy that the privilege confers may also undermine the standards of behaviour expected from corporate agents and lawyers.

By contrast the benefits of the privilege are limited and largely speculative. Large private and public companies already have sufficient incentives to consult lawyers in order to obtain legal advice. Corporate governance rules, especially the

[58] Ibid 554.

directors' duties of diligence, skill and care under section 174 of the Companies Act 2006, and the guidance for publicly listed companies under the Combined Code of Corporate Governance, effectively require the reasonable director to get advice on important legal matters affecting the company. In addition a corporate privilege provides only limited protection for corporate agents, including ordinary employees, because a company is free to waive the privilege without their employees' consent. Accordingly corporate agents cannot be sure that what they tell the company lawyer will be kept confidential.

The basic problem with a corporate privilege is that there is a conflict of interest at its core. However the privilege rule is formulated, it will have significant costs for one or more parties interested in the content of lawyer-corporate client communications: the individual employees who provided the information, the entity who has a right to the information, and law enforcement agencies and other third parties who may have a legitimate need for the information.

In that vein, this thesis argues that the best solution in the Churchillian sense of the word – it is the worst except for all the others – is to split the corporate privilege into one rule as it applies to the entity and another as it applies to individual corporate agents. The entity, like any legal person, is entitled to prepare for litigation in private, and be judged on the case it puts forward rather than on its case preparation. However in order to ensure that information held by the entity, or its agents, is not lost altogether to

the law enforcement process the entity's litigation privilege should be qualified. The privilege would give way only if the party seeking disclosure can show it has a substantial need for the evidence in preparing its case, and the substantial equivalent cannot be obtained by other means without undue hardship. By contrast, the corporate advice privilege should be abolished altogether, although there is good case for continuing recognise an advice privilege for small private companies.

In one important area the current scope of a corporate privilege needs to be expanded, not shrunk. It is submitted that the position of corporate agents should be strengthened by granting them an immunity which prevents their statements to corporate counsel, from being used in evidence against them to prove their personal liability or culpability. This will give employees a guarantee that the information they provide to corporate counsel about matters connected with their employment will not undermine their own legal position, regardless of what the entity does with their communications.

Overall, these reforms are likely to make a significant reduction in the costs of a corporate privilege, whilst still ensuring that LPP provides some meaningful protection to those companies and agents who are genuinely and reasonably concerned about the disclosure or use of their communications with corporate counsel.

Chapter 1 – The costs of corporate abuse of privilege

It might seem odd to begin an examination of the case for corporate privilege by looking at its costs. If the exercise were a purely abstract one, it would be more logical to identify the best rationale/s for the privilege and then consider the extent to which those rationale/s apply to corporations, or whether there are other corporate specific rationales that would justify a privilege. However there is an important advantage to starting the discussion with the costs of corporate privilege (LPP): it highlights the practical significance of recognising a corporate privilege for the administration of justice.[1]

Many large and publicly listed corporations wield extensive economic and social power. It is in everyone's interests that corporations are well governed, and comply with their legal obligations. A privilege may promote compliance and good governance by encouraging companies to get advice and order their affairs in a lawful manner. Yet in crucial respects LPP undermines legal compliance because it allows corporations to keep information secret that they would otherwise be compelled to reveal in legal investigations and proceedings. Corporations' capacity to conceal sensitive information under the cloak of privilege is substantial, and far greater than an individual's capacity to conceal evidence, largely because of the way in which corporations acquire information and use legal services. This issue is examined in the detail in the next chapter.

We should begin our discussion by setting out the various costs of recognising a right to withhold evidence that is otherwise compellable in legal investigations or

[1]G Hazard, 'Under Shelter of Confidentiality' (1999) 50 Case W Res L Rev 1, 4.

proceedings. The primary cost is that it makes it harder for law enforcement agencies to enforce the law, and private litigants to enforce their rights. Secondly, the fact that courts sometimes decide cases differently than they would if privileged material were available can also undermine public confidence in the correctness of judicial decisions. Perhaps most damagingly of all, the privilege can undermine public confidence in the rule of law, flowing from a perception that well resourced corporations with access to lawyers' services are able to conceal sensitive evidence and to avoid justice. These costs are well known and understood, and virtually all commentators accept that because of them powerful arguments are needed to justify the privilege.[2] But there are other costs associated with privilege which are rarely mentioned in the literature, and it is worth outlining them in a bit more detail.

There are financial costs to the privilege holder in maintaining the privilege, and to law enforcement agencies, opponents and the courts in reviewing privilege claims. The cost of reviewing documents for relevance during the disclosure process can already be substantial, but reviewing documents for privilege adds another layer of cost. For privilege holders, the financial costs of maintaining the privilege are voluntary. Perhaps more significant are the costs to law enforcement agencies or opponents in litigation in reviewing and challenging privilege claims. These costs can be substantial and are voluntary only in the sense that a person met with a privilege claim may accept the claim and forego inspection of the evidence. If a person were to challenge a privilege claim it can result in costly satellite litigation and lengthy hearings and appeals.

[2] C Tapper, *Cross & Tapper on Evidence* (11th edn OUP, Oxford 2007) 447.

There are also competition costs in recognising a privilege which is exclusive to one relationship: that between legal advisers and their clients. Where lawyers are in competition with other professional service providers whose communications are not protected from disclosure, for example accountants giving tax advice, the privilege has the potential to distort competition in favour of lawyers. The exclusivity of the privilege has been criticised by the Office of Fair Trading (OFT), which has recommended either a limited extension of the privilege to specified legal services provided by other professionals (recognising that there was need for these professions to receive adequate training and be bound by similar ethical codes as lawyers), or a reduction in the scope of the privilege for lawyers.[3]

The High Court recently affirmed the privileged position of lawyers and their clients in *Prudential v Special Commissioners* holding that 'legal advice privilege does not extend to the process of obtaining legal advice from accountants.'[4] Charles J has acknowledged that:

> There is force in the argument that a level playing field on the disclosure of legal advice to clients of lawyers and accountants (and other professionals with expertise in a particular field of law or perhaps other matters where a full and frank exchange of information is necessary or desirable if sound advice is to be given) should be created.[5]

The judge went on to state that the level playing field could equally be achieved by removing advice privilege for lawyer-client communications. Both precedent, and the

[3]Office of Fair Trading, response to Consultation Paper published by Lord Chancellor's Department 'In the Public Interest?' (Press Release, November 2002) 3.

[4]*R (Prudential Plc) v Special Commissioner of Income Tax* [2009] EWHC 2494 (Admin), [2010] All ER 1113 [80].

[5]Ibid [73].

need to limit the loss of evidence to the privilege, prevented the Judge from extending the privilege to accountants giving advice. The court's decision was upheld on appeal.[6]

Both the courts and the legislature will come under further pressure to extend privilege to non-lawyers providing legal advice in light of the radical changes to the structure of the profession that will be brought about by the Legal Services Act 2007. The Act allows for the establishment of alternative business structures, enabling lawyers to go into business with other professional service providers, such as accountants, bankers, insurers and business consultants, whilst businesses such as Tesco and Barclays will be able to offer legal services to their customers.[7] Given that one of the purposes of the Act is to 'promote competition in the provision of [legal] services' the question of whether and when non-lawyers providing legal advice should be covered by the privilege is unlikely to go away.[8]

On a more fundamental level there are behavioural costs associated with secrecy. At the heart of the privilege is a promise of confidentiality. Many political scientists have noted that secrecy is a fertile breeding ground for corruption in government. [9] There is no reason to doubt that the corrupting effects of excessive secrecy on public officials also apply to corporate agents or, indeed, to anyone. As Bentham noted: '…one of the cornerstones of political science [is that] the more strictly we are watched,

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[6] *R (Prudential Plc) v Special Commissioner of Income Tax* [2010] EWCA Civ 1094, [2011] 1 All ER 316.

[7] These will be permitted from 6 October 2011 http://www.legalservicesboard.org.uk/Projects/abs/index.htm (accessed 31 January 2011) .

[8]Legal Services Act 2007 s 1.

[9] Quoted in C Hood and D Heald (eds), *Transparency: The Key to Better Government?* (OUP, Oxford 2006) 9.

the better we behave.'[10] And, in contrast to the state, corporations enjoy indefinite secrecy over privileged information because the privilege survives in perpetuity at common law.[11] Therefore the privilege cloak has the potential to lower the standards of behaviour of corporate agents and their lawyers.

The present chapter focuses on two of the most serious, and intangible, costs associated with corporate privilege: the behavioural costs of secrecy and the loss of public confidence in the rule of law. Because these costs are hard to measure, they are examined in a context where they are most evident in practice: instances of abuse of privilege. Abuse in this context refers to people making unmeritorious privilege claims in order to conceal sensitive information. It looks at examples of abuse of privilege that have emerged, the potential for abuse, and the adequacy of existing mechanisms for controlling it. Chapter 2 then turns to examine the capacity of corporations to suppress evidence through legitimate claims, and the effect this has on the law enforcement process.

This chapter argues that corporate abuse of legal professional privilege is a significant problem, but due to the nature of the privilege its extent is unknown and largely unknowable. The evidence of abuse that has emerged from time to time is probably the best evidence of the behavioural costs of the privilege cloak and the secrecy it confers. Some cases have attracted public notoriety, suggesting that abuse of privilege has brought the law into disrepute. While there is scope in England & Wales to

[10] Ibid (as quoted by the authors).

[11] Privileged material of public bodies is covered by the Freedom of Information Act 2000, but subject to a qualified exemption: s 1, 2 and 42. After 20 years most privileged material becomes a public record and if preserved, accessible by anyone at the Public records office: Public Records Act 1958 s 3; Freedom of Information Act 2010 Part VI.

improve court procedures for detecting abuse, there are inherent limitations in the capacity of courts to control abuse of privilege because of the nature of the rule. Furthermore the track record of lawyers' preventing their clients making unmeritorious privilege claims has sometimes fallen short of the high ethical standards expected of the profession. Accordingly, more effective solutions need to be found for minimising abuse of privilege and the lawyer-client relationship.

1.1 The debate on abuse of privilege

Sometimes cases come to light that reveal attempts by large corporations to 'cheat' the justice system by making false privilege claims to conceal sensitive information, sometimes with the complicity of their lawyers; or, worse, using their lawyers to help commit legal wrongs, and making false privilege claims to avoid detection or proof of the wrong. In the last decade lawmakers in the United States and Australia have reviewed their corporate laws and/or the rules on privilege in response to well known cases of corporate misconduct and abuse of LPP.

While there have been no similar reviews of LPP in the UK, lawyers have also been involved in major corporate collapses in this country. In its report on the collapse of the Mirror group, the Department of Trade & Industry heavily criticised Clifford Chance, along with other professional advisors for its part in the production of an 'inaccurate and misleading' prospectus of the Mirror Group. Clifford Chance were advisors on the float of the Mirror Group. The Department's report concluded that "the verification work carried out by Clifford Chance was defective in failing to identify that

the description of the board gave an incorrect impression [in the prospectus]."[12] The Maxwell and BCCI affairs prompted some soul searching about corporate governance and led to the Cadbury Report on the Financial Aspects of Corporate Governance in 1992, which was an important milestone in the modern development of corporate governance principles in the UK.[13]

The United States reviewed its regulatory framework for public corporations and rules for professional advisers in the aftermath of the Enron collapse. The U.S Congress legislated a raft of changes affecting securities laws, the accounting profession, and the legal profession, though the privilege rules remained unchanged following intense lobbying by the American Bar Association.[14]

Major corporate collapses like that of Enron raise governance and regulatory issues that go far deeper than just the lawyer client relationship and abuse of the privilege. The collapse of Enron raised key questions about corporate governance structures and whether and how they could be improved to prevent such scandals.[15] Similarly, the disturbing role of the accounting firm Arthur Anderson, which audited Enron's accounts, suggests that there are sufficient incentives for external advisers to go along with their client's plans, no matter how questionable, even without the secrecy of

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[12] Quoted in A Townsend, 'DTI report slams CC over Mirror Group float' *The Lawyer* (London 2 April 2001).

[13] M Walsh and J Lowry, 'CSR and Corporate Governance' in R Mullerat (ed) *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (Kluwer Law International, The Hague 2005) 37, 43.

[14]Known as the Sarbanes-Oxley Act 2002 Pub L No 107-204, 116 Stat 745 (2002), after the Senators who sponsored the Bill. Regulations adopted under s307 of the Act required lawyers to report suspected material violations of securities laws or breaches of fiduciary duties up the corporate ladder. See also J Glater, 'Lawyers Pressed to Give Up Ground on Client Secrets' *New York Times* (New York August 11, 2003) A1; B Carrey, 'Enron - Where Were the Lawyers?' (2003) 27 VLR 871.

[15] This was examined in J Armour and J.A. McCahery (eds), *After Enron: Reforming Corporate Governance and Capital Markets in Europe and the US* (Hart Publishing, Oxford 2006).

privilege.[16] Nonetheless it is still important to examine the role of lawyers in such scandals and why they failed to stop them.

In Australia, allegations of corporate abuse of LPP prompted a review of the laws of privilege in 2007-8. The review was conducted following a Royal Commission into whether AWB Limited, the largest supplier of goods under the UN Oil for Food Programme to Iraq, had breached international or domestic law in paying $300 million AUD in kickbacks to Saddam Hussein's regime. In his final report, the Royal Commissioner concluded that AWB had used unmeritorious privilege claims to thwart the inquiry, and that a review of privilege laws relating to federal investigations was needed.[17] The Commonwealth Attorney General responded by requesting that the Australian Law Reform Commission (ALRC) review federal privilege law.

The ALRC's review of LPP was illustrative of the debate surrounding abuse of privilege. During the review defenders and critics of the privilege made a number of bold assertions about the benefits and costs of the privilege when used and abused by corporations. The debate was sharply polarised, and principally waged by those with the greatest interest in retaining or modifying the privilege. The lawyers' associations and corporate lobby's position could be summarised as follows:

I. The privilege was crucial in promoting greater candour in the lawyer-client relationship, and encourages legal compliance.

[16] The capacity of advisers to act as gatekeepers is examined in J Coffee, *Gatekeepers* (OUP, Oxford 2006)

[17]T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (Commonwealth of Australia, Canberra 2006) [7.55] recommendation 4.

II. Abuse of privilege is not widespread.

III. There are appropriate sanctions in place for abuse of privilege, such as sanctions for professional misconduct and cost orders.

IV. Abrogated or modifying the privilege would be an unnecessary knee-jerk reaction, disadvantaging the overwhelming majority of companies who use confidential legal advice to conduct their affairs in a lawful manner.[18]

Critics of corporate privilege, and/or those hoping to limit its scope, particularly federal regulatory agencies, advanced the following arguments in reply:

I. Corporate abuse of privilege can significantly thwart investigations by regulatory agencies into potential breaches of the law, and undermines public confidence in the legal system.

II. The procedures for determining privilege claims have serious limitations.

III. While there is no evidence of widespread abuse, this does not prove that such abuse does not occur, only that widespread abuse is not being detected.[19]

[18]Eg Law Council of Australia, 'Client Legal Privilege and Federal Investigatory Bodies', (Submission LPP 26 to ALRC June 2007) 6-9 (on benefits of privilege and Council's position), 14-15 (on corporations), 50-51 (on evidence of abuse), 63-64 (on adequacy of existing sanctions).

[19]e.g. Australian Competition and Consumer Commission, Submission LLP 53 to ALRC (quoted in ALRC Discussion Paper 73, 2007) [3.120] (limitations of procedure), [6.25] (cost to the administration of justice quoting prior ACCC submission), [9.36] (extent of abuse).

In its final report on federal privilege the ALRC proposed a number of reforms designed to limit abuse, including streamlining the procedures for claiming privilege, and better education and training of the legal profession on their ethical duties *vis-à-vis* the privilege rule. The ALRC did not recommend any changes in the scope of privilege for individuals or corporations, but did recommend extending the privilege to tax advice provided by accountants.[20]

This chapter aims to inject some factual context into the debate on corporate abuse of privilege. First, it will outline the different types of abuse of privilege and discuss case studies where abuse has been revealed. Second, it will consider the adequacy of the existing mechanisms for detecting and controlling corporate abuse of privilege, and whether they can be improved.

There are three main categories of abuse that need to be distinguished:

I. Deliberately transmitting sensitive information through lawyers (‘information funnelling’) to generate a claim for privilege over the information and avoid its disclosure.

II. Seeking legal assistance for the specific purpose of furthering a crime or fraud and hiding behind privilege claims over the legal advice received to avoid detection of the improper purpose.

[20]Australian Law Reform Commission, 'Privilege In Perspective Client Legal Privilege in Federal Investigation' (Report 107, 2007), Executive Summary.

III. Making false privilege claims to thwart investigations and proceedings. 'Scorched earth' tactics of this kind can apply to any procedural steps, not just the assertion of privilege claims.

All of these practices are squarely inconsistent with the privilege rule. Because the courts do not tolerate abuse of privilege, an obvious solution for minimising its costs is to adopt procedures that adequately detect and prevent abuse. There are presently two types of mechanism available for controlling abuse, which Hazard has conveniently labelled external and internal mechanisms.[21] External mechanisms are the court rules and procedures for determining privilege claims, so that only communications that legitimately fall within the scope of the privilege are suppressed from production. Internal mechanisms relate to the lawyer-client relationship, and the role of lawyers in regulating/policing privilege claims made by their clients. Most privilege claims are made directly by lawyers on behalf of their clients, and lawyers are theoretically well placed to prevent their clients from making unfounded claims.

Defenders of corporate privilege cite these control mechanisms as reasons for maintaining the privilege. If the lawyers do not participate in such abuses, and courts are resolute in cracking down on them, then the costs of privilege can be strictly limited to those costs which are necessary for the privilege to perform its intended function. When the Court of Appeals for the 7th Circuit became the first US Court directly to hold that corporations were entitled to claim legal professional privilege in *Radiant Burners*, it expressed a belief that any abuses of the privilege by corporations could be dealt with by

[21]Hazard (n 1) 5.

carefully applying the existing rules that limit the scope of privilege.[22] Whether this is a realistic goal should not go unquestioned. First, we need to consider the extent of corporate abuse of LPP, and then we can examine the mechanisms for controlling it.

1.2 The extent of abuse of privilege

Assertions by proponents or critics of corporate privilege that abuse is either minimal or widespread are easy to make but difficult to substantiate. Corporations rarely admit to committing crimes or abusing privilege rules to conceal them. And because confidentiality lies at the heart of privilege, there are inherent limitations in the mechanisms for detecting abuse. As one US court aptly put it, there is a danger that 'in giving practical application to the [crime-fraud exception] the secret must be told in order to see whether it ought to be kept.'[23]

If the courts were to subject every privilege claim to rigorous scrutiny it would erode the privilege holder's confidentiality, and in any event, would impose an intolerable workload on the courts. Therefore, the role of scrutinising privilege claims is left initially to law enforcement agencies, or opposing litigants, who must decide whether to challenge a privilege claim without having seen the allegedly privileged information. Given the difficulties in detecting abuse, it is impossible to assert that the abuses which are detected from time to time represent all the abuse that occurs. Few if any criminologists would suggest that the amount of criminal convictions represents the

[22]*Radiant Burners Inc v American Gas Association* 320 F2d 314 (7th Cir, 1963) (US CA 7th Circuit), 322-323.

[23]*Hamil & Co v England* (1892) 50 Mo App 338, 348.

sum total of crime in society. The proposition is equally unconvincing when applied to abuse of privilege.

The reality is we do not know how much abuse there is, and we are unlikely to find out. No one knows the extent to which corporations use the privilege for its intended purposes, including legitimately minimising their legal liability, or use it as a cloak of secrecy for the purposes of evading their legal obligations.

While the extent of abuse is unknown, there is a good deal of evidence that corporations engage in all types of the abuse described above. In the one empirical study conducted to date on how the privilege influences corporate behaviour, three in-house lawyers admitted without prompting that they participated in the filtering of communications from one business person to another *solely* for the purpose of generating a privilege claim over the communication.[24] There is evidence that external lawyers are also used in information funnelling. Wright & Graham make the point that lawyers are generally more expensive and less expert at information gathering activities than non-lawyers who offer those services. The fact that lawyers continue to be employed in these activities suggests that the client is not so much hiring a legal service as renting a privilege.[25]

One notorious example of information funnelling comes from tobacco litigation. The tobacco industry adopted a routine practice of funnelling non-legal information and documents through lawyers so as to protect them from discovery. In 1988 a lawyer from

[24]V Alexander, 'The Corporate Attorney - Client Privilege: A Study of the Participants' (1989) 63 St John's L Rev 191.

[25]C Wright and K Graham (eds), *Federal Practice and Procedure* (vol 24, 2nd edn West Publishing, St Paul 2007) 155-156.

the English firm Lovell, White & King (now Hogan Lovells), who was acting for British American Tobacco, wrote to the chief scientist of the company advising him on procedures for handling *scientific* documents in a way that would render them "privileged". The letter states:

> Dear Ray
>
> *Buerger's Disease*
>
> When I met you briefly in Southampton, I suggested that BATCo should investigate the scientific evidence relating to Buerger's disease, in view of the significance this disease has in the context of possible UK litigation. At a meeting of the Industry Lawyers Scientific Evidence Sub-Committee last Friday we discussed a *modus operandi* for collecting scientific material relating to Buerger's disease to ensure that legal professional privilege is not lost.
>
> . . .*Because correspondence on the subject of Buerger's disease might not be privileged, it is important that contact between the scientists should be routed through the lawyers*. In addition, you should ensure that any internal memoranda written on the subject of Buerger's disease in relation to the current investigation should be captioned 'Privileged and Confidential'.[26]

The District Court of the District of Columbia held this memo was a clear attempt by BAT to transform the collection of ordinary business records into privileged communications so that the company could obtain the information it wanted without having to disclose it on discovery.[27] Abuses of this kind cannot be written off as the act of rogue or irresponsible lawyers. Lovells is a highly reputable London law firm, and the lawyer involved went on to become a partner of the firm.

There are also well known examples of clients using lawyers' services, under the cloak of privilege, to perpetrate crimes and frauds. One case worth focusing on comes

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[26] Memorandum from Andrew Foyle of Lovell White and King to Ray Thorton of BATCo (21 March 1988) <www.tobaccodocuments.org> accessed May 6, 2008, emphasis added.

[27] *United States v Philip Morris* (2006) 449 F Supp 2d 1 (DC of DC) at [4003]–[4015].

from the Australian asbestos industry. James Hardie Limited (Hardie), historically the largest supplier of asbestos products in Australia, was found to have abused the lawyer-client relationship by using lawyers to effect a corporate restructure that defrauded thousands of involuntary creditors. The legal advice in relation to the restructure probably falls squarely within the crime-fraud exception to privilege, although Hardie maintains a claim for privilege over the advice and no court has ruled on the question. One of the most interesting features of the case is the behaviour of Hardie's lawyers in wilfully shutting their eyes to the fraud their client was perpetrating.

The facts of the Hardie case can be briefly summarised as follows. Hardie sought to separate its massive asbestos liabilities from the corporate group by establishing an independent trust fund to manage and pay compensation claims brought by persons exposed to Hardie's asbestos. The restructure involved a series of complex transactions, which resulted in the Australian parent company being almost entirely stripped of its assets and later removed from the corporate group, and the establishment of a new entity in the Netherlands which had no legal connection with, or liability to, the trust fund in Australia. Facilitating this complex restructure required the intense assistance of lawyers, and court approval. However the trust fund Hardie established was grossly underfunded, because it relied on wholly inadequate actuarial reports that underestimated Hardie's liability. Hardie knew the reports were unreliable, but the restructure went ahead, with assurances to the Court that any outstanding liabilities in Australia could be satisfied through partly paid shares owned by the new Dutch entity in the former Australian parent, which the latter could call for at any time up to approximately $1.9 billion. The Court was not told that there was a put option over these shares under a deed of covenant and indemnity that meant the trust fund could be forced

to buy the shares for nominal consideration. Approximately one year after Court approval was obtained, the put option was exercised, which meant the trust fund and thousands of victims of Hardie's negligence were effectively cut adrift.

All this came to light after the directors of the new trust fund publicly declared that they were misled by Hardie, and that the trust fund was rapidly running out of money. This prompted the NSW State Government to establish a Royal Commission. The Commissioner made damning findings about Hardie executives, holding that it was 'difficult to accept that management could really have believed that the funds of the foundation would have been sufficient to pay all future legitimate asbestos related claims'[28] especially on the basis of the 'wholly unsuitable' actuarial reports.[29] The Commissioner also made it clear that the restructure was an attempt by Hardies to avoid its legal obligations, rather than a transaction motivated by business necessity:

> To put it directly JHINV [the new Dutch entity] still has in its pockets the profits made by dealing with asbestos, and those profits are large enough to satisfy most, perhaps all, of the claims of victims of James Hardies asbestos.[30]

After intense political pressure and lengthy negotiations the Hardie group finally agreed to underwrite the trust fund indefinitely so that it would be in a position to pay compensation claims into the future.[31] The Australian Securities and Investments Commission subsequently brought civil penalty proceedings against Hardie for making

[28]D Jackson, 'Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation' (NSW Government, Sydney 2004) [1.14].

[29]Ibid [2.42].

[30]Ibid [30.16].

[31]For a detailed account of the affair see G Haigh, *Asbestos House* (Scribe, Melbourne 2006).

misleading statements to the market and breaching its disclosure obligations. It also brought proceedings against the entire board for breaching their directors' duties. [32]

The critical point about the involvement of lawyers in this fraud is that it could never have taken place without their assistance. The restructure could not have been effected without legal advice and court approval, and it is difficult to believe that it would have gone ahead had Hardie's lawyers, Allens Athur Robinson, asked the hard questions of its client about the adequacy of the fund and what its real intentions were. Instead they simply followed their client's instructions to make the restructure happen. The concluding remarks of the Royal Commissioner are apposite here:

> There is a disturbing feature in the events which took place... It is why no one, of the many advisers which JHIL had in relation to [the proposal for] separation, ever appears to have said … that separation was unlikely to be successful unless the Foundation was fully funded, and that this was required to be rigorously checked.[33]

Allens' role in Hardie's corporate restructure echo the allegations made against Enron's lawyers following its collapse. Its lawyers gave 'true value opinions' to related party transactions of Enron entities: i.e. verifying that the transactions represented fair commercial value when in truth they were accounting devices designed to create artificial profits for reporting purposes.[34] Nor do the echoes stop there. The US Judge Sporkin famously criticised the role of lawyers in the collapse of the Lincoln Savings and Loan Bank run by Charles Keating. The Judge stated:

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[32] See the discussion in chapter 4.2.1.

[33]Jackson (n 28) [1.14].

[34]S Koniak, 'When the Hurly Burly's Done: The Bar's Struggle with SEC' (2003) 103 Colum L Rev 1236.

> Keating testified that he was so bent on doing the 'right thing' that he surrounded himself with literally scores of accountants and lawyers to make sure all the transactions were legal. The questions that must be asked are: [1] Where were these professionals, a number of whom are now asserting their rights under the Fifth Amendment, when these clearly improper transactions were being consummated? [2] Why didn't any of them speak up or disassociate themselves from the transactions?[35]

Lawyers turning a blind eye to their client's misconduct is bad enough. Worse are cases where lawyers actively assist their clients in committing legal wrongs. Once again tobacco litigation provides another good example. In the 1980s British American Tobacco adopted a formal document retention policy to deal with what it claimed was a huge records management problem. While there are often statutes requiring the retention of documents for a specific number of years – e.g. tax records, there is no general law which prevents companies or individuals from destroying their own documents. Yet what if under the guise of that policy BAT had been destroying sensitive internal records to prevent them from being used against the company in future legal proceedings? Evidence that BAT did have this purpose emerged in the advice of its lawyers regarding the document retention policy and the company's discovery obligations in future litigation. In a file note of a 1990 conference between BAT and its Australian lawyers, a Partner is recorded as giving the following advice:

> Keep all research docs that become part of the public domain and discover them. As to the rest, get rid of them and let other side rely on verbal evidence of what they contained.
>
> To shred all docs in Aust more than 5 years old (documents will still be available off-shore).[36]

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[35]*Lincoln Savings & Loan Assn v Wall* 743 F Supp 901 (DDC 1990).

[36]File note of John Oxland of Clayton Utz dated 2 April 1990 extracted in *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73 (22 March 2002) [42]-[43].

Surprisingly, the Victorian Court of Appeal found that there was nothing untoward about this note. It can be safely stated however that were a lawyer to advise her client to destroy documents to avoid their production in legal proceedings, the communication would be seen to be in furtherance of a 'fraud on justice', or even an attempt to pervert the course of justice, and therefore no privilege would apply.[37]

The abuse of privilege in the tobacco and asbestos examples above was very costly to the administration of justice: not merely in terms of evidence lost, or the undermining of legal rights, but equally significantly in eroding public confidence in the rule of law. Headlines in respected broadsheets shouting 'Cheated by the law', and stating: 'Two high-powered lawyers engaged in serious professional misconduct to try to deny lung cancer victim Rolah McCabe justice… sensational new evidence revealed today by The Sunday Age shows' – is hardly likely to engender public confidence in the justice system.[38]

The sixty four thousand dollar question is: are these cases rare exceptions (the bad apple phenomenon)? Or are they symptoms of a broader problem (the iceberg phenomenon)? While we are unlikely ever to know the answer to this question, what we do know is that abuse has been exposed from time to time and that the tobacco and asbestos examples are not the only instances of it.[39] Plenty of disturbing, colourful and

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[37] *(Re Mowbray) Brambles Australia Ltd v British American Tobacco Australia Services Ltd* [2006] NSWDDT 15 ; *United States v Philip Morris* 449 F Supp 2d 1 (2006) (DC Columbia, Amended Final Opinion, 17 August 2006); *Sealed Case, Re* (1985) 754 F2d 395 (DC CA); The phrase 'fraud on justice' comes from the High Court of Australia: *A-G for the Northern Territory v Kearney* (1985) 158 CLR 510 (HCA) [17].

[38] W Birnbauer, 'Cheated by the law ' *The Age* (Melbourne 29 October 2006) 1.

[39] It is also speculation as to whether they are the worst instances of it. The Hardies affair was described in the media as 'one of the worst identifiable examples of the problems resulting from a lack of corporate social responsibility' J Durie, 'Hardies: A Stench Until Heads Roll' *Australian Financial Review* (September 22, 2004) 64.

mundane examples of abuse can be found in law reports or newspapers involving electricity companies[40], computer technology companies[41], insurance companies,[42] railway companies,[43] mining companies,[44] banks[45], telephone companies,[46] medical device manufacturers,[47] arms manufacturers,[48] steel manufacturers,[49] airlines,[50] storage

[40]Enron, apparently with the aid of counsel, exploited the Californian energy market by artificially producing energy shortages, so it could claim profitable congestion charges from the state. Operation 'Death Star' was described in one legal memo as a strategy where Enron 'gets paid for moving energy to relieve congestion without actually moving any energy or relieving congestion.' The legal memoranda were voluntarily released by the successor Enron Board following the resignations of previous directors: R Oppel, 'How Enron Got California to Buy Power it Didn't need' *The New York Times* (May 8, 2002) C1.

[41]*Rambus Inc v Infineon Technologies AG* (2004) 222 FRD 280 (DC VA) Company developed with counsel a document retention policy, which involved a 'shred day' where 2 million documents were destroyed and staff were treated to a beer, pizza and champagne 'celebration.' The Court held that the company intentionally destroyed potentially relevant documents when it anticipated litigation, and the legal advices regarding the policy fell under the crime-fraud exception ; *Misek Falkoff v IBM* (1992) 144 FRD 48 (So DC NY) IBM improperly claimed privilege over the minutes of a meeting solely on the grounds an attorney was present.

[42]*State Farm Fire and Casualty Co v The Superior Court of Los Angeles* (1997) 62 Cal Rptr 2d 834 (4th Cir) Declaration by former paralegal in insurance company that staff forged 'no earthquake' coverage clauses in insurance policies, and had legal strategy of paying claims where the fraud might be detected, but would first try to have proceedings summarily dismissed and withheld evidence for that purpose. Court ruled that employee's evidence fell under the crime-fraud exception; *Saudi v Paul Revere Life Insurance Co* (2004) 224 FRD 169 (DC PA) Court ruled crime-fraud exception applied to report by attorneys acting as US management consultants that purportedly advised insurance company to funnel claims denials through lawyers so that mistakes could be covered up by privilege.

[43]*Williams v Quebrada Railway, Land and Copper Co* [1895] 2 Ch 751 (Ch) Defendant company allegedly issued charge in favour of their agents with the purposse of defeating the holders of first debentures. Court ordered disclosure of counsel's opinions with respect to the charge, on the grounds that they fell within the crime-fraud exception.

[44]*Dubai Aluminium Co Ltd v Al Alawi* [1999] 1 WLR 1964 (QB). The plaintiff company had obtained an Anton Piller order and a worldwide Mareva Injunction against the defendant on the basis of evidence about the defendant's financial affairs which had been obtained by false representation and impersonation by agents of the plaintiff. The court held that criminal or fraudulent conduct for the purposes of acquiring evidence for litigation were outside the legitimate scope of LPP.

[45]*First Union National Bank v Turney* (2001) 824 So 2d 172 (FL Appeals Court) Trustee bank devised strategy with legal counsel to cover up breach of fiduciary duties to beneficiaries in respect of mortgage transactions conducted by the Bank. The court held that legal advice regarding the strategy fell under the crime-fraud exception.

[46]*US v Western Electric Co Inc* (1990) 132 FRD 1 (DC DC) Company responding to Federal Government investigation claimed privilege over hundreds of documents, some of which did not exist, some which had already been released, and the particulars for all privilege claims were 'hopelessly deficient.' The court ruled that the company was making false privilege claims in a systematic attempt to thwart the investigation.

[47]*AH Robins Co Inc, Re* (1985) 107 FRD 2 (DC KA) Manufacturers of Dalkon Shield IUD devices used lawyers in a strategy of creating a false evidentiary record about the safety of the devices, and then attempts to cover up and limit the company's liability. Court found that company was entitled to vigorously defend claims of fraud, but attempts to cover up the facts in the litigation fell under the crime fraud exception.

companies,[51] and even an incorporated church.[52] Most of these cases come from the US. This could be attributable to several factors: i) that US jurisdictions generally have more robust procedures for determining privilege claims because they require parties to file detailed privileged logs and their courts more readily inspect privilege claims in camera; ii) that Americans have a reputed fondness for litigation; and/or iii) that UK based companies and legal advisers maintain higher ethical standards than their American counterparts. It is difficult to draw even tentative conclusions on this issue. However, the fact that there are cases of abuse in the UK too,[53] in a jurisdiction where detecting abuse is more difficult than in the US,[54] means we cannot be complacent about the problem.

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[48]*Grand Jury Subpoena, Re* (1994) 31 F3d 826 (9th Cir) Two former employees testified that corporation had sought counsel's assistance to get an export license to UAE which it then used to illegally re-export the weapons to Iran. Court ruled that communications were subject

[49]*Istil Group Inc v Zahoor* [2003] EWHC 165, [2003] All ER 252 (Ch) Claimant company relied on evidence from third party, knowing third party had forged evidence, without disclosing the forgery to the court. This case is discussed in chapter 5.

[50]*Kuwait Airways Corp v Iraqi Airways Co* [2005] EWCA Civ 286, [2005] 1 WLR 2734 This case is discussed in chapter 1.2; *White v American Airlines* (1990) 915 F2d 1414 (DC KA) Corporate counsel urged company witness to give perjured evidence in an employment discrimination proceeding; communication held to be subject to crime/fraud exception.

[51]*Ocean Spray Cranberries Inc v Holt Cargo Systems Inc* (2000) 785 A2d 955 (NJ Superior Court) Defendant warehousing company had concocted strategy to cover up massive spill of claimant's cranberry juice being stored at defendant's premises. The juice had leaked and flooded into an adjacent parking lot. Rather than notify the claimant, the defendant cleaned up the juice and moved it to a working freezer. In subsequent litigation it stated in answers to interrogatories affirmed by corporate counsel, that they were unaware there was a problem with the cranberries. However an earlier report from Holt's risk manager to corporate counsel stated 12 times that information about the cranberries had been 'fabricated', that refrigeration systems had failed, that Holt employees recorded phony temperature readings at will, that there had been a flood of cranberry juice and that none of this had been disclosed to Ocean Spray. The court ruled that the report to in-house counsel was covered by the crime fraud exception.

[52]*Sealed Case, Re* (n 37) Document retention policies were utilized to destroy sensitive information, as part of ongoing conspiracy to distort the court's processes in litigation. The conduct occurred with the assistance of lawyers, even if they were not aware of the fraud, and hence the crime-fraud exception applied to the lawyer-client communications.

[53]And Australia as the ALRC acknowledged in its report: Australian Law Reform Commission, 'Privilege in Perspective Client Legal Privilege in Federal Investigation' (n 53) [9.5] et seq.

[54]The procedure in England & Wales for claiming privilege is described below.

Of course these cases do not and cannot prove the extent of corporate abuse of privilege. All they do is confirm that abuse does occur, and that it is not a new phenomenon. Developing a clear picture of the extent of abuse is probably impossible. What we have to work with is a foggy, but troubling, picture of abuse in the corporate world.

One worrying feature about abuse is that even if it is not widespread, individual instances of it can have dramatic and far-reaching consequences. The collapse of the Savings and Loan Scheme in the US, like Enron's failure, was a massive crisis at the time, and prompted the intervention of the US Federal Government. Hence, in formulating legal policy, lawmakers should have at least some regard to exceptional cases and the need to prevent them.

With that in mind we shall return to consider the mechanisms for limiting abuse.

1.3 Mechanisms for controlling abuse

1.3.1 External mechanisms: court procedures and practice

As already mentioned the first thing to be said about combating abuse through court procedures is that there are no reliable ways of detecting it, short of examination of the allegedly privileged communication in question. Sometimes, even with full knowledge of the content of the communication it can be difficult for a court to decide whether the claim is a bona fide one. This raises a dilemma for the courts: should they protect a party's confidential material by refusing inspection of documents claimed to be

privileged – and let abuses go undetected - or should they intrude on the client's confidences in order to examine whether the privilege is properly claimed? The English courts have in essence adopted a middle path, adopting rules designed to minimise abuse without compromising the integrity of the privilege, and in most cases they have erred on the side of protecting the privilege.

The rules on disclosure in civil litigation provide a good example. During the disclosure process, the details that a privilege holder must provide to an opponent in civil litigation about the documents they claim privilege over is limited to some basic particulars under CPR 31 and the accompanying practice direction. In practice, privilege holders typically provide even less information than the rules require.[55] A party must provide a certified list identifying the documents he is disclosing, the documents he objects to disclosing, and the grounds of the objection.[56] The mandatory practice form supplied for standard disclosure[57] 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 precisely the same information that must be provided for non-privileged documents which a party is disclosing. In order to comply with the disclosure requirements in CPR31:

> 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

[55]H Malek (ed), *Phipson on Evidence* (17th edn Sweet & Maxwell, London 2009) [23.65].

[56]CPR 31.10 (3)-(4); 31.19 (3)-(4).

[57]By virtue of CPR PD 31 [3.1].

> documents all falling into a particular category the disclosing party may list those documents as a category rather than individually.[58]

The rules and practice direction contemplate that a document or part of a document that is withheld from inspection is ordinarily identified individually. But some commentators and the courts have taken the view that even listing privileged documents individually would in many cases be an unwarranted intrusion on the privilege. The editors of *Phipson on Evidence* submit 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.'[59] They go on to state that 'in an exceptional case, where the claim for privilege has been shown to be unsatisfactory, Practice Direction 31 appears to give the court power to order privileged documents to be listed individually in order to better judge whether the claim for privilege can be supported.' What the editors overlook however is the basic catch 22: how can a claim for privilege be 'shown to be unsatisfactory' *before* the privilege holder has even identified the document or communication which it asserts is privileged. If this approach is correct, an opponent faces a Herculean task in trying to show that the privilege claim is unsatisfactory, for they may not even know what documents are subject to a privilege claim.

It is submitted the CPR 31 and the accompanying practice direction should be given their ordinary meaning and applied consistently by the courts. Each privilege claim should identify by name and title (or job position) the author and recipient of the document, the document's date, its type (e.g. letter, report, email) and its subject matter.

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[58]Ibid [3.2].

[59]Malek (ed) (n 55) [23.65].

Identifying the author and recipient is desirable for several reasons. First, it allows an opponent to verify that a claim for advice privilege is properly made by confirming that both the author and recipient belong to the 'corporate client'. Secondly, it would have the added advantage of informing law enforcement agencies and opponents in litigation of the corporate agents who hold information which is relevant to an investigation or dispute. This information remains compellable.

The objection to identifying the subject matter of a privileged communication is that it undermines the privilege holder's confidentiality, and that it is information that could be used against the privilege holder and as a consequence might deter people from seeking legal advice. This objection is unconvincing. Identifying the subject matter of a communication reveals virtually nothing of what was communicated between lawyer and client: neither the information the client provides to the lawyer nor the advice they receive in return. Furthermore no adverse inference can be drawn from a party's claim to privilege,[60] so knowing the subject matter of a privileged claim has no forensic use in legal proceedings. At any rate, the fact that a person took legal advice on X, reveals no more than that they were acting prudently in wanting to ascertain their legal position. On the other hand revealing the subject matter of a document or communication will provide an opponent with more information about the circumstances and the purpose of the communication, which will assist them in deciding whether there are good grounds to challenge the privilege claim.

Unfortunately it does not bode well for the future reform in this area, that the courts already seemingly allow parties to 'bend' the rules when asserting privilege

[60] *Wentworth v Lloyd* (1864) 10 HLC 589 .

claims, with the support of some distinguished commentators. In its review on privilege the ALRC recommended a more transparent and accountable procedure for asserting privilege. And in stark contrast to the editors of *Phipson on Evidence*, the editors of the 3rd Australian edition of *Cross on Evidence* lamented that the task of assessing privilege was made difficult by the 'traditional but reprehensible practice' of parties making an affidavit of documents by simply asserting that the document was brought into existence for the requisite purpose, and the reluctance of judges to permit cross examination of the deponent.[61] Yet this statement was made a full 10 years after the High Court of Australia stated in *Grant v Downs* that the courts' power to inspect documents where privilege is challenged should be exercised more readily.[62] The ALRC's call for more transparency in the process for making privilege claims looks like history repeating itself.[63]

An equally important procedural issue is when should a court look beyond the assertion of privilege in the event the claim is challenged? Here again, the English courts have tended to give greater latitude to the privilege holder than other common law jurisdictions.[64] A recent example is The High Court's decision in *West London Pipeline and Storage Ltd v Total UK Ltd*.[65] The issue in that case was whether an accident investigation report made in the immediate aftermath of a massive explosion at the Buncefield Oil Terminal in Hertfordshire could conceivably be made for the dominant purpose of preparing for litigation, rather than a factual inquiry into what happened.

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[61]D Byrne and JD Heydon, *Cross on Evidence* (3rd Australian edn Butterworths, Sydney 1986) 640.

[62]*Grant v Downs* (1976) 135 CLR 674 (HCA) 689.

[63]Australian Law Reform Commission (n 20) Recommendation 8-3.

[64]Malek (ed) (n 55) [23.69].

[65]*West London Pipeline and Storage Ltd v Total Uk Ltd* [2008] EWHC 1729 (Comm), [2008] All ER (D) 294 (Jul).

Beatson J held that an 'assertion of privilege or the requisite purpose are not determinative and are evidence of fact which may require to be independently proved'.[66] However Beatson J held that the court should not go behind the affidavit (now the disclosure statement) asserting privilege, unless it was reasonably certain from the disclosure statement: (a) the statements of the party making it that he had erroneously represented or had misconceived the character of the documents in respect of which privilege was claimed; (b) that the evidence of the person who, or entity which, directed the creation of the communications or documents over which privilege was claimed that the affidavit is incorrect; or (c) that the other evidence before the court shows that the affidavit is incorrect or incomplete on the material points. Where an affidavit is not conclusive, there are four options available to the court: the court could inspect the document; order the party make a further affidavit providing more detailed particulars of the claim or disclosure in default; or allow cross examination of the deponent as to the basis of the privilege claim. 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 practical alternative. In addition, cross examination on the affidavit, which according to Matthews & Malek was not permitted at all under the old RSC,[67] should be reserved for 'extreme cases'.[68]

The English courts' approach is an overly cautious one, and runs the risk of allowing many unmeritorious claims to go undetected. While inspection in camera by the courts is an obvious intrusion of the privilege holder's confidentiality, it is a sensible compromise between protecting the interests of the privilege holder, whose primary

[66]Ibid [86].

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

[68]*West London Pipeline and Storage Ltd* (n 65) [88].

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. Indeed the real limitation with this option is that it cannot be used more often because of the strain it would put on court resources.

The limited particulars that are given of privileged claims, and the narrow circumstances in which a court will look behind a privilege claim, gives some insight into the difficulty faced by opponents contemplating a challenge to a privilege claim. An equally difficult problem can be in defining what constitutes abuse of LPP. Lawyer-client communications in furtherance of a crime or fraud, our second category of abuse, provide a useful case study on how the definition of abuse and the detection of it can be extremely difficult in practice.

The crime-fraud exception, as it is commonly known, was first established in the 1884 case of *The Queen v Cox & Railton.* [69] The rule enshrines the principle that, while clients are entitled to consult their lawyer in confidence about past misdeeds, it is no part of the lawyer's role to assist clients in perpetrating future wrongs. In such cases, and even if the lawyer is unaware her advice is being used for a wrongful purpose, the privilege 'takes flight'.[70] The rule marks an important boundary to the protection afforded by the privilege, and in this regard it is arguably not an exception.[71]

[69]*R v Cox and Railton* (1884-85) LR 14 QBD 153 (CA).

[70]Ibid; *Clark v United States* (1933) 289 US 1, 15.

[71]*McE, Re* [2009] UKHL 15, [2009] 1 AC 908 [11].

Initially the exception was confined to crimes but it was quickly extended to cover fraud as well.[72] Fraud in this context is defined broadly although the precise scope of the exception is unclear. In England & Wales it includes abuse of statutory power, and in Australia conduct amounting to 'a fraud on justice'.[73] There is disagreement in the United States as to whether fraud covers all legal wrongs, such as torts or breach of contract.[74] In *Crescent Farm (Sidcup) Sports Limited v Sterling Offices Ltd* Goff J accepted that in England & Wales the exception covered all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances but it did not extend to the tort of inducing a breach of contract.[75]

A common feature of many Commonwealth authorities is that it applies to legal wrongs which involve dishonesty.[76] However in *Barclays Bank v Eustice* the Court of Appeal went much further, and held that the exception can apply to wrongs where the client's conduct is 'iniquitous', regardless of whether the client and the lawyer were acting in good faith.[77] In that case the defendant entered into transactions under market value for the purposes of prejudicing creditors' claims. This was done deliberately and overtly with their solicitor's assistance. The Court of Appeal held that the defendant's conduct might not have been dishonest but that the transactions were a breach of S423 of the Insolvency Act 1986. The scheme amounted to 'sharp practice' and was

[72] *Williams v Quebrada Railway, Land and Copper Co* (n 43).

[73] *A-G for the Northern Territory v Kearney* (n 37) [17].

[74] E Imwinkelreid, *The New Wigmore: A Treatise on Evidence* (Aspen Law & Business, New York 2002) 966 – 970.

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

[76] Ibid; *Kang v Kwan* [2001] NSWSC 698 .

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

sufficiently 'iniquitous' that public policy required the disclosure of the communications between the defendant and his legal advisers.[78]

The view that the exception extends to 'iniquitous' conduct finds mixed support in the most recent decision of the House of Lords, which considered the crime 'fraud exception', albeit in *obiter dicta* remarks. In *re McE* the House of Lords considered whether Parliament had intended that covert surveillance provisions of the Regulation of Investigatory Powers Act 2000 abrogated legal professional privilege over lawyer/client communications and doctor/patient consultations (insofar as the latter could qualify for litigation privilege); and whether the Act was compatible with Art 8 of the European Convention on Human Rights. Both Lord Justices Phillips and Neuberger described the 'crime-fraud' exception as the 'iniquity exception', though the latter expressly left open whether the decision in *Eustice* had been correctly decided.[79]

It is submitted that *Eustice* was correctly decided. The decision could have significant consequences, which is why it is controversial, but on the whole its implications are positive. 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.'[80]

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[78] Ibid 644-645.

[79] *McE, Re* (n 71) [109].

[80] *Eustice v Barclays Bank* [1995] 2 BCLC 630 (CA) 645.

This is a significant observation. The traditional case for privilege rests on the potential negative effects of disclosing lawyer-client communications: deterring clients from seeking legal assistance and reducing candour in lawyer-client consultations. Less attention is paid to the potential positive effects of opening up lawyer-client communications to greater transparency. It is likely to lead to lawyers giving more cautious advice to their clients as to what the law requires, permits and prohibits them from doing. In turn, clients acting in good faith are likely to follow their lawyer's advice, knowing that failure to do so would risk non-compliance, and the possibility of investigations and/or litigation in which the legal advice offered to them might be disclosed and used against them.

However the term 'sharp practice' is a rather unhelpful controlling device. It is an imprecise term which is open to inconsistent and equally defensible interpretations. Critics of *Eustice* could fairly argue that any client who follows advice from their lawyers which is wrong, who then end up breaking the law, risk disclosure of their otherwise privileged communications. The fact that iniquity has been defined by Lord Denning to include any 'legal wrong' and any misconduct of such a nature that it ought to be disclosed supports this contention.[81]

If *Eustice* is to be defended it should be on the basis that it could apply to communications in furtherance of any criminal offence or civil wrong. This could expose clients who acted in good faith in following their lawyer's incorrect advice. While this cannot be a desirable end in itself, the reputational, professional and

[81] *Initial Services Ltd v Putterill)* [1967] 3 All ER 145 (CA) 148.

commercial costs to lawyers from exposure of incorrect advice they provide should encourage them to give more prudent advice in the first place.

A related problem is the temporal and causal relationship between the lawyer-client communication and the iniquity. For the exception to apply the communication must be *in furtherance of the crime or fraud*, rather than merely relating to it or even disclosing it.[82] This means it is unclear whether the exception applies where a person decides to commit the crime or fraud *after* they receive advice. Consider the case of a client who consults a lawyer in good faith about the legal consequences of doing X. She is advised that X is a fraud, but later decides to use the advice to commit X in a way that reduces the chances of the fraud being detected and/or proven in court. The arguments for and against upholding privilege in this scenario are similar to those articulated by the Court of Appeal in *Eustice*. The privilege may encourage people who are ambivalent about complying with the law to obtain advice about the legal consequences of their proposed conduct. This gives lawyers both the opportunity to dissuade clients from engaging in unlawful conduct, or to advise them on ways they could carry out their plans lawfully. On the other hand, denying privilege would prevent people from using legal advice to break the law, and that, too, is undoubtedly in the public interest. It is submitted that the exception should apply to any document or communication which has been *used* by clients to commit legal wrongs, whether or not they intended to commit such wrongs at the time of their creation.

While there is value in giving the exception a broad scope in relation to future and ongoing wrongs, there is need to ensure the exception does not prevent a client from

[82] *R v George Smith* (1915) 11 Cr App R 229.

adequately defending allegations of wrongdoing. Can a party's robust defence of the allegations against him become an attempt to further the crime or fraud by concealing it? If the exception is interpreted too broadly it could inhibit clients from obtaining effective legal assistance and thus breach their right to fair trial under Art 6 of the ECHR. If the exception is interpreted too narrowly, the integrity of the proceedings could be undermined. All clients are entitled to adequately and vigorously defend claims or charges against them, but they cannot do it unlawfully. The crime-fraud exception should apply to communications in preparing for litigation where the attempt to 'conceal' the wrong constitutes unlawful conduct independently of the offence or wrong which is the subject matter of the litigation.

However, difficulties can arise where unlawful conduct in litigation is the *subject* of subsequent litigation. The Court of Appeal confronted this problem in *Kuwait Airways Corpn v Iraqi Airways Co.*[83] The case involved a long-running dispute arising out of Iraq's seizure of Kuwaiti aircraft during the first Gulf war. The claimants challenged the defendant's claim for litigation privilege over certain documents, on the basis that they were generated as part of a fraud (being perjury) on the court in earlier actions between the parties. The claimants were seeking to overturn an earlier judgment on the basis that it had been procured by the very same fraud. The court held that, where the fraud is one of the issues in the underlying action, the exception could apply but only where there was a *strong prima facie* case of fraud.[84]

[83]*Kuwait Airways Corp v Iraq Airways Co* (n 50).

[84]Ibid [42]. The exception will not apply to the ordinary run of cases where a litigant's evidence is not accepted by the court: *R v Snaresbrook Crown Court ex p DPP* [1988] QB 532, 537-538.

Even if the scope of the crime-fraud exception can be settled fairly, the problem of policing the exception remains. Given that we know that some lawyers are prepared to turn a blind eye to unlawful corporate conduct, or to participate actively in it, it is also fair to assume that the very same lawyers would without hesitation make a false privilege claim over the advice they have given their client in order to prevent detection of the wrongdoing. In *Re McE* Lord Neuberger acknowledged the difficulty of detecting abuse without inspecting lawyer-client communications in the context of covert surveillance of lawyer-client communications to prevent major crime and terrorism:

> The authorities cannot know if the privilege is being abused…until the interception or listening in has occurred. Secondly, the authorities cannot warn the parties in advance that interception will occur, as to do so would defeat the whole point of the exercise. Further, it is self-evident that knowing that a communication may be the subject of surveillance could have a chilling effect on the openness which should govern communications between lawyer and client, and this is the very basis of the [privilege].[85]

To detect abuse of privilege *after the fact*, the courts have developed a number of rules to overcome the practical difficulties in challenging a privilege claim. First, a person challenging a privilege claim on the grounds it falls within the crime-fraud exception, need only prove a *prima facie* case that the communication was in furtherance of a crime or fraud. If the crime or fraud could be proven without reliance on the communication then there would be no need for the exception. The protection of LPP is lost even if, after the documents have been disclosed, it is ultimately held that there was no crime or fraud.[86] And the court always has the power to inspect a document

[85]*McE, Re* (n 71) [111].

[86]Ibid [11] (Lord Phillips).

to satisfy itself that a claim for privilege is properly made.[87] In the US case of *Zolin* the Supreme Court set out in detail what the party alleging the crime-fraud exception must establish before a court will conduct an in camera inspection. The challenging party must show that there is 'a factual basis adequate to support a good faith belief by a reasonable person that the crime-fraud exception applies'.[88] But that test brings us back to the threshold question: where is the factual basis to be found if not in the communication between lawyer and client?

Some cases of crime-fraud can be easier to detect because, where there is independent evidence that a person has committed a crime or fraud, it is at least possible that any prior communications between that person and their lawyer on the same subject were made in furtherance of the crime or fraud in question. On the other hand the evidence of the crime or fraud is sometimes found exclusively or primarily in the lawyer-client communications. This is especially the case for *mens rea* crimes where, absent a 'guilty mind', the conduct is perfectly lawful – for example if I pay you to go on a holiday to Brazil that is unobjectionable. If however I pay for the trip after being advised by my lawyer that no one can subpoena you in Brazil to testify as a witness at my impending criminal trial, that would amount to a contempt of court.

Two Australian Federal Regulatory Agencies[89] submitted to the ALRC privilege review that in their experience legal advice can be central to determining whether there

[87]In England & Wales CPR 31.19(6)(a); in the US *United States v Zolin* 491 US 544, 109 S Ct 2619 (1989) ; in Australia *Grant v Downs* (n 62).

[88]Ibid *US v Zolin.*

[89]The Australian Competition and Consumer Commission and the Australian Securities and Investments Commission, charged with regulating trade and corporations laws respectively.

has been misconduct.[90] This was true of the very first case to articulate the crime-fraud exception: *The Queen v Cox and Railton*. Cox and Railton were partners who sought advice as to whether they could affect a bill of sale from Railton to Cox to avoid a damages judgment against Railton for publication of a defamatory article. The solicitor in good faith told them they could not do this because they were partners. Cox and Railton thanked the solicitor for the advice and left his office. When the Sherriff tried to enforce the judgment, Railton produced a bill of sale from him to Cox and a deed purporting to dissolve the partnership which was dated prior to the date of the judgment against Railton. Railton and Cox were subsequently convicted of fraud due in large part to the evidence of the solicitor.

In most cases unless there is some independent evidence of the criminal or fraudulent enterprise, which also indicates that legal advice may have been obtained in furtherance of the enterprise, then law enforcement agencies and third parties are forced to accept the privilege claim, or make guesses and potentially groundless allegations. In practice most lawyers have at their disposal only limited particulars of a privilege claim and resort to a 'smell test' to determine whether it is genuine. Then there is a dilemma as to whether to mount a privilege claim, potentially raising questions over the professional integrity of their opponent which lawyers are loathe to do, when the prospects of success are at best a guess and the prospects of an adverse costs order if the challenge is unsuccessful are a near certainty.

One might be tempted to point to the tobacco and asbestos examples above as evidence that the abuses there were uncovered, and hence the system 'worked'. This

[90]Australian Law Reform Commission, 'Client Legal Privilege and Federal Investigatory Bodies' (Discussion Paper 73, 26 September 2007) [6.146].

would be wishful thinking. In the Hardie case all of these matters only came to light after a Royal Commission had been set up, and legislation had been passed through the Commonwealth Parliament expressly abrogating any privilege over Hardie's legal advice for the purposes of the inquiry. The financial costs to the taxpayer of detecting the abuse were immense. In relation to tobacco the first insights into the operations of that industry and its abuse of legal professional privilege came about when a rogue employee of one company effectively stole thousands of internal documents.[91] The information-funnelling memorandum cited above was placed on the internet by a US Congressional Sub-Committee which had issued a Congressional subpoena for documents that the industry had claimed as privileged in a health care cost recovery action brought by the State of Minnesota. The second document destruction memorandum was disclosed only because a Victorian Judge ruled that British American Tobacco had impliedly waived privilege over it. That decision was appealed successfully by BAT, and therefore the communication remains to this day privileged.[92] In short, the discovery of the abuse in these cases owes more to radical personal and political intervention than it does the courts or the operation of the common law. It is also worth bearing in mind that most of the US cases of abuse of privilege described above were detected not through the court's procedures but because there was independent and publicly available evidence of abuse: in some cases it was disclosed inadvertently, or by whistleblowers; or quite literally leaked in the rotting cranberry juice case.

[91]Who calling himself 'Mr Butts' sent them anonymously to a leading public health advocate, Professor Glantz, at UCLA.

[92]*British American Tobacco Australia Services Ltd v Cowell* [2002] VSCA 197, (2002) 7 VR 524 (Victorian Court of Appeal) [192].

Another factor that puts a strain on court procedures for detecting abuse is the staggering volume of material that can be subject to a privilege claim by corporations. Privilege challenges can involve an enormous amount of work, both for the challenging party and the court, and sometimes they can only be sensibly ruled on by categories.[93] It would be disingenuous to suggest that such rulings can be made with the same rigorous analysis that is employed when assessing privilege claims over individual documents.[94] The difficulties faced by opposing parties and the courts in reviewing privilege claims provide fertile ground for scorched earth tactics: i.e. asserting clearly false privilege claims en masse in the hope of avoiding disclosure of at least some compellable information or embroiling the opponent in a costly fight to force its disclosure. This was the complaint of the Royal Commissioner regarding AWB and its lawyers in the Oil for Food Inquiry. That there are examples like the 1970s case *US v IBM*, where less then 10% of privilege claims are upheld, is an indication that such 'scorched earth' tactics are not new. One of the main conclusions of an empirical study into the effects of privilege on corporate behaviour was that 'assertions of privilege often lack merit'.[95]

The ALRC argued that improvements in the procedure for making and determining privilege claims could fix many of the underlying problems 'while still respecting the fundamental principle of client legal privilege'.[96] The proposals include the establishment of a 'model procedure' for resolving privilege claims, which includes giving the parties an opportunity to submit a contested privilege claim to an independent review process. The decision of the independent mediator would be binding but the

[93]See *RIMAC v WARF* (1987) 114 FRD 672 (DC Wis) for a case where the magistrate throws in the towel when faced with 1700 pages of documents for in camera review.

[94]Wright and Graham (eds) (n 25) 158-159.

[95]Alexander (n 24) [266]. The study is discussed in more detail in chapter 4.2.

[96]Australian Law Reform Commission (n 20) Recommendations 8-1 to 8-22, p 104.

process is voluntary.[97] The ALRC also proposes a rule that the party claiming the privilege should bear the onus of commencing court proceedings for a declaration of privilege, when a federal body disputes the claim.[98] Conceivably this reform could result in fewer privilege claims being pursued by smaller corporations, but it is hardly likely to act as a deterrent for big corporations who have the resources to fight litigation and are familiar with the legal process.

Even if there are more robust procedures for making privilege claims, it is an open question how effective it would be in reducing unmeritorious privilege claims. Forcing parties to give more detailed particulars of their privilege claims may go someway towards reducing abuse because it gives law enforcement agencies and private litigants more information about the origins and nature of the information, but it is not a fail-safe solution. For example, advice instructing a client on how to evade payment of taxes looks just as innocuous as advice detailing a client's tax liabilities, when both are described in a privilege log. Sometimes, even with full knowledge of the contents of a communication, it can be difficult to determine whether it was made for the dominant purpose of seeking legal advice or merely as an attempt to conceal information. To take another simple example, a client can send a communication to a lawyer containing sensitive information about the client's business affairs for the *bona fide* purpose of obtaining legal advice, or it can send an identical communication to the lawyer requesting advice but its main purpose is to avoid disclosure of the sensitive information. The author will be the same, the recipient will be the same and the wording will be identical. The only distinguishing factor between the two communications is the client's state of mind: and proving improper purpose by reference to someone's state of

[97]Ibid Recommendation 8 – 13.

[98]Ibid Recommendation 8 – 11.

mind is notoriously difficult.[99] The dominant purpose test and the difficulties of applying it to corporations are discussed in detail in chapter 2. The point for present purposes is that, while the procedures for making and reviewing privilege claims in England are capable of improvement, their impact on unmeritorious privilege claims, and on abuse that occurs under the privilege cloak, is likely to be limited.

Given the limits of procedural mechanisms for detecting abuse, one method of deterrence that warrants consideration is to impose tough(er) sanctions for parties or lawyers who engage in it. The position of lawyers is discussed in the next section. In relation to parties to litigation, privilege claims over documents are normally made as part of the disclosure process.[100] Contempt proceedings are the primary sanction for those who make a false disclosure statement. However, such proceedings can only be brought by the Attorney General, or with the permission of the court. Based on the author's searches it appears no such proceedings have been brought against anyone for making a false privilege claim. Another possible approach is to link the sanction for abuse of privilege in litigation directly to the forensic benefit a party derives from withholding compellable evidence. Where a court finds that a party has tried to conceal evidence through unmeritorious privilege claims it could have the power: (i) to prevent that party from leading any evidence on a particular issue; or (ii) to strike out parts or all of the party's statement of case or defence. In theory, imposing sanctions that could affect the disposition of the legal dispute will be more effective in deterring conduct that is itself designed to affect the resolution of the legal dispute, as opposed to indirect sanctions on the lawyer or cost orders. Such powers would be compatible with the

[99] Brian CJ thought it was impossible 'for the Devil himself knows not the intent of a man.' *Anon* (1476) YB Pas 17 Edw 4, fo 1, pl 2 .

[100] CPR 31.19 (3)-(4).

overriding objective of the CPR, which requires proportionality in the court's response to party default. While denying a party's right to lead evidence on, or to contest, a particular issue may seem drastic at first blush, the courts have long recognised that intentional non-compliance is a threat to the integrity of the court's processes, and when non-compliance is designed to undermine another party's right to fair trial, the court has the power, and sometimes the duty, to limit the defaulting party's participation in the process that they sought to undermine.[101] Such an approach is also consistent with CPR 3.4(c), which gives the court power to strike out a statement of case where there has been a failure to comply with a rule, practice direction or court order.

1.3.2 Internal control mechanisms: lawyer regulation of abuse

Lawyers have professional obligations to uphold the rule of law and the proper administration of justice that outweigh all other duties including those owed to the client.[102] In theory, therefore, they are well placed to stop their clients from making unfounded privilege claims. If the client insists on making a false claim for privilege the lawyer has the opportunity, if not the obligation, to cease to act. Wigmore disputed the claim that guaranteeing clients with unjust causes the right to communicate in confidence with their lawyers is an evil. He argued that it is only an evil to the extent that lawyers are unprincipled and, if that is the case, far more drastic remedies are required than the mere abolition of the privilege.[103] There is a great deal to be said for

[101] *Arrow Nominees v Blackledge* [2000] BCLC 167 (CA).

[102] Solicitors Code of Conduct 2007, r 1.

[103] J Wigmore, *On Evidence* (vol 8, 4th edn McNaughton Revision, Little Brown & Co, Boston 1961) 533.

this argument. The examples referred to above involve much deeper problems than the privilege rule alone. Yet it must also be observed that the privilege seems to act as a honey pot for bad behaviour, and adds weight to Bentham's dictum that the more strictly we are watched, the better we behave. This is a controversial proposition, which should be stated directly. Not only is it dangerous to rely on lawyers to self-police privilege claims given the evidence of lawyer complicity in abuse of privilege rules, the degradation of a lawyer's professional ethics – which enables him or her to engage in such conduct – may be partly a product of the secrecy the privilege confers.

In addition, many law firms are now as large as their corporate clients and operate in a similar fashion. While law firms have historically operated on a partnership model, with each partner being liable for the debts of every other partner, some have chosen to become limited liability partnerships,[104] and in some jurisdictions law practices have incorporated.[105] The big UK magic circle firms all have global practices.[106] Allen & Overy LLP has some 5,000 employees, Clifford Chance has approximately 3,200 legal advisers and Freshields Bruckhaus Deringer LLP has approximately 2,500 lawyers worldwide. There is also a growing trend towards mega practices in the United States. In 1960 only 38 US law firms employed 50 or more lawyers, and the total number of lawyers in these firms numbered only a few thousand. By 2000 well over 100,000 lawyers were employed in law firms with 50 or more lawyers.[107] The legal 'profession' is big business, and hence many lawyers are subject to

[104]Pursuant to the Limited Liability Partnerships Act 2000.

[105]The author should declare that they were formerly employed by a law practice that had not only incorporated, but was one of the first law practices in the world to go public.

[106]<www.legal500.com> accessed 9 August 2010.

[107]M Galanter, 'Old and In the Way: The Coming Demographic Transformation of the Legal Profession and its Implications for the Provision of Legal Services' [1999] Wis L Rev 1081, 1090.

the same commercial pressures to further their employer's (or employers') interests to which corporate agents are also subject.

What sets these mega law practices apart from their corporate clients, if anything, is their ethical training and the professional rules governing their lawyers, or 'fee earners' as the practices typically describe them. Regrettably however, professional rules have rarely, if ever, been brought to bear against lawyers making false privilege claims. In the review on privilege in Australia, the Law Council acknowledged that asserting or maintaining an unfounded claim for privilege is an abuse of process, and represents serious professional misconduct on the part of the lawyer. Yet the Council was unaware of even a single case where a lawyer had been referred to a disciplinary body for abusing privilege.[108]

The effect of lawyers' ethical training is a complex issue. Lawyers' ethical training and respect for legal institutions and the rule of the law act should act as a buffer to lawyers being complicit in unlawful conduct by their clients. Yet whereas non-lawyers might have an instinctive deference to the idea of legal compliance ('it's the law') lawyers are well aware that legal compliance is frequently arguable, nuanced, and full of grey zones. Lawyers' skills in understanding these grey zones and helping clients navigate them are what make their services so valuable. But these skills are entirely morally neutral, and are just as capable of being used to help clients evade legal obligations as they are in helping them achieve compliance.

[108]Law Council of Australia, Submission to ALRC 4 June 2007 (n 18) 50-51.

Lawyers traditionally view themselves as practising an 'honourable profession' in the service of one the most important social institutions: the legal system. All lawyers offer the benefit of their skills and training to the public: explaining the law, the rights and obligations it confers; and guiding their clients away from legally questionable conduct. This idealised notion of the lawyer is based on a static view of the lawyer-client relationship: lawyers are always independent, always above the fray, and never influenced by the sharp practices or ambitions their corporate clients might entertain.

But there is also another undeniable trend in modern law practices, one that lawyers share with every other business, large and small: that is a commercially oriented focus on the customer, and the need to 'deliver' for the customer. For lawyers this means getting their clients results, whether in litigation or engineering and executing successful transactions. The market for corporate legal services is highly competitive and not just between rival law firms. Corporations have increasingly relied on in-house counsel to provide their legal services, forcing external law firms to market themselves aggressively to existing and prospective corporate clients as having special expertise to offer. That 'expertise' is often delivering the outcomes that the client wants. Corporate lawyers have been known to adopt this line overtly in their marketing strategies. In an article in a business magazine, the managing partner from Allens – the law firm that represented James Hardies in the asbestos case discussed above – said he expected Allens lawyers to treat their clients like 'God'.[109] This is advertising rhetoric, but revealing nonetheless for if the client is God what place is there for the lawyers' duties to the court and the administration of justice?

[109]Tom Poulton quoted in J Walker, 'The Gods are Pleased' *Business Review Weekly* (March 9, 2006).

In reality, the relationship between lawyer and client is a dynamic one. Lawyers can influence their clients' conduct and vice versa. As Wright and Graham have observed: 'There is reason to believe that the conduct and advice of corporate attorneys suffers from being immersed in corporate amorality.'[110] Thornburg has also noted that young lawyers quickly learn that the process of getting along with their clients means going along with their clients.[111] This is partly due to normal market pressures. In our modern society, where large corporations thrive and have big budgets, and have big demand for legal services, there are plenty of financial and career advancement incentives for corporate lawyers to further their clients' goals, whether these are lawful or not.

Social factors may also be responsible for the close, even cosy, relationships between lawyers and their corporate clients. There is extensive survey research indicating that lawyers in large law firms undergo a socialisation process that leads them to 'strongly identify' with their corporate clients' interests.[112] Hazard has argued that in the 19th century lawyers were largely drawn from the elite classes, represented clients from those classes, and identified with their interests; and one hundred years later little has changed.[113]

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[110]Wright and Graham (eds) (n 25) 2007 Supplement, 77, citing the case of *General Motors Corporation v McGee* (2002) 837 So 2d 1010 (FL Appeals Court). The decision discusses the efforts of GM, aided by its corporate attorneys, to systematically abuse the rules of discovery and conceal internal memoranda disclosing GM's awareness of the risks of post collision fires.

[111]E Thornburg, 'Sanctifying Secrecy: The Mythology of the Corporate Attorney Client Privilege' (1993) 69 Notre Dame L Rev 157, 177.

[112]R Nelson, *Partners With Power: Social Transformations of the Large Law Firm* (University of California Press, Berkeley 1988) 5.

[113]G Hazard, 'The Future of Legal Ethics' (1991) 100 Yale LJ 1239, 1266.

The commercialisation of the lawyer-client relationship has potentially broad implications for the advice lawyers provide their clients. Rather than use privilege to advise their corporate clients as to what should prudently be done in a specific legal context, it is equally plausible that lawyers are inclined to provide morally neutral advice to the client: 'You tell us what you want, and we'll tell how to do it.' Intriguingly in the tobacco case discussed above, a Clayton Utz partner tried to distance himself from his colleague's advice to destroy documents by stating that it was not the lawyer's role to tell the client what to do. [114] Coffee has also argued that corporate lawyers are reluctant to play the role of 'wise counsel' in favour of giving their clients purely tactical advice: providing information, options and potential defences.[115] The end result is that lawyers' advice amounts to an instruction manual (and a defence guide should litigation ensue), which clients can use in taking whichever course of action they prefer. Options advice can still play a role in fostering compliance, but the causal nexus is more indirect than it would be if lawyers gave their considered opinion on what the law requires their clients to do.

An interesting feature of the Hardie case was that the lawyers did not speak up about their client's intentions even when they were put on notice that the proposed conduct might be unlawful. Of course lawyers are bound by professional obligations of confidence to their clients, but there are exceptions.[116] And there is nothing to prevent the lawyer from directly raising questions of propriety with the client. Chronic failure by professional advisers to 'speak up' or blow the whistle on unlawful conduct is not

[114]Evidence of G Eggleton, *McCabe v BATAS Ltd* (n 36) (VSC 8121 of 2001) 13 February 2002.

[115]J Coffee, *Gatekeepers* (OUP, Oxford 2006) 194.

[116]Solicitor's Code of Conduct 2007, r 4 Confidentiality and disclosure (see paragraph [12] of the guidance note).

confined to lawyers, or to instances where the professional relationship is protected by the secrecy of privilege. In the context of failure by lawyers, however, it is worth considering the role privilege plays in this failure and the quality of advice lawyers give. To ask the hypothetical question in the Hardie case: would Allens have given James Hardie more rigorous and forthright advice, which would have almost certainly stopped the fraud, if they had known their advice would be subsequently disclosed?

The American Bar Association has argued that the privilege is critical in permitting lawyers to give strong independent advice, stating that if the privilege were abolished lawyers would invariably soften or hedge their advice for fear that strong advice might force their clients to accept it, or significantly compromise the corporation's legal position if the advice were not followed.[117] This is an interesting reversal of the traditional justification for the privilege, which centres on the client's behaviour rather than the lawyer's: it encourages the *client to speak freely* with the lawyer, as opposed to making the lawyer comfortable with giving forthright advice. If lawyers are truly independent, as the ABA asserts, then it is difficult to understand why lawyers would be reluctant to give forthright advice simply because it could be disclosed.

The potential costs of the commercialisation of the relationship between lawyer and corporate client are particularly acute in the case of LPP. For as Neuberger J stated in *Bank Austria Aktiengesellschaft v Price Waterhouse:* '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

[117]American Bar Association, Amicus Brief, quoted in *Garner v Wolfinburger* (1990) 430 F2d 1093 (5th Cir).

client's cause.'[118] The pressures on lawyers to deliver results for their corporate clients, combined with the secrecy that the privilege casts over the lawyer-client relationship, creates a potent mix: incentives for lawyers to ignore or participate in corporate wrongdoing, and a rule which significantly limits the chances of that wrongdoing being detected.

Unfortunately the asbestos and tobacco examples cited above suggest that, far from being gatekeepers in a practical sense, there are enough lawyers and enough respectable firms which are prepared to be complicit in their corporate client's abuse of the privilege rules.

The examples of abuse from the tobacco industry, and the many others that exist, led the District Court of Columbia in *United States v Philip Morris et al* – the US Federal Government's RICO[119] action brought against the US tobacco industry – to make the following observation in its judgment about the conduct of lawyers:

> Finally, a word must be said about the role of lawyers in this 50-year history of deceiving smokers, potential smokers, and the American public about the hazards of smoking and second hand smoke, and the addictiveness of nicotine. At every stage, lawyers played an absolutely central role in the creation and perpetuation of the enterprise and the implementation of its fraudulent schemes.
>
> They…directed scientists as to what research they should and should not undertake;…and they devised and carried out document destruction policies and took shelter behind baseless assertions of the attorney client privilege.

[118] *Bank Austria Aktiengesellscaft v Price Waterhouse* (HC April 16 1997).

[119] Racketeering, Influenced and Corrupt Organisations Act, 18 USC §§ 1961-1968 (1965) .

> What a sad and disquieting chapter in the history of an honorable and often courageous profession.[120]

Even a small number of lawyers abusing the privilege rules is enough to have a significant impact on the administration of justice. The pull of market forces is likely to lead to more corporations retaining these hired guns, creating pressure on scrupulous lawyers to lower their standards.

In the circumstances relying on lawyers to act as voluntary gatekeepers in preventing abuse of privilege seems unwise and unlikely to work.

1.3.3 Reforming the lawyer-client relationship

At this point it is worth briefly examining some reforms that have already been implemented in the United States and the EU, designed to limit abuse of the lawyer-client relationship. Lawmakers in these jurisdictions are *forcing* lawyers to act as private policemen or 'gatekeepers', even if this compromises the confidentiality of the lawyer-client relationship.

In 2003 the United States introduced new reporting requirements on securities attorneys, designed to stop them turning a blind eye to unlawful conduct. Following the collapse of Enron and other major companies, the US Congress passed legislation known as the Sarbanes Oxley Act,[121] which included sweeping new regulations governing the conduct of corporate managers, accountants and attorneys. The legislation

[120]*United States v Philip Morris* 449 F Supp 2d 1 (2006) (DC Columbia, Amended Final Opinion, 17 August 2006) 4-5.This case is presently on appeal.

[121]Named after the Senators who sponsored the bill. Sarbanes-Oxley Act 2002 Pub L No 107-204, 116 Stat 745 (2002).

complemented the President's commitment to 'use the full weight of the law to expose and root out corporate acts of corruption.'[122]

S307 of the Act mandated that the SEC adopt regulations governing the conduct of securities attorneys, which included, as a minimum, a rule requiring lawyers to report suspected material violations of securities law up the corporate ladder to the CEO or Chief Legal Counsel; and if no adequate response was forthcoming, to report the matter to an audit committee, or other committee comprised of independent directors, or to the full board of directors. The SEC adopted such regulations in 2003.[123]

It is probably too soon to assess the effect of these new reporting requirements, although they have critics. Zacharias argues the SOX Act may have unintended, negative consequences, for the lawyer-client relationship.[124] For example, Noorishad suggests that the first time an attorney went over the head of the chief counsel or CEO to report an issue to the board would also be their last. This would impose intolerable pressures on corporate counsel, who must choose between complying with their obligations, and the 'need to put food on the table'. [125]

The proposition that an obligation on lawyers to raise possible legal breaches directly with the corporate client – i.e. its board – would create tensions in the lawyer-

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[122]J Cummings, 'Bush crackdown on Business Fraud Signals New Era' *Wall Street Journal* (10 July 2002) A1.

[123]Standards of Professional Conduct for Attorneys Appearing and Practicing Before the SEC in Representing an Issuer 68 Fed Reg 50955 (6 Feb 2003) Codified at 17 CFR S205. The final rules are available online at http://www.sec.gov/rules/final/33-8185.htm (accessed 3 March 2011).

[124]Eg F Zacharias, 'Coercing Clients: Can Lawyer Gatekeeper Rules Work?' (2006) 47 Boston College Law Review 455.

[125]K Noorishad, 'Sarbanes-Oxley Act and Inhouse Legal Counsel: Suggestions for Viable Compliance' (2004-2005) 18 Georgetown Journal of Legal Ethics 1041, 1051.

client relationship and put lawyers in an invidious position, implicitly recognises the enormous pressures on attorneys not to cause 'problems' for lucrative corporate clients or their client/employer. It also suggests that lamentably little reliance can be placed on lawyers' professional standards to ensure compliance with professional and legal obligations.

As for the merits of Noorishad's claim, the fact that a lawyer's economic interests diverges from their legal obligations is not a convincing argument against imposing such obligations. There are a myriad of laws that impose obligations on people who have economic incentives to act differently (indeed in many cases this is precisely why the law is imposed) and most people choose to comply with the law when faced with such choices. One way the law encourages persons to make the 'right' choice in such circumstances is to impose high penalties for non-compliance. A lawyer who breaches their obligations under the SOX Act can be denied the right to practise as a securities attorney.[126]

On the other hand legislation requiring lawyers to report wrongdoing up the corporate ladder cannot change a lawyer's opinion as to whether their client is committing a wrong. Bainbridge, a corporate law professor at UCLA, believes that many attorneys will continue to turn a blind eye to client misconduct because 'lawyers who win the tournament develop a set of skills, attitudes and cognitive biases that systematically skew their analysis of client conduct.'[127]

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[126] Standards of Professional Conduct for Attorneys Appearing and Practicing Before the SEC in Representing an Issuer 68 Fed Reg 50955 (6 Feb 2003) Codified at 17 CFR S205.3(d)(2)(i)-(iii).

[127]Quoted inJ Bauman, *Corporations Law and Policy: Materials and Problems* (5th edn West Group, 2003) 30.

It has been suggested that one way of forcing agents to look more objectively at their principals' conduct is to split an agent's loyalties, expressly recognising that the agent also owes duties to third parties. The third party can either be the state or a private party who may be affected by the principal's wrongdoing. The European Union has seemingly taken this step in its Directive on Money Laundering.[128] The Directive enlists lawyers in the law enforcement process by requiring them to report evidence of money laundering directly to the competent authorities. The Directive applies to all independent legal professionals who participate in any financial or real estate transactions on behalf of their client, or assist the client in the planning and execution of various transactions. [129] Art 22 of the Directive obliges Member States to require institutions and persons covered by the Directive to cooperate fully, by promptly informing the relevant authority,[130] on their own initiative, where they 'know, suspect or have reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted'. It also imposes a further obligation to provide the relevant authorities with all necessary information when requested. The Directive allows states to exempt lawyers who are retained for the purpose of advising the client on its legal position: *viz* a possible case of money laundering, including for the purposes of representing or defending the client in a judicial proceeding.

[128]Council Directive (EC) 91/308 on prevention of the use of the financial system for the purpose of money laundering [1991] OJ L344/76 as amended by directive 2001/97 of the European Parliament and of the Council.

[129]These are: (i) buying and selling of real property or business entities; (ii) managing of client money, securities or other assets; (ii) opening or managing of bank, savings or securities accounts; (iv) organisation of contributions necessary for the creation, operation or management of companies; (v) creation, operation of management of trusts, companies or similar structures; (b) or by acting on behalf of and for their client in any financial or real estate transaction.' The directive applies to other relevant service providers such as real estate agents and accountants.

[130]Which in the UK is the Financial Services Authority.

Both the US and EU reforms can be construed as a means of exposing lawyer-client communications that fall within the crime-fraud exception, defined broadly. The reforms certainly do this (although the US legislation falls short of requiring lawyers to report evidence of wrongdoing to law enforcement agencies) but arguably they go further by covering information that the lawyer learns during the course of her retainer, not simply those communications directly with the lawyer for the purposes of perpetrating future wrongs. The reforms reflect a policy choice by lawmakers that the public interest in preventing money laundering or serious crimes warrants interfering with the lawyer-client relationship.

Arguably the reforms will go some way towards strengthening a lawyer's position within the lawyer-client relationship. While corporate managers may be tempted to dismiss lawyers who 'blow the whistle', if lawyers continue to act consistently with their reporting obligations, there should come a point, at least in theory, where the company realises that it is more efficient to prevent violations than to be continually dismissing or changing attorneys.

The risk in the reforms is that they will undermine the benefits of the privilege; making clients less likely to consult a lawyer, and less candid in their communications with lawyers. Undoubtedly there is a risk that once the lawyer's blind eye is opened corporate managers will respond by keeping lawyers in the dark or out of the picture altogether. This would be a blow for the goal of legal compliance because discouraging corporate agents from obtaining legal advice is bound to inhibit their chances of organising their affairs in a lawful manner.

Yet reduced consultation and candour with lawyers is not always a bad thing. The privilege is not designed to assist money launderers and corporate fraudsters achieve their goals with lawyers' help, as the Court of Appeal in *Barclays Bank v Eustice* observed.[131] If the rules have a chilling effect on these clients, whilst encouraging other clients – or better still, these same clients – to seek legal advice expressly for the purposes of ascertaining their legal position; determining what they need to do rectify any breaches and making their activities legally compliant, then that would be a desirable outcome.

Coffee has argued that LPP is a means to an end – the end being legal compliance. The reforms to lawyers' reporting obligations may have the effect of improving the leverage lawyers have over their corporate clients.[132] In the future corporate managers planning major transactions may have to do more than just direct their lawyers to 'make it happen'. Faced with the possibility of the company lawyer reporting suspected unlawful conduct to their board or to the authorities, managers are likely to have to couch their requests for legal assistance along the following lines: 'This is what we are hoping to achieve: please advise on whether and how we can achieve it lawfully.'

The idea that lawyers' leverage is the key to preventing abuse of the privilege cloak is also discernible in the EU approach to in-house counsel. One possible way of limiting abuse is to deny privilege to lawyers most likely to succumb to pressures from the client to facilitate or turn a blind eye to wrongdoing and/or make false privilege

[131] *Eustice v Barclays Bank* [1995] 2 BCLC 630 (CA) 645.

[132]J Coffee, 'The Attorney as Gatekeeper: An Agenda for the SEC' (Columbia Law School, Working Paper 221 2003).

claims. This is the primary reason why EU Law denies privilege to communications with in-house counsel. In September 2010 in *AKZO Nobel v European Commission* the ECJ confirmed this rule, which the Court had first laid down some 30 years earlier.[133] The Court's reasoning can be summarised as follows:

I. the purpose of the privilege is to enable persons to obtain independent legal advice and assistance;
II. in-house counsel (also sometimes referred to as salaried legal advisers) are not independent from their employer/client;
III. because in-house counsel are not independent they are not in a position to give truly independent advice, so a privilege is unnecessary.

The first two propositions are not controversial. The third is hotly debated. A number of law associations and several Member States intervened in AKZO in the hope of persuading the Court to revisit the issue of privilege for communications with in-house counsel.[134]

The applicants argued that, while in-house counsel are in an employment relationship with their client, in many Member States they are also members of the independent bar and are subject to the same professional standards and obligations as those imposed on lawyers who practise independently. Hence, in-house lawyers are

[133] Case C-550/07 P (2010) 5 CMLR 1143; Case C-155/79 *Australian Mining & Melting Europe Ltd v Commission of the European Communities* [1982] ECR 1575 .

[134] The associations were the Conseil des barreaux européens, the Algemene Raad van de Nederlandse Orde van Advocaten (the Netherlands Bar Association), the European Company Lawyers Association, the European Chapter of the American Corporate Counsel Association and the International Bar Association. The states were The Netherlands, the UK and Ireland.

required to act independently, and to give independent advice to their employer/client. The ECJ again rejected this argument. It held that, while the rules of professional organisation may strengthen the position of an in-house lawyer within the company, the fact remains that they are not able to ensure a degree of independence comparable to that of an external lawyer. Endorsing the observations made by the Advocate General Kokott,[135]it stated that the concept of the independence of lawyers is determined not only positively, that is by reference to professional ethical obligations, but also negatively, by the absence of an employment relationship. Consequently, an in-house lawyer is 'less able to deal effectively with any conflicts between his professional obligations and the aims of his client.'[136]

It is important to observe that the ECJ's judgment does not reduce the reach of the privilege in practice. A company which wants legal advice or assistance on competition matters, and wishes to maintain confidentiality over the information it gives to its lawyer and the advice it receives, can simply retain external counsel. The irony of the ECJ's ruling is that it entrenches a competitive advantage enjoyed by the external bar in competition law.

The rationale for the ECJ's decision must be that external counsel are less likely to allow clients to abuse the privilege cloak, or engage in abuse themselves. Or to put it in positive terms, external counsel are better able to serve the administration of justice than in-house counsel, because in-house lawyers 'are unable to guarantee they are acting in the 'overriding' interest of the administration of justice'. This is a bold claim for it

[135] At paragraphs [60] and [61] of her opinion (29 April 2010).

[136] *Akzo Nobel Chemicals v European Commission* Case C-550/07 P (2010) 5 CMLR 1143 [45].

effectively concedes that in-house counsel are less able to comply with their professional obligations.

Most of a lawyer's professional obligations under the Solicitors' Code are designed to ensure lawyers maintain their independence and deal effectively with potential conflicts of interest: conflicts between different clients, conflicts between the client's interests and lawyer's own interests, and conflicts between the client's interests and their obligations to the administration of justice. Clearly in-house counsel are at distinct advantage compared to external lawyers in managing the first two categories of conflict. They have only one client, and their interests and their client/employer's interests are closely aligned. It is the last category of conflict – between the client's interest and the lawyer's obligations to administration of justice – where in-house counsel may be at a disadvantage *vis à vis* external lawyers.

The ECJ's belief that independence is determined both positively, by reference to someone's obligations, and negatively, by reference to the absence of conflicting interests, is logically sound. In some situations conflicts of interest can have just as much impact on a person's conduct as rules specifying what they are required, permitted and prohibited from doing.

The potential for conflict of interests to influence an agent's behaviour improperly is greatest where the rules governing the agent's behaviour are imprecise or open to interpretation. Where a range of choices is available to the agent there is a risk that they will favour those choices that best serve their personal interests. Some aspects of the lawyer's professional obligations are open to interpretation: for example a

lawyer's obligation that they must never knowingly allow the court to be misled[137] sounds clear cut, but what constitutes misleading can be highly contestable.

But the ECJ's sharp division between in-house and external counsel represents a very formalistic view of lawyers and the legal services market. It ignores both the capacity of in-house counsel to manage conflicting interests effectively, and the many conflicting interests of external counsel that can influence the advice they give, to the detriment of the administration of justice.

An employment relationship is significant because the employee/lawyer has vested interests in the fate of her employer/client which might compromise her ability or willingness to fulfil her professional obligations. In-house lawyers are economically dependent on their employer/client to put food on their table. For social reasons they may also identify with the employer/client, its successes and failures, and feel bonds of allegiance to their fellow employees. They are also likely to have contractual obligations to pursue the commercial and strategic interests of their employer/client, although such legal obligations can be made subject to their professional obligations as was the case in AZKO. [138]

On the other hand, external counsel can also have strong vested interests in the fortunes of their clients. To take some obvious examples, corporate lawyers face strong economic and social pressures to put their client's interests above their professional obligations as we have already seen. Claimant lawyers who conduct their practices using conditional or contingency fee arrangements get paid only if their clients win their

[137] Solicitors' Code of Conduct 2007, rule 11.01.

[138] *Akzo Nobel* (n 136) [34]-[35].

cases; and in the case of contingency fees, their fees are directly linked to the size of the award. This creates an obvious risk that lawyers will manipulate evidence and inflate damages claims in order to increase the chances of success and the size of recovery. Yet in a justice system which is largely privately funded, conditional and contingency fee arrangements play a crucial role in facilitating access to justice for people of limited means. Although these fee arrangements create clear conflicts between the client's interests and the lawyer's professional obligations, some systems recognise that the benefits outweigh the risks and seek to minimise those risks through professional codes and related disciplinary procedures.

The regulation of in-house lawyers as independent practitioners in England & Wales and The Netherlands is probably guided by a similar philosophy: that the benefits outweigh the costs. While the availability of fully qualified in-house counsel may not be at the forefront of considerations of access to justice, in-house counsel can provide substantial benefits to the client, including cost savings and quality legal advice from a person who knows the business inside out.

The ECJ's decision could be defended on the grounds that, in practice, more in-house counsel than external counsel are likely to succumb to pressures to misuse the privilege cloak. However, the rule is a blunt mechanism, and in the opinion of one commentator, ultimately a toothless means of preventing clients from insulating corporate memories or marginal non-legal/legal advice from disclosure. [139] One alternative is to consider the question of independence on a case by case basis. In

[139] L Bastin, 'Should 'independence' of in-house counsel be a condition precedent to a claim of legal professional privilege in respect of communications between them and their employer clients?' (2011) 30 CQJ 33, 46.

Australia communications with the in-house lawyer neither automatically qualify for protection, nor are they automatically disqualified from protection. Instead, the court examines the facts of each case to determine whether the lawyer was acting independently when giving legal advice or assistance.[140] However the standard for when in-house counsel are acting 'independently' is not yet clear. The authorities have used different verbal formulae to define independence, including the necessity of maintaining 'professional detachment',[141] avoiding the 'risk of being compromised',[142] and ensuring the provision of 'impartial legal advice'.[143] Furthermore, in the few cases that have considered the issue, not once has the independence of an in-house lawyer been proven to the court's satisfaction.[144]

One could also ask whether communications with in-house counsel need protection from disclosure based on the rationale for privilege. The case for privilege assumes that without a guarantee of confidentiality clients would be less willing to talk candidly with a lawyer about their affairs. But there is no obvious reason why company employees need a promise of confidentiality to talk to in-house counsel, any more than they need a promise of confidentiality to talk to any other employee. This issue is further examined in chapter 5 on the rationale for privilege and its applicability to corporations.

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[140] *Telstra Corporation Limited v Minister for Communications* [2007] FCA 1445 [27]; *Rich v Harrington* [2007] FCA 1987 [60].

[141] Ibid *Rich* [40], [58], [60].

[142] *Telstra* (n 140) [35].

[143] Ibid [12].

[144] In *Rich* (n142), for example, the court held that in-house counsel were 'not in a position to give professionally detached advice:' [48], [60].

Conclusion and possible solutions

This chapter has argued that abuse of privilege is an unavoidable cost of having the privilege rule because of the nature of the rule and the limitations in detecting abuse. Furthermore, the costs of abuse are substantial, especially in the case of corporations, although the actual extent of abuse is unknown and unknowable. That said, the rules on asserting and reviewing privilege claims, professional obligations and training can all affect the level of abuse and the likelihood of it being detected and stopped.

There is scope for reform of the procedures for asserting privilege claims in England & Wales, so privilege holders give more detailed particulars of the material that they assert is privileged and the basis of the claim. At the very least, there ought to be greater adherence to the existing rules rather than the lax approach that has developed in practice. The courts should also be more willing to review a privilege claim when it is challenged, including examining the allegedly privileged material in camera.

Reforms aimed at stopping lawyers turning a blind eye to, or facilitating, client misconduct have potential and limitations. The calls by the ALRC for better legal education of lawyers with regard to their obligations and the privilege are welcome but likely to have a limited impact given the social and economic pressures for lawyers to 'get along and go along' with their corporate clients. For the same reason, the reforms in the United States and the European Union aimed at *forcing* lawyers to stop major fraud and/or crime have merit, but they are not a failsafe solution. If such laws are to be effective in at least reducing lawyer involvement in client misconduct they must clearly

define a lawyer's obligations, must contain strong sanctions for non-compliance, and must be rigorously and consistently enforced.

A third option to combat abuse is to reduce the scope of the privilege. The Court of Appeal is moving in the right direction in its jurisprudence on the 'iniquity' exception to legal professional privilege. The Court has broadened its scope in advice contexts to prevent clients engaging in iniquitous conduct with legal assistance, whilst ensuring litigants can still adequately and vigorously defend legal proceedings. Nonetheless there are inherent difficulties in detecting unfounded privilege claims. This means more robust procedures for making and reviewing privilege claims are likely to have only a modest impact on reducing the number of unmeritorious privilege claims.

The scope of the privilege could also be reformed in ways that would limit the capacity of corporations to keep sensitive information secret. In the next chapter we look at the controlling devices designed to keep *legitimate* privilege claims within sensible limits, and to stop companies from deliberately insulating corporate memories from disclosure. Increasing the likelihood of disclosure of lawyer-client communications should act as a deterrent to corporations who might otherwise abuse the confidentiality of the lawyer-client relationship.

Chapter 2 – The costs of legitimate use of privilege by corporations

In case the reader has formed a view that the costs of privilege are largely associated with abuse of the rule, the purpose of this chapter is to examine the primary costs of legitimate use of privilege, namely the suppression of evidence relevant to legal investigations and proceedings. By 'costs of legitimate use' we mean the negative impacts of allowing people to claim privilege over information and documents that qualify for protection based on the existing scope of the rule. Suppressing evidence can make it harder for law enforcement agencies to enforce the law, for defendants in criminal proceedings to defend charges against them, and private litigants to successfully enforce or defend their legal rights. In some cases a privilege claim means evidence is lost to investigations or the adjudicative process altogether. In other cases, particularly privilege claims over third party communications in preparing for litigation, the effect of suppressing evidence is to change the probative value of evidence that is presented to court, because it would be given greater or lesser weight if the privileged material was also available.

The chapter begins by looking at the importance of access to evidence to the law enforcement process. It then turns to consider how much evidence can be suppressed through legitimate privilege claims and in particular the capacity of corporations to suppress evidence under the privilege cloak. It argues that while it is impossible to tell how much evidence is suppressed through legitimate privilege claims, it is clear corporations can suppress much more evidence than individuals. This is partly because the rules designed to keep the privilege within sensible limits – so that the material

which needs protection is immune from disclosure, and everything else remains compellable – are less effective when applied to corporations.

The chapter focuses on two key controlling devices: the knowledge/communication distinction and the dominant purpose test. The capacity for individuals to suppress evidence under privilege is limited principally because the rule only protects *communications* between the lawyer and client, and not the client's *knowledge* of underlying facts. An individual can only communicate what they know, and such knowledge remains compellable in civil proceedings through interrogatories or cross examination. By contrast, restricting the privilege to communications is much less effective in preventing corporations from suppressing evidence, because corporations have the capacity to structure their corporate knowledge as internal or external communications. A corporation may do this in good faith for the purpose of obtaining legal advice, but it can also be done principally for the purpose of generating a privilege claim over sensitive information. As such there can be a fine distinction between practices that amount to legitimate use of privilege and abuse of the rule.

Another reason corporations can legitimately claim privilege over large amounts of information transmitted to, or generated by, lawyers is the scope of the dominant purpose test. Under this test documents or communications can attract privilege even if they were created partly for business purposes. In practice, this tends to give corporations comparatively greater protection from the privilege than individuals, because of differences in the way they use legal services. Typically when an individual consults a lawyer their sole purpose is to get legal advice. By contrast corporate memoranda often have a variety of purposes: administrative, commercial and legal.

Provided the legal purpose predominated over any other purpose such memoranda will qualify for privilege. The chapter argues that the dominant purpose test is an inadequate device for keeping the privilege 'within the narrowest possible limits consistent with the logic of its principle.'[1]

2.1 The importance of access to evidence

To appreciate the potential costs of LPP it is important to appreciate the value of the very thing it denies to law enforcement agencies and parties to legal proceedings: access to evidence. Having access to documents and information and the right to question witnesses or persons of interest is crucial if law enforcement agencies are to detect and prove breaches of the law, if defendants in criminal proceedings are able to adequately defend the charges against them, and private litigants are able to successfully enforce or defend their legal rights. For these reasons all modern legal systems provide some compulsory measures to help law enforcement agencies and parties to legal proceedings obtain relevant evidence. English law provides more assistance to litigants in securing evidence in civil proceedings than most European systems. Under CPR 31 a party is to disclose relevant documents even if they are adverse to her case or helpful to her opponent's case, and CPR 34 provides facilities for litigants to obtain evidence from third parties. However as Mathews & Malek point out, while in general there is no similar obligation in civil systems based on roman law, [2] the courts do have the power to order a party to produce to his opponent s*pecified* documents shown to exist in his possession and whose importance to the opponent's case can be demonstrated.[3]

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[1] J Wigmore, *On Evidence* (McNaughton Revision, Little Brown & Co, Boston 1961) 554.

[2] P Matthews and H Malek, *Disclosure* (Sweet & Maxwell, London 2nd edn) [1.24].

[3] See, eg, *Nouveau Code de Procedure Civile,* Art 11 (France).

The ability to access evidence held by an opponent is necessary to reduce information asymmetry, and also has the advantage of reducing resource inequality. In this respect compulsory disclosure obligations help afford equality of arms between the parties. In criminal proceedings the right of equality of arms as part of the right to fair trial in ECHR Art 6 has crystalised into an obligation on prosecutors to disclose all evidence which is both for and against a defendant, subject to certain exceptions.[4] In criminal proceedings the state is normally the goliath in the court room. The resources available to law enforcement agencies, both as representative of the state at trial and as pre trial investigators equipped with a range of powers to collect evidence, generally dwarf the puny resources available to defendants. However, even the state can have difficulty proving breaches of the law without access to a corporation's records. Sometimes a corporation will exclusively hold the information which proves they breached the law. Second, while law enforcement and prosecuting agencies act on behalf of the state, and can draw on its substantial resources, these agencies must work within the budgets allocated to them. Decisions about pursuing a matter are not solely a cost/benefit calculus, measuring the resources required to take action compared with the gravity of the alleged breach and its likelihood of continuing. Sometimes the equation is as simple as deciding whether an agency can afford 'the fight.' The head of Australia's corporate regulator, the Australian Securities and Investments Commission (ASIC), acknowledged that because a regulator cannot tolerate being 'out-litigated' by a corporation, ASIC are very careful about which matters they choose to prosecute.[5]

[4] *Edwards v UK* (1993) 15 EHRR 417 ; *A and others v United Kingdom* (2009) 49 EHRR 625; A Ashowth and M Redmayne, 'The Criminal Process' (Oxford OUP 2010) 34.

[5] ABC Radio, Interview with Jeff Lucy on PM, February 15, 2007.

Compulsory procedures for obtaining evidence are also important in private disputes involving large corporations. Here too, the evidence that an opponent needs to prove their claim or defence may be found exclusively in the company's files. In other cases, information held by a company may also be held by third parties or be publicly available, but individual litigants lack the means to collect the evidence from those sources.

Access to evidence is also critical to the integrity of the judicial process. For a court to enforce the law it must, *inter alia*, correctly apply the law to the true facts. Rectitude of decision, as Bentham famously called it, is much harder to achieve if the court does not have access to all relevant material. Therefore the starting point of the common law is that any evidence that is relevant to a dispute is compellable and admissible in a proceeding. It is in the public interest, Lord Lloyd said, 'that all relevant material should be available to courts when deciding cases. Courts should not have to reach decisions in ignorance of documents or other material which, if disclosed, might well affect the outcome.'[6] Imposing disclosure obligations on parties to civil litigation may also deter the parties from presenting a misleading picture to the court based on a selection of relevant evidence, as Lord Neuburger MR, pointed out in *Al Rawi v Security Services.*[7] Perhaps the most famous statement on the importance of ensuring the court has access to all relevant evidence, rather than decide the case on the material put before it, comes from Donaldson M.R. He said:

> The litigation process is not a game. It is designed to do real justice between opposing parties and if the court does not have all the relevant information it cannot achieve this object.[8]

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[6] *R v Derby Magistrates* [1996] 1 AC 487 HL 510.

[7] *Al Rawi and others v Security Service and others* [2010] EWCA Civ 482 [18].

[8] *Davies v Eli Lilly & Co* [1987] 1 WLR 858 CA 967.

There are a number of important limits on the right to obtain evidence, of which LPP is one. Another is the very practical consideration that collecting and disclosing evidence is costly and time consuming. This can make legal proceedings expensive and undermines the accessibility of the justice system. In the context of civil proceedings, the right to fair trials requires that a court reach its decisions in a timely manner and at reasonable cost.[9] Law and policy makers have responded to the concerns about the costs of litigation by reducing the disclosure obligations on parties to ensure that they are proportionate to the interests at stake.[10]

It may be tempting to argue that restricting LPP would go against the trend of limiting disclosure obligations in civil litigation. Such an argument would be misplaced for two reasons. First, as already mentioned, the privilege rule actually increases the costs and time of disclosure because reviewing a party's documents for potentially privileged communications is a major part of the disclosure process. Second, LPP is not designed for the purpose of making the disclosure process more efficient.

LPP is one of several rights to resist compulsory disclosure of evidence based on a belief that in some situations compulsion would harm rather than hinder the administration of justice because of the unfairness it would cause to those forced to provide information. In the case of LPP the unfairness is that compulsory disclosure would inhibit a person's capacity to obtain legal advice or representation, and adequately prepare for litigation. Privilege would be a blunt and not very effective means of tackling the problem of excessive disclosure. If the privilege is to be justified it should be on the basis that there are good reasons for providing persons with a right to

[9] Principles which are expressly recognised in the Civil Procedure rules: CPR 1.1.

[10] CPR 31.6 gives the court power to limit or dispense with disclosure.

resist disclosure of information *that would otherwise be compellable* in legal proceedings or investigations. Let us now turn to consider in more detail how LPP limits access to evidence, particularly when the right is available to corporations.

2.2 Assessing corporations' ability to suppress evidence through legitimate privilege claims

Assessing the precise amount of evidence that is suppressed under the privilege is difficult. To do it we would need a parallel universe which is the same in every relevant respect except for the absence of LPP. Nonetheless a number of basic observations can be made about the potential to suppress evidence. It is too simplistic to state that privilege over documents or communications means that the evidence in those documents or communications is lost. One needs to consider what such material would contain if there were no privilege. If the privilege were abolished, clients who were concerned about disclosure of their confidential information are likely to stop communicating this information to their lawyers. Hence 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.[11] This basic game theory seems plausible in the case of individual clients, at least in some cases. Indeed the

[11]Bowring (ed), *The Works of Jeremy Bentham* (London, 1842) 473-479.

rationale for the privilege is founded on the correctness of this assumption. Whether this analysis also applies to corporations is not so clear.

Corporations are by their nature intertwined and heavily dependent on the laws and regulatory regime of the state. Their activities also normally involve larger amounts of money and entail a broader range of legal issues – and thus greater potential legal liability – than is the case with an individual's affairs. Arguably many corporations have no option but to get legal advice, and to talk candidly to their lawyers, to allow the company to carry out its day to day business, and to avoid the potentially significant ramifications of non-compliance with the law. Endorsing this view the editors of the *Harvard Law Review* have on several occasions described the relationship between corporations and the state as 'irreducible bedfellows'.[12]

A variation on the theory that abolishing the privilege would have a negligible effect on the amount of evidence subject to compulsory disclosure is that corporate agents would increasingly resort to oral communications with company lawyers when discussing sensitive subjects.[13] While this risk is undoubtedly real, the contents of oral communications are also compellable in court proceedings through interrogatories and cross examination. A person who provides false answers under oath runs the risk of conviction for perjury, although proving an answer concerning an oral communication is false can be a forensically difficult challenge, to put it mildly. Secondly, the ability of

[12]Note ——, 'The Supreme Court: 1980 Term' (1981) 95 Harv L Rev 91, 276-277; ——, 'The Attorney Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement' (1977) 91 Harv L Rev 464, 473-474.

[13]Justice Dawson, former Judge of the High Court of Australia, noted this prospect as a reason for preserving the privilege in a review he chaired into Australia's competition laws: Australian Government Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (Canprint Communications Pty Ltd, Canberra 2003) Ch 13. See also V Alexander, 'The Corporate Attorney - Client Privilege: A Study of the Participants' (1989) 63 St John's L Rev 191, 263-264.

corporations to avoid giving written instructions to their lawyers and obtaining written legal advice is limited for practical and legal reasons.The need for companies to obtain relevant and accurate (and written) legal advice is discussed in chapter 5.

There are two points for present purposes. First, communications between lawyer and corporate clients are likely to contain more 'real evidence' about the company's affairs. Such evidence is likely to exist in some form even without a privilege, whereas the communications between lawyers and individual clients will often contain 'admissions' more akin to testimonial evidence, and which the client could easily withhold without a promise of confidentiality. Second, the amount of evidence that can be lost to a corporate privilege is huge by comparison with the evidence individuals can suppress under the privilege cloak. Well-documented social phenomena, economic realities and structural differences between corporations and individuals all point to this conclusion.

Corporations are playing an increasingly dominant role in modern society, and the legal system. Defenders of corporate privilege frequently make the correct point that the overwhelming majority of corporations are small businesses that do not fit the caricature of the big powerful corporation. Nonetheless a cursory glance of the court lists would reveal that many cases in the commercial and superior courts—the very same courts that have the power to compel the production of documents—involve corporations, specifically large private or public corporations, and often exclusively. Corporations also have more need for legal services than individuals, and provide the

bulk of the demand for the legal services market.[14] This is why many corporations employ in-house counsel and internal legal departments to protect their interests.

The amount of records and lawyer–client communications companies generate normally dwarf the information an individual can acquire and communicate to their lawyer over the course of their lifetime. 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.

There are also significant structural or qualitative differences between corporations and individuals in the way they process information and obtain advice.[15] What an individual knows is in his or her mind, and not recorded in a computer memory or kept in documentary form. Much of this knowledge is acquired without any conscious plan to do so, and the knowledge is lost by processes that are beyond volitional control. A claim to have 'forgotten' can be assessed by judge or jury, and a false claim is subject to penalty of perjury.

By contrast, corporations are brainless and bodiless. They acquire information and can act only through their agents. Except for the smallest of companies, regular communication and written records are essential for them to operate effectively. The

[14]M Galanter, 'News from Nowhere: The Debased Debate on Civil Justice' (1993) 71 Denv U L Rev 77, 88.

[15] C Wright and K Graham (eds), *Federal Practice and Procedure* (vol 24, 2nd edn West Publishing, St Paul 2007) 159-160.

company archives are in many respects the knowledge base of a corporation. Importantly, a corporation acquires most of this knowledge in a purposeful rather than accidental matter. Its agents can decide what information is collected, how it is collected, how it is stored and how long to keep it in the company archives. Corporate managers have the capacity to structure communication flows within a company and between a company and third parties, and thus what it knows and how it knows it, in a way that few individuals can.

Taken together, all these factors tend to suggest that corporations generally have greater opportunities to use (and abuse) the privilege rules than individuals, and this use has a greater legal and social impact.

Of course not all communications to or from a lawyer, or communications in connection with litigation, qualify for privilege. There are a number of conditions precedent to a privilege claim that are designed to ensure that evidence subject to compulsory disclosure is not unnecessarily lost to legal investigations or proceedings. Two of the most important preconditions are: i) the rule that while *communications* between lawyer and client are privileged from disclosure, the client's *knowledge* of underlying facts is still compellable; and ii) for the privilege to apply the communications or documents must have been made for the dominant purpose of obtaining advice or preparing for litigation. However both rules are less effective in limiting the loss of evidence when the client is a corporation as opposed to an individual. These two rules and their application to corporations require further discussion. Each will be dealt with in turn.

2.2.1 The knowledge/communication distinction

The capacity of individuals to suppress evidence under the corporate privilege is limited principally because the individual client can communicate only what she knows, and such knowledge remains compellable. Thus the evidence contained in the lawyer-client communication can still be obtained by other means, and with minimal financial cost. By contrast, restricting the privilege to communications is less effective in preventing corporations from suppressing evidence because corporations have the capacity to structure their corporate knowledge as communications, and transmit these communications through lawyers.

The line between *compellable knowledge* and *privileged communications* is not always clear cut,[16] and in the case of corporations can be almost impossible to draw. Because corporations acquire information and can act only through their agents the act of acquiring and communicating knowledge can be one and the same process: its 'knowledge' is principally found in the records obtained or generated by its corporate agents, normally in the form of communications from third parties or communications to other agents in the corporation.

There is an obvious temptation for corporate managers to have company records generated by lawyers, or routed through them, for the purposes of creating a privilege claim over sensitive information obtained and held by the company. For example if a corporate employee communicates information to the company lawyer about a matter,

[16]H Malek (ed), *Phipson on Evidence* (17th edn Sweet & Maxwell, London 2010) [23-69].

and the lawyer then advises the Board about its legal implications, both the employee's *communication* and the lawyer's advice may qualify for privilege

Of course in this example *knowledge* of the matter would then reside with both the board and the employee, but for several reasons it may not qualify as compellable *knowledge of the company*. First, while the privilege rule does not protect knowledge of underlying facts, it does attach to material which evidences or reveals the substance of legal advice, including *information derived* from legal advice.[17] The rule is designed to allow companies to disseminate the substance of legal advice within the company, and sometimes to third parties without losing privilege over the legal advice.[18] If we assume there is a real risk of reduced candour without a privilege, this rule is needed if the privilege is to perform its intended function: encouraging clients to obtain legal advice, *and act upon it*, so that they can order their affairs in a lawful manner. However the cost is that knowledge obtained by corporate agents from legal advice is also privileged from disclosure. Thus where a manager's knowledge of certain facts is derived entirely from legal advice from the company lawyer, it is arguable that the manager cannot be questioned about her knowledge of the matter because she could not answer without revealing the substance of legal advice given to the company.

Objecting to disclosure on these grounds is common in the United States. When interrogated about a particular subject it is possible for a corporation to reply: "we object to this question on the grounds that answering it would require us to disclose privileged

[17]*Three Rivers DC v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610 [72].

[18]*USP Strategies v London General Holdings Ltd* [2004] EWHC 373 (Ch).

communications."[19] And while corporate employees can be individually deposed in the US, depositions can also be seriously frustrated by an objection that 'everything the employee knows about this subject is derived from privileged attorney-client communications.'[20] The courts in the United States are still grappling with this problem and there are different opinions as to whether knowledge held by corporate agents is compellable notwithstanding it was obtained from lawyer-client communications.[21] In *Gordon v Boyles* the Supreme Court of Colorado held that employees could claim privilege over information learned via attorney-client communications,[22] while in *Massachusetts v First National Supermarkets Inc* the District Court of Massachusetts held that information acquired from attorney-client communications about certain legal violations by the company was privileged, but that the company had to disclose the names of the employees who held any information about the violations concerned.[23]

This issue has not been specifically examined by an English court. However, if the general rule that privilege attaches to material which discloses the substance of legal advice is applied strictly, it is difficult to see an English court ruling that such material should be disclosed, or that employees could be questioned about information that they obtained from legal advice, provided the other requirements of a privilege claim are met.

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[19] This was the issue in the well known case of *City of Philadelphia v Westinghouse Electric Corp* D.CPa 262 210 F Supp 483 in which the federal courts first articulated the 'control group' definition of the corporate client to limit the scope of the corporate privilege.

[20]For an example of this ploy see *Protective National Insurance Co v Commonwealth Insurance Co* (1989) 137 FRD 267 (DC Nebraska) 272-277.

[21]Wright and Graham (eds) (n 15).

[22]*Gordon v Boyles* (2000) 9 P3d 1106, 1124.

[23]*Massachusetts v First National Supermarkets Inc* (1986) 112 FRD 149 (DC MA) 152.

One way of avoiding this conundrum is for investigators or opponents to obtain the information from the employee who initially communicated the information to the company lawyer. However this strategy has two notable limitations. First, the biggest problem is that law enforcement agencies and opponents face the practical difficulty of identifying the employees who might hold such information. In some cases 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. Whereas an individual litigant can always be cross examined in the witness box over their knowledge of the underlying facts, 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 normally depends on the full co-operation of the corporation in identifying the likely current or former employees.

In making this statement it must be acknowledged that the rules of disclosure also require the full co-operation of the parties to the litigation, and that any party determined to suppress evidence can try to do so even if no privilege is available. While the potential for parties to suppress evidence by refusing to comply with their disclosure obligations cannot be overlooked, the privilege increases the likelihood of parties suppressing evidence successfully. This is because the privilege offers corporations a legitimate means of keeping sensitive information confidential. On the other hand deliberate non-compliance with disclosure obligations is a serious breach of the rules of procedure and can constitute a contempt of court.[24]

[24]CPR 31.23. Though in practice contempt proceedings for non-disclosure are rare: P Matthew and H Malek (eds) *Disclosure* (2nd edn OUP Oxford 2000) 333. There have also been problems in enforcement of disclosure obligations – of both the prosecution and defence – in criminal proceedings: M Redmayne, 'Disclosure and its Discontents' (2004) *Criminal Law Review* 441.

The second problem is more debatable because there is no clear authority on point. It flows from the fact that even if information can be obtained from corporate employees, the law does not always attribute the knowledge of ordinary employees to the entity. The concept of a 'corporation's knowledge', like that of 'corporate actions', is an artificial one and depends on the rules of attribution implied by the law, or adopted by the company, or both. Those rules identify the acts and knowledge of agents of the company that will be treated as those of the company.[25] In the field of criminal law, historically the courts were unwilling to attribute knowledge of ordinary corporate employees unless the employee was deemed to be the company's 'controlling mind'. [26]

The Privy Council adopted a more flexible rule of attribution of knowledge for statutory offences in *Meridian Global Funds Management Asia Ltd* where Lord Hoffmann stated that the true question was who, as a matter of construction of the relevant statute, was to be regarded as the controller of the company. [27] In *Meridian* two senior employees of the defendant investment management company, with the company's authority but unknown to the board of directors and managing director, used funds managed by the company to acquire shares in a cash rich publicly listed New Zealand company as part of a fraudulent scheme to gain control of the NZ company and use its assets for their own purposes. The investment management company thus became for a short period a substantial security holder in the NZ company, but did not give notice thereof as required by section 20(3) of the Securities Amendment Act 1988. In enforcement proceedings brought by the Securities Commission the defendant argued it

[25]*Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC) 506.

[26]*Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL).

[27]*Meridian* (n 25).

should not be liable because the Board was unaware that it had acquired an interest in the NZ company. The Privy Council held that the knowledge of the two senior employees could be attributed to the defendant company. Since the policy of the 1988 Act was to compel, in fast-moving markets, the immediate disclosure of the identity of persons who became substantial security holders in publicly listed companies, the Act required a rule of attribution by which the knowledge of the person who, with the authority of the company, acquired the relevant interest was to be attributed to the company, since otherwise the policy of the Act would be defeated and there would be a premium on the board paying as little attention as possible to what its investment managers were doing.[28]

There is some doubt whether the new approach in Meridian is confined to statutory offences, or whether it will apply more generally to all criminal offences.[29] While the more flexible approach to attribution in *Meridian* in criminal law reduces the risk of corporate employees' knowledge 'vanishing' under the cloak of privilege, Davies points out that there will inevitably be uncertainty as to who will be regarded as the relevant person within the corporate hierarchy for the purposes of the identification rule.[30] This is because the issue of whose acts and knowledge are to be attributed to the company 'depends *ex-hypothesi* on an analysis of the context of the particular rule with which the court is dealing,' and that must be decided on a case by case basis. The issue of attribution causes less difficulty in the case of contract, where the rules of agency generally supply the answer, or tort, where a company can be held vicariously liable for

[28]Ibid 511.

[29]P Davies, *Gower & Davies' Principles of Company Law* (7th edn Sweet & Maxwell, London 2003) (7th edition) 175. In the latest edition of his book Davies suggests that the approach in Meridian may be given a broader interpretation stating that Hoffman's approach required construction of the statute, 'or presumably other rule of law.' [7-29].

[30] *Meridian* (n 25) [7-30].

the wrongs of its employees provided there is a sufficiently close connection between the wrongful acts of employees and the activities which they were employed to undertake.[31] But what this distinction demonstrates is that rules of attribution in criminal cases will still be narrower than in tort or contract cases, and so the problem of non-attribution will not disappear altogether.[32]

In cases where the knowledge of ordinary employees is not attributable to the company, there is the prospect that the privilege can give corporations a form of 'selective amnesia' to use the words of Wright & Graham.[33] Companies can acquire what they need to know by directing the employee to communicate his knowledge to the company lawyer, who can then advise management and the board about the issue. And yet, if the company's activities are scrutinised by regulators, or become the subject of litigation, when the company is asked 'what does it know?' there is scope for corporations to answer 'nothing apart from information derived from privileged communications.'

Evidence held by third parties or external sources can also be lost to the privilege if it is communicated or obtained at a time when litigation is pending or anticipated (i.e. when there is a real prospect of litigation against the party).[34] By definition, information contained in third party communications never lies exclusively with the litigant. The information is also held by the witness, and because there is no property in a witness, an

[31]*Lister v Hesley Hall Ltd* [2001] 2 All ER 769 (HL).

[32] Although it is possible that specific solutions can be devised for specific crimes. For example, the legislature introduced a new offence of corporate manslaughter, which renders a company culpable for causing a person's death as a result of the way its activities are organised or managed if this amounts to a gross breach of a duty owed by the company to the deceased: Corporate Manslaughter and Corporate Homicide Act 2007 s 1.

[33]Wright and Graham (eds) (n 15) 161-162.

[34]*USA v Philip Morris Inc* [2004] EWCA Civ 330, [2004] 1 CLC 811 [68] [71].

opponent can obtain the evidence from the third party, either by taking a statement from them or issuing a witness summons to give evidence under CPR 34.

It is probably correct to state that the main cost of litigation privilege is not the loss of evidence, but the financial cost and practical difficulties of obtaining the evidence by other means. These difficulties should not be underestimated. The costs of obtaining evidence can be substantial, and significantly greater than the costs of retaining a lawyer. A lawyer has to work out where relevant documentary evidence can be found, and sift through archives to find it. Identifying and locating witnesses who have relevant information is often a major cost. Even when witnesses are found there may be substantial expenses involved in taking a statement from them, particularly if they do not live locally. Witnesses may refuse to cooperate for various reasons, for example, because they have an ongoing commercial or personal relationship with the other party. Where a witness does not co-operate, a litigant has to decide whether to call the witness 'blind' not knowing what information they hold or what they might testify. If they do call the witness, they must meet the witness' expenses in giving evidence and compensation for loss of time, which is a requirement of issuing a witness summons.[35]

While the opportunity to compel witnesses to give evidence is important, it cannot secure the evidence at the time when it is most needed: prior to trial. A witness' evidence may be compellable at trial, but the benefit of the parties having access to all the evidence well before trial is that it helps them identify the strengths and weaknesses in their own, and their opponent's, case. This knowledge promotes early and fair settlements, thereby avoiding the expense of a trial both for the parties involved and for

[35] CPR 34.7

the taxpayer. The fact that the overwhelming majority of cases settle means there is a risk that some settlements (which do not take into account the material protected by litigation privilege) are not a fair reflection of the true value of the claim.

There are also some instances where evidence is effectively 'lost' to the privilege for the purposes of the litigation, or indeed for all time. Evidence can be 'lost' where the third party is no longer available to give evidence (they may have died or left the jurisdiction or can no longer be found), or give reliable evidence (because they cannot remember the events in question), or the documentary evidence which was publicly available has been lost or destroyed.

The costs of litigation privilege over communications with experts are more complex again. In the case of experts, what is 'lost' to the privilege is the expert's opinion about the facts presented to them. Perhaps the greatest cost of privilege over expert evidence is not the loss of evidence, but its effect on the value of the expert evidence presented to the court. Because the process by which expert evidence was created or came into being may be subject to a privilege claim, it is difficult for an opponent to the test the credibility of the expert evidence that an opponent relies on. Not only does this allow parties to tailor their experts' evidence – for expert reports "are written to order" – it also allows them to shop for favourable expert witnesses. These costs are compounded by the fact that it is difficult for a party to confer with an opponent's expert prior to trial due to the expert's contractual obligations to the client who retained them,[36] and there is some doubt about whether experts can be compelled to

[36] The expert's retainer is normally interpreted to include an obligation of confidence which prevents the expert from talking to any other party in the case unless ordered to do so by the court: *De Taranto v Cornelius* [2001] EWCA Civ 1511.

give evidence at trial.[37] These costs are well known and oft criticised.[38] The CPR includes a number of rules designed to minimise the financial costs of using experts and to ensure experts assist the court understand the facts or questions in issue rather than act as hired guns for the parties who retain them. The CPR prevents parties from calling expert witnesses without the court's permission, provides a procedure for the use of single joint experts, requires experts to disclose all material instructions in their report, and recognizes experts have an overriding duty to assist the court.[39] In addition, CPR 35.10 provides that where a party relies on a report from an expert the instructions to that expert are not privileged, but it goes on state a court will not order disclosure of an expert's instructions, or permit questioning about them, unless the court is satisfied that there are reasonable grounds to consider the expert account of the instructions that he received to be inaccurate or incomplete.

Notwithstanding these improvements, the positive case for recognizing a privilege over communications with experts (or not requiring the disclosure of an expert's instructions where CPR 35.10 applies) is weak. This issue is examined further in chapter 4.

Another cost of litigation privilege that needs to be noted relates to privilege over documents collected from public sources. The privilege can make it difficult to attribute knowledge to the company of information contained in documents or data which was

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[37]Malek (ed) (n 16) [33-65]; *Seyfang v GD Searle* [1973] QB 148 cf *Harmony Shipping v Davis* [1979] 3 All ER 177 CA.

[38] *Three Rivers District Council* [2004] UKHL 48, [2005] 1 AC 61, [29] (Lord Scott).

[39] CPR 35.4(1), 35.7, 35.10 and 35.3 respectively cf Criminal Justice Act 2003 section 35 which required the defence in criminal proceedings to disclose the details of any expert witnesses it has consulted. This provision has not been implemented: A Ashworth and M Redmayne, *The Criminal Process* (4th edn Oxford OUP 2010) 263.

collected when preparing for litigation. Of course law enforcement agencies and opponents might argue that the corporation *ought* to have known about such information, but an 'ought to have known' plea normally lacks the forensic punch of proving actual knowledge. In this context, the cost of litigation privilege is not the 'loss' of evidence, but a reduction in its probative value because the information cannot be attributed to the company.

2.2.2 The purpose test

Arguably a more effective way of limiting the amount of evidence suppressed by the privilege is to focus on the purpose for which the communications or documents were made. The basic rationale for using purpose as a criterion for privilege claims is that the privilege is designed to facilitate access to legal advice and assistance, and that only communications made for these purposes should be protected from disclosure.

The present position in England & Wales, Europe and most Commonwealth countries, is that a communication or document will qualify for privilege if obtaining legal advice or preparing for litigation was the dominant purpose for which the information was brought into existence. Thus communications or documents that contain one or more non-legal purposes, e.g. commercial or administrative purposes, can still qualify for privilege provided the legal purpose predominates over the non-legal purposes.

However, before examining the dominant purpose test it should be acknowledged that in England & Wales there is some residual debate in the textbooks

on whether the dominant purpose test applies to both advice and litigation privilege, or to litigation privilege only.[40] This is because the House of Lords adopted the dominant purpose test in a case concerning litigation privilege, *Waugh v British Railways Board*.[41] In its decision in *Three Rivers* the House considered at length the rationale and scope of advice privilege but made no reference to the dominant purpose test. The test that has won general acceptance in England & Wales was articulated by Lord Taylor in *Balabel v Air India*:

> The test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly.'[42] If a communication is part of the 'necessary exchange of information' that enables the lawyer to provide advice, it will qualify for privilege.[43]

With respect to those commentators who suggest that the dominant purpose test does not apply to advice privilege, it is not clear whether the test would produce different results in practice to that articulated by Lord Justice Taylor. The lens of the dominant purpose test is, like Taylor's formulation, focused on both the individual communication and the whole transaction between lawyer and client to which the communication belongs. The dominant purpose test applies not only to communications requesting advice but also to material put before the lawyer for the purposes of obtaining advice on matters to which it relates. If the communication is not referable to the purpose of obtaining advice, then it will not be privileged under either test. Furthermore, it is not surprising that the House of Lords did not refer to the dominant purpose test in *Three Rivers No 6,* because that issue was not before the court. The issue decided by the

[40]B Thanki (ed), *The Law of Privilege* (OUP, Oxford 2006) 111.

[41]*Waugh v British Railways Board* [1980] AC 521 (HL).

[42]*Balabel v Air India* [1988] Ch 317 (CA) 330-331.

[43]Ibid 332.

House of Lords in *Three Rivers No 6* was the meaning of 'legal advice', and their Lordships endorsed Lord Taylor's formulation that it included advice 'on what should prudently and sensibly be done in a relevant legal context'.[44] The Court of Appeal in *Three Rivers No 5* and *6* had stated that the dominant purpose test applied to advice privilege, and this has not been overruled by the House of Lords, either expressly or by implication. If this view is wrong, and the test in *Balabel v Air India* affords broader protection from disclosure than the dominant purpose test and remains good law, then by definition more evidence is likely to be lost to legal advice privilege. Accordingly the critique of the dominant purpose test which follows would apply with even greater force to a broad interpretation of Lord Taylor's test, with one notable exception: the more lax the purpose test, the easier it is to prove that a communication has the requisite legal purpose, so there are likely to be fewer problems applying it in practice and less satellite litigation.

The dominant purpose test is not the strictest purpose test available. The sole purpose test previously favoured in Australia required a document or communication to be prepared *solely* for a legal purpose. The less strict the requisite purpose the greater protection from disclosure the privilege will confer on all clients – individuals and corporations alike – and the greater the amount of evidence that is no longer accessible to other parties. Because that is so, courts may sometimes have to make decisions contrary to what they would have made if the sole purpose test had been the governing criterion.[45]

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[44]Ibid 330-331.

[45]*Esso v Federal Commissioner of Taxation* (1999) 201 CLR 49 (HCA) [71] McHugh J.

In practice, a less strict test is also likely to provide greater protection to corporations compared with individuals because of differences in the way they interact with lawyers and use legal services. Typically, when an individual consults a lawyer their sole purpose is to get legal advice. By contrast corporate memoranda can have a variety of purposes: administrative, commercial and legal. Because the privilege protects communications with multiple purposes provided the legal purpose was the 'dominant' one, ordinary business activities, from internal investigations, business strategy meetings, and even scientific research, can attract privilege. The question is should privilege attach to a communication merely because one of its intended destinations was the lawyer's inbox? Zuckerman has observed that there is a risk that companies can create a paper trail leading to the lawyer's office for the express purpose of establishing a privilege claim.[46]

Of course sending information to a lawyer is not sufficient to satisfy the dominant purpose test. Nonetheless routing information through lawyers does make it easier for a party to prove as a matter of evidence that the communication was made for the requisite purpose of obtaining legal assistance.[47] Corporations are also capable of mounting credible arguments that 'making sure everything we do is legal' is always the dominant purpose behind sending information to lawyers or involving them in the company's activities. Thus a potential weakness of the dominant purpose test is that it allows corporations to structure their communications *legitimately* in a way that will protect significant parts of its operations from disclosure. If a company's business –

[46]A Zuckerman, *On Civil Procedure* (2nd edn Sweet & Maxwell, London 2006) [15.43]; Justice McHugh raised the same concern in his dissenting judgment rejecting the dominant purpose test in *Esso v Federal Commissioner of Taxation* (n 45) [74]-[76].

[47]A Palmer, 'Recent Trends in Legal Professional Privilege' (paper presented to Law Institute of Victoria, 18 July 2007).

marketing, scientific, medical – administrative proposal or activity is cast in the terms ‘is this legal?’ and lawyers are intimately involved in advising on those proposals or directing those activities, it is at least arguable that under the dominant purpose test communications on those matters are privileged. For example does the proposed corporate restructure comply with company and tax law? Do the pricing policies of the company violate competition laws? Are any of our products defective within the meaning of the Consumer Protection Act 1987?

It is noteworthy that there is a great deal of literature in reputable journals advising corporations on how to structure information flow so as to maximise possible privilege claims.[48] Articles in the US are more open in this regard: they are advertised by their authors as instruction manuals for clients. However, often articles in Commonwealth journals on LPP, particularly professional journals, also include tips on how to maximise privilege claims. To interpret the literature in a benign light, it does no more than set out prudent steps that corporations can follow to ensure privilege is not *lost* over confidential communications. Large corporations have become information processing bureaucracies to such an extent that mistakes are bound to occur when trying to keep privileged communications confidential, especially when sorting privileged communications from potentially discoverable documents. However the literature also contains suggestions on how to structure information to avoid its disclosure or, as

[48]Examples from the US include: RJ Allen and C Hazelwood, 'Preserving the Confidentiality of Internal Corporate Investigations' (1989) 31 Corp Prac Comment 76; Berger, 'The Attorney Client Privilege and Corporate Clients' (1975) 47 NY St Bar J 274, 322. Examples in Commonwealth journals include: N Cunningham, 'Disclosure and Privilege' (2005) 111 Adviser 43-45; J Holland and C Webber, 'Disclosure in litigation: the importance of privilege for in house lawyers and effective document management' (2005) 20 Butterworths Journal of International Banking & Finance Law 352-4; D Good, 'Privilege: the in-house view' (2005) 16 Practical Law Companies 49-54; M Kingstone and K Price, 'Inland Revenue investigations and privilege after Three Rivers ' (2004) Financial Instruments Tax & Accounting Review Apr 12-16; C Passmore and S Davis, 'Privilege: what can you protect?' (2003) 14 Practical Law Companies 35-41.

Florent and Longva euphemistically put it, they give 'practical tips for clients and their legal advisers on how they can minimise the risk of creating unnecessary non-privileged documents.'[49]

Whether corporations have made use of this literature is difficult to tell. The only empirical study on corporate privilege to date, which was in New York in 1989, found that the nearly 70 per cent of the lawyers interviewed who had raised the subject of privilege with their corporate clients, said that they were often motivated by the tactical purpose of helping the client follow procedures to preserve the privilege, and 27 per cent of the lawyers admitted that this was their *only* purpose in raising the privilege with their corporate client.[50]

The possibility that clients would alter their behaviour based on the content of the privilege rule is hardly surprising. The rationale for corporate privilege assumes that clients will modify their behaviour depending on the existence and scope of the privilege. For example, if a sole purpose test were to apply, a properly advised client will endeavour to create documents and communications that either have a sole legal purpose or strictly non–legal purposes, so as to maximise privilege claims. In an investigation governing a train accident it is likely that a company will prepare two reports: one to the lawyers regarding the legal aspects of the accident, which will be privileged, and another to management regarding safety – which is compellable. However in a jurisdiction that adopts the dominant purpose test, the same company may decide to prepare only one report with two purposes: to obtain legal advice about the

[49]M Florent and T Longya, 'Rights and Privileges' (2004) 142 Legal Business (Mar) Supp (Disputes 2004) 12.

[50]Ibid 243-244. 102 lawyers were interviewed as part of the study including 50 in-house counsel and 52 external counsel: 204.

accident and subsequent litigation, and to provide recommendations about safety in order to prevent such accidents in the future.

Assessing whether a report into a train accident with a dual purpose – one legal, the other safety - satisfies the dominant purpose test raises another problem: the line between a meritorious and unmeritorious claim for privilege can be a very fine one. The standard response to the train accident example above would be that if the object of the company's communication was to conceal sensitive recommendations on safety then it was not made for the dominant purpose of obtaining legal advice. In reality, it is reasonable to assume that the train company would be motivated by the dual goals of keeping the information secret and obtaining legal advice about its position. Furthermore the presence of recommendations on safety in a report sent to the lawyer is not itself evidence of an improper purpose. That many communications have multiple purposes is a major reason why the dominant purpose test is favoured in England & Wales and other Commonwealth jurisdictions. The application of the dominant purpose test in the train accident example, and in many other cases, would then come down to assessment of which of the company's purposes – safety or legal advice - was dominant.

In the leading case of *Waugh v British Railways Board* the Board was claiming privilege over a report regarding a train accident. The Board submitted an affidavit which made clear that the report was prepared for a dual purpose: for what may be called railway operation and safety purposes and for the purpose of obtaining legal advice in anticipation of litigation, the first being more immediate than the second, but both being described as of equal weight.[51] Accordingly the House of Lords held that the

[51]*Waugh v British Railways Board* (n 41).

report was not privileged because the legal purpose did not predominate over the non-legal purpose. It would be naïve to believe that train companies will structure their accident reports in the same way in the future. No doubt they will strongly emphasise the legal purpose of such reports, making the court's task more difficult than was the case in *Waugh*. Lord Davies would not be swayed by such language if his dicta in *Waugh* is any guide. He stated: '..the claims of humanity must surely make the dominant purpose of any report upon an accident (particularly where personal injuries have been sustained) that of discovering what happened and why it happened, so that measures to prevent its recurrence could be discussed and, if possible, devised.'[52] However suggesting that the purpose of a document or communication should be measured not simply objectively, but also normatively, by having the court inquire into what the purpose of the report *should* be, is a step that no other court or judge has yet taken.

The *Waugh* case demonstrates a related problem with applying the dominant purpose test. Determining a document or communication's purpose can be complicated by the fact that there is often an immediate, intermediate and ultimate purpose for their creation. Reasonable minds can differ on which of these purposes is more dominant, or even whether the purposes are distinguishable, and this will invariably lead to more interlocutory litigation. Two real cases help illustrate the point. In *Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA* the court held that the defendant bank could not claim privilege over a report by its accountants investigating its problematic loans.[53] Millett J held that the report was produced for the dominant purpose of establishing the financial position of BCCI so that proper provisions could be made in BCCI's accounts

[52] Ibid 544.

[53] [1992] BCLC 583. The proceedings arose after the collapse of BCCI, on the application of Price Waterhouse for a declaration as to whether it was free to disclose such reports to the Serious Fraud Office and the Bank of England.

and if necessary calls could be made on its shareholders. Litigation to recover the loans was only a subsidiary purpose of the report. The board of BCCI needed to know what BCCI's financial position was before it could decide whether or not recovery proceedings were necessary, and the Judge suggested the situation was directly analagous to that in *Waugh.*

A case in which the court reached the opposite result is *Re Highgrade Traders Ltd.*[54] The communications in question in that case were expert reports commissioned by insurers into the cause of a fire which destroyed the insured's business in what the insurer considered suspicious circumstances. The insurer denied the claim for compensation. In subsequent litigation the insured sought production of the report. The issue was whether the report was prepared for the ultimate purpose of litigation or the more immediate purposes of ascertaining the cause of the fire, and whether to pay the claim. The Court of Appeal ruled that these purposes could not be separated from each other, and that the overarching purpose of the report was a litigation purpose. Oliver LJ commented:

> The Learned Judge found a duality of purpose because, he said, the insurers wanted not only to obtain the advice of their solicitors, but also wanted to ascertain the cause of the fire. Now, for my part, I find these two quite inseparable. The insurers were not seeking the cause of the fire as a matter of academic interest in spontaneous combustion. Their purpose in instigating the inquiries can only be determined by asking why they needed to find out the cause of the fire. And the only reason that can be ascribed to them is that of ascertaining whether, as they suspected, it had been fraudulently started by the insured. It was entirely clear that, if the claim was persisted in and if it was resisted, litigation would follow.[55]

[54] [1984] BCLC 151 (CA).

[55] Ibid 173-174.

It is equally plausible to argue that in *Re Hightrade* the overarching purpose was to decide whether to pay the claim. While that decision rested on legal advice, litigation in the event the insured challenged the decision not to pay could only have been a subsidiary purpose of preparing the report into the cause of the fire.

Determining whether a communication passes the dominant purpose test will become more difficult when multi-disciplinary partnerships (MDPs) start operating under Part 5 of the Legal Services Act 2007. MDPs may be very convenient for companies looking for a one-stop shop for their legal, accounting and business consultancy needs but they could create great difficulties for the courts when applying the privilege rules to communications passing between MDPs and their clients.

Therefore the courts will soon have to rule on privilege claims over client communications with firms of lawyers and accountants providing a one stop shop for their clients legal, accounting and related business needs.

Section 190 of the Legal Services Act is designed to ensure that clients of MDPs will have the same rights to legal professional privilege that they would have if they retained a traditional law firm. Privilege will attach to communications with a non-barrister or non-solicitor providing reserved legal services provided they are authorised to provide such services in accordance with the Act. In relation to any other service provided by a licensed body, privilege will attach to a non lawyer providing such services only if they are working under the supervision and direction of a lawyer, and only to the extent that the communications would have been privileged had a lawyer been providing the service. While the intention of the Act is tolerably clear, applying the

rules on privilege to these new inter disciplinary practices will not be straightforward. In particular identifying the dominant purpose of a communication from a client to an MDP providing integrated legal and other services may prove extremely difficult. One might wonder how a court is to decide whether a client which sends sensitive commercial information to an MDP offering a 'one stop shop' for their client's legal, accounting and related needs, is providing the information for the purpose of obtaining integrated legal and business advice (so that presumably privilege can attach) or merely for ordinary business advice. While the court may inquire into the circumstances surrounding the communication, it is doubtful that a court could practicably do this every time a privilege claim over a communication with an MDP was challenged.

Furthermore, if the test in England & Wales is not the dominant purpose test, but the broad view of Taylor LJ's purpose test in *Balabel v Air India* - whether the communication or other document was made confidentially for the purposes of legal advice…defined broadly', [56] then privilege is likely to attach to virtually every communication between client and lawyer in an MDP. However it is submitted that the Taylor LJ formulation does not provide such broad protection. Lord Justice Taylor pointed out in *Balabel* that to speak of the privilege extending to all matters 'within the ordinary business of a solicitor' would be too wide because 'the range of assistance given by solicitors to their clients and of activities carried out on their behalf has greatly broadened in recent times and is still developing.' Hence, his Lordship recognised that there was a need to re-examine the scope of legal professional privilege and to keep it within justifiable bounds.[57]

[56]Malek (ed) (n 16) [23-88].

[57]*Balabel v Air India* (n 42) 332.

Another and related problem with the dominant purpose test is that there are considerable evidentiary difficulties in determining whether a communication or document meets the requisite purpose. As McHugh J observed in *Esso v Commissioner of Taxation*, often the contents of a document will not indicate that one or other purpose was dominant. Frequently the issue of dominant purpose will turn on the surrounding facts and circumstances, particularly previous dealings between the parties. A test that requires the party claiming privilege to examine surrounding facts and circumstances seems ill suited to the discovery and subpoena processes, which can involve thousands of documents.[58]

Whether there are better alternatives to the dominant purpose test is discussed in chapters 4 and 6. To sum up, the dominant purpose test can be extremely difficult to apply in practice and is ineffective in limiting the amount of evidence that is lost to a corporate privilege through legitimate privilege claims. This conclusion also has implications for our discussion in chapter 1 on preventing abuse of privilege. If there are evidentiary difficulties in determining the validity of a privilege claim under the dominant purpose test even with full knowledge of the contents of the information and surrounding circumstances, it follows that detecting, and therefore preventing, abuse of the privilege poses even greater challenges.

[58]*Esso v Federal Commissioner of Taxation* (n 45) [77].

Conclusion on costs of legitimate use of privilege

This chapter argued that the primary cost of legitimate use of privilege is the suppression of evidence that would otherwise be relevant to legal investigations or proceedings. The non-disclosure of evidence can mean that the evidence is lost to investigations or the adjudicative process altogether, or it can change the probative value of evidence that is presented to court, because it would be given greater or lesser weight if the privileged material was also available. Exactly how much evidence is lost is extremely difficult to measure, but there are strong reasons for believing that the amount of evidence lost to a corporate privilege is far greater than the evidence lost as a result of individuals asserting the privilege.

Acknowledging that LPP can distort legal investigations and the adjudicative process, there are several options open to law makers. First, these costs can be accepted as a price worth paying for a rule that has great social benefits. Alternatively the privilege could be abolished altogether, or removed for certain categories of legal persons such as corporations. A third option is to restrict the scope of the privilege so that the preconditions of a valid privilege claim are more effective in limiting the amount of evidence which is lost to the privilege. At this stage it is worth identifying what those preconditions or controlling devices may be. There are three:

I. Narrowly defining the corporate client. One possibility is to define the client as the ‘control group’ in the company – i.e. the board and senior managers – who have the authority to obtain

advice and order that it that be followed. This would exclude communications of ordinary employees.

II. Tightening the requisite legal purpose of a communication or document for it to qualify for privilege. The courts could adopt a sole purpose test so that only communications that were made for the sole purpose of obtaining legal advice or assistance would attract privilege.

III. Making a corporate privilege a qualified privilege that can be overridden where there is a compelling need for disclosure. At present an lpp is an absolute privilege: it cannot be overridden or balanced against other interests which favour disclosure of the communication.

These options will be explored further in chapters 4, 5 and 6.

Chapter 3 – The rationale for litigation privilege and its relevance to corporations

This chapter examines the rationale for litigation privilege and its applicability to corporations. It looks at the various rationales put forward over its lengthy lifespan to justify the privilege, and criticisms of the privilege. Litigation privilege covers a range of different material. Indeed most communications or documents brought into existence for the dominant purpose of preparing for litigation qualify for privilege, although it has not been definitively decided whether the privilege covers the work product of litigants in person; and the courts have restricted the scope of privilege both over information obtained from third parties, and over documents copied or collected while preparing for litigation. Thus we risk over simplifying the debate if we speak only of the arguments for and against 'litigation privilege'. On the other hand, by identifying the core interests that litigation privilege seeks to protect, we can better assess the case for extending the privilege to the various categories of information that currently qualify, or might qualify, for protection.

This chapter argues that the best rationale for litigation privilege is that it provides a private and secure sphere in which people can adequately prepare for litigation, without fear that their preparatory materials will be disclosed to their prejudice.[1] This inviolable space, and the privilege which guarantees it, is integral to a person's right to fair trial as protected by Art 6 of the ECHR. Within this secure space, a person has a right to consult a lawyer to help them prepare and present their case

[1]A Zuckerman, *On Civil Procedure* (2nd edn Sweet & Maxwell, London 2006) [15.19].

effectively; in some cases the right to fair trial requires that legal assistance is made available to indigent litigants. This chapter also suggests that at its core litigation privilege represents a basic principle of procedural fairness. A person is entitled to put their own case forward to the court – including the litigant's own testimonial evidence, legal argument and factual submissions – and not be judged on their case preparation. For all these reasons a private and secure sphere in which people can prepare for litigation with a lawyer's assistance protects their dignity and the integrity of the legal process.

The fact that litigation privilege is protected by the right to fair trial provides strong prima facie reasons for extending it to corporations. However not all process rights that make up an individual's right to fair trial necessarily apply to other legal persons. The rationale for each rule, the interests it is designed to protect, and its relevance to corporations, need to be considered on a case by case basis. This chapter argues that, while corporations do not have dignity, the integrity of the legal process demands that corporations, like individuals, are able to prepare for litigation in private, to put their own case forward to a court or tribunal, and not be judged on their case preparation.

3.1 The rationale for litigation privilege

LPP has a long lineage dating back to Elizabethan times. Wigmore claims the privilege could not have come into existence much earlier because testimonial compulsion of witnesses was not generally authorised until the early part of Elizabeth's reign; thus 'it appears to have commended itself at the very outset as a natural exception to the then novel right of testimonial communication.'[2] Wigmore also asserts that the privilege originally had more to do with protecting the honour of gentleman barristers than any concern for the client's interests. By the late 1700s a sounder instrumental rationale had emerged in the need to protect and promote free consultation between clients and lawyers without the fear that such communications might be disclosed in court to the prejudice of the client's cause.[3]

While Wigmore's celebrated but brief history of the privilege enjoys almost universal acceptance, some commentators have criticised it as flawed and simplistic. Auburn argues that the privilege could not have been an obvious exception to testimonial compulsion, because compulsion in Chancery courts first began in the 14th century although probably started to gain widespread use in the middle of the 15th century, whereas the compulsion referred to by Wigmore in Elizabeth's reign was its introduction in the common law courts. Yet all the 16th century cases on privilege come from the Chancery courts so any causal link between testimonial compulsion and the privilege is doubtful. Instead it is more likely that that the privilege developed gradually as an important rule of evidence but was no more important than the mass of other rules relating to testimonial compulsion. Auburn also questions the honour theory, on the

[2]J Wigmore, *On Evidence* (vol 8, 4th edn McNaughton Revision, Little Brown & Co, Boston 1961) 543.
[3]Ibid 543-44.

grounds that lawyers were still compelled to attend and answer questions, including any matters they knew of in a personal capacity.[4]

Wright and Graham are also critical of Wigmore's account of the changing rationale for the privilege. They claim that both instrumental and non-instrumental reasons have been relied on to support the privilege, both separately and in combination, throughout the centuries, although the prominence given to each varied depending upon the scope of the rule and intellectual fashion at the time.[5] Wright and Graham assert that no one has written an adequate history of the privilege. According to Auburn a conclusive account of the early history of the privilege is impossible because the reasoning underlying the first reported cases, and precise knowledge of pre-Elizabethan Chancery procedure, are simply not available.[6]

This chapter does not seek to discover which of the rationales put forward for LPP over its lengthy lifespan were accepted by the courts. Instead it assesses which of these rationales have merit and can justify a privilege connected with litigation in the 21st century. The rationales in favour of legal advice privilege are considered separately in chapter 5. All that need be said about advice privilege at this stage is that it was not recognised until the 19th century, over 200 years after litigation privilege first appears in the law reports. Advice privilege was considered to be a logical extension to litigation privilege, in that it was necessary to allow people to take steps to make future

[4]J Auburn, *Legal Professional Privilege: Law and Theory* (Hart, Oxford 2000) 5-6, citing *Kelway v Kelway* (1579) Cary 89, 21 ER 48 in which the court ordered that the plaintiff's solicitor be examined but not on matters 'which he knoweth as solicitor only.'

[5]C Wright and K Graham (eds), *Federal Practice and Procedure* (vol 24, 2nd edn West Publishing, St Paul 1986) 75.

[6]Auburn (n 4) 7.

proceedings successful, or all proceedings superfluous.[7] The rationale for advice privilege was derived from the rationale for litigation privilege, so it makes sense to begin our discussion with litigation privilege: the oldest and archetypal form of privilege.

This chapter argues that litigation privilege is a facilitative right: it is not valuable per se but valuable as a means of promoting other interests. Wright and Graham are undoubtedly right in at least one respect: most rationales for privilege are based on a combination of instrumental and non-instrumental reasons. The right to resist disclosing what you said to your lawyer about a legal dispute, and what she told you in response, does not immediately spring to mind as a prerequisite for any Bill or Charter of fundamental rights, alongside other rights such as freedom of expression or freedom from slavery. Indeed one distinguished US evidence scholar, McCormick, has argued that if one were to legislate for a new country, without history or customs, LPP would not even find its way into the statute book 'because it would be hard to maintain that a privilege for lawyer-client communications would facilitate more than it would obstruct the administration of justice.'[8] Edward Livingston, a 19th century US scholar who supported the privilege, thought the arguments for and against it were so finely balanced that professional bias might account for his own conclusions.[9]

If the privilege is to be justified, let alone accorded the status of a fundamental right, we must provide a full account of the purpose of the rule, identifying the

[7]*Greenough v Gaskell* (1833) 1 My & K 98, 39 ER 618 .

[8]C McCormick, *McCormick On Evidence* (West, St Paul 1954) 182.

[9]S Chase (ed), *The Complete Works of Edward Livingstone* (New York 1873) 459.

objectives or ends it is designed to promote, and explain how fulfilling those ends or objectives would be undermined by the absence of a privilege.

The rationale that comes closest to treating the privilege as intrinsically valuable is the notion that it protects a person's right to privacy. The European Court of Human Rights has endorsed this rationale in a number of decisions holding that the right to confidential and inviolable communications with a lawyer is embedded in the protection of privacy under Art 8 of the ECHR.[10] These decisions need to be treated with caution. The right to privacy under Art 8 is not absolute. The right can be curtailed to the extent that this is 'necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

Therefore contracting states have a wide margin of appreciation in the degree to which they entrench, or limit, a right to privacy in their domestic law. The disclosure process in civil litigation, where LPP is of great practical significance, is a case in point. The assistance the state provides to private litigants in gathering evidence, whether by way of disclosure or by subpoena processes, is usually more restricted in civilian systems than in common law countries. As mentioned in chapter two, in most civilian systems there is no general obligation on a party to produce to his opponent documents in his possession which are adverse to his case or helpful to his opponent.[11] Disclosure obligations are also limited in the ECJ and the European Court of First Instance. Art 24

[10]*Golder v UK* (1979–80) 1 EHRR 524 ; *Campbell v UK* (App No 13590/88) (1992) 15 EHRR 137 ; *Foxley v UK* (2000) 31 EHRR 637 .

[11]P Matthews and H Malek (eds), *Disclosure* (2nd edn Sweet & Maxwell, London 2004) [1.24].

of the Statute of the Court of Justice of the European Economic Community 1957 confers power on either court to require the parties, Member States and institutions which are not parties, 'to produce all documents and to supply all information which the court considers desirable.' However the only sanction for a breach of an order is that 'formal note' is taken and adverse inferences may be drawn. Hence it is not surprising that the rules on privilege in the ECJ and European Court of First Instance are less well developed than English rules of privilege, where disclosure obligations are substantial and LPP is a critical exception.[12]

Most common law superior courts possess sweeping powers to order the disclosure of relevant evidence, both written and oral. In determining a legal dispute, the court begins from the principle that 'all relevant evidence should be adduced to the court'[13] so that it can 'correctly apply the law to the true facts'.[14] There are only a few discrete rights that operate as an exception to this principle, and a free standing right to privacy is not one of them. Nor does the right to privacy shape the scope of a litigant's disclosure obligations. Privacy considerations are antithetical to the fact finding function of the courts. In the goal of achieving rectitude of decision, all relevant admissible evidence is compellable, no matter how private or intimate it might be. That includes everything from confessions made to religious elders, to discussions between family members.[15] The court has discretion to disallow questions that serve no useful purpose to a proceeding, but where the evidence is relevant and necessary, a court will receive

[12]Ibid [17.36].

[13]*Waugh v British Railways Board* [1980] AC 521 (HL) 535.

[14]J Bentham, *Rationale of Judicial Evidence* (Vol 1, London 1827) 3.

[15] Subject to a limited spousal privilege which confers a right not to testify against one's spouse in certain circumstances. See discussion in the introduction.

it.[16] This intrusion into a litigant's private life is compatible with Art 8 because it is deemed necessary to protect the rights of others: namely the opposing litigant.

In civilian systems LPP could be viewed as a manifestation of a person's general right to privacy.[17] However, English law protects the privacy of lawyer-client communications, not because it considers such privacy intrinsically valuable, but because it helps protect other important interests.

Those interests certainly do not include loyalty in the lawyer-client relationship. The idea of protecting the loyalty of a lawyer to their client is no more convincing today than it was at the time of its rejection in the 18th century. As Wigmore observed: 'The judicial search for truth could not endure to be obstructed by a voluntary pledge of secrecy, nor was there any moral delinquency or public odium in breaking one's pledge under force of law.'[18] Furthermore, principles of loyalty are equally, if not more apposite, to other relationships built on trust and confidence such as priest and penitent or doctor and patient. Yet the loyalty inherent to those relationships does not give rise to any privilege at common law, despite the pledge of secrecy being protected by religious vows for priests, or the Hippocratic Oath in the case of doctors.

The flipside of this loyalty argument, that LPP prevents a lawyer betraying a client's confidences, is also unconvincing. The client's expectation that a lawyer will maintain their confidences is based on a belief that neither they nor their lawyer can be

[16]*A-G v Mulholland* [1963] 2 QB 477 (CA) 489, 492.

[17]Although the ECtHR has recognised that in appropriate cases interference with privileged communications may be justified: *Foxley v UK* (n 10) [44].

[18]Wigmore (n 2) 543.

compelled to disclose the communications passing between them. But like all other legitimate expectations, an expectation of confidentiality can be changed with proper notice. As Bentham argued, once it was known that lawyer-client communications were not immune from disclosure, clients concerned to avoid disclosure of their confidential information would simply cease communicating such information to their lawyer.

This proposition seems self evidently correct, at least for individuals in the context of litigation. Set against the prospect of a court determining a person's culpability, or their rights and liabilities, there is a real risk that a client will withhold information from their lawyers for fear of prejudicing their cause if the information could be disclosed and used against them. Sometimes those apprehensions are misguided and the information actually supports the client's case. Sometimes the apprehensions are well founded. In both cases the privilege provides a secure zone within which the client can 'make a clean breast of his affairs'[19] to the lawyer for the purposes of preparing for litigation. While the consequences of removing the privilege from communications between lawyer and client regarding pending or anticipated litigation are reasonably obvious, what is needed is an explanation of why such outcomes are undesirable or unacceptable: what precisely is the free flow of information between client and lawyer in aid of?

Bentham argued that the chilling effect brought about by removal of the privilege would produce positive outcomes for the administration of justice. According to him the net result of abrogating the privilege would be that clients who had committed legal wrongs would not derive as much assistance from their lawyers as is

[19]*Anderson v Bank of British Columbia* (1876) 2 Ch D 644 (CA) 649.

presently the case. Bentham's objection to LPP is not the loss of evidence to the law enforcement process, but the availability of legal assistance to the undeserving. Clients who complied with the law had nothing to fear from the abolition of the privilege and the disclosure of their communications with their lawyer, and thus could continue to consult them without inhibition.

Bentham's argument has several flaws, and exposing them demonstrates the value of the privilege, both to the individual and to the legal process. Firstly, it makes a bold assumption that a person can know their guilt or innocence without legal advice or the legal process set up to decide it. Secondly, it implies that persons who have committed crimes should not receive the same legal assistance as those who have not, ignoring longstanding jurisprudence on the requirements of the right to fair trial. Thirdly it overlooks the need for all litigants to have a secure sphere in which they can adequately prepare their case, without fear that their preparations could be disclosed to their prejudice. These points merit further discussion.

First, Bentham's argument assumes that clients know in advance of communicating with a lawyer whether they have committed a criminal offence or civil wrong. Whether this was ever a fair statement, it is plainly untrue when applied to the complex web of laws that govern our lives today, and where compliance with many of them is not always instinctive. Thus, to say that the innocent have nothing to fear from disclosure of their communications with their lawyer, ignores the fact that people sometimes need legal advice to ascertain whether they have committed an offence in the first place. Where the law is not settled, even the lawyer may not be able to give a firm answer. Accordingly, a person who is acting in good faith, but is unsure of her legal

position, may have good reason to fear the disclosure of communications with her lawyer.

Second, Bentham's statement implies regret that persons who commit crimes (and by extension civil wrongs) receive the same level of legal assistance as those who do not. Such a view has been rejected by every advanced legal system as incompatible with the right to fair trial. The right to fair trial is deeply rooted in the common law and protected by Art.6 of the European Convention on Human Rights. The right to fair trial comprises a number of different process rights, which perform different functions. But a common feature of all process rights is that they are designed to protect the integrity of the legal process and the dignity of all persons subject to the legal process.

One process right guaranteed by the right to fair trial is the parties' right to equality of arms in both criminal and civil proceedings.[20] A procedure that gave institutional advantages to some parties over others would undermine the credibility of the outcomes delivered by the process and the community's confidence in the legal system as a whole. The right to consult a lawyer is also necessary to ensure the integrity of the legal process. The inability of some to obtain legal assistance can be a major institutional disadvantage in court proceedings or preparing for them. In some cases a lack of legal assistance may result in inequality of arms between parties.

The need for legal assistance may not be as pressing in civil litigation as in criminal proceedings, but in many instances it is still vital if the parties are to adequately prepare and present their case to court. This is often the case in complex litigation, for

[20]*Neumeister v Austria* (1968) EHRR 91 Series A no 8 (ECtHR).

example in cases involving mass tort or human rights claims, or where factual investigations require time, resources and legal expertise. It is also true of family law proceedings, where parties can be under great emotional strain and often the welfare of children is at stake. Without legal assistance, large numbers of people would not be able to enforce and defend their legal rights. Even if litigants in person were able to pursue their case to trial, there is an increased risk of error in the judgment delivered by the court. Such outcomes undoubtedly undermine the integrity of the legal process which, it hardly needs stating, is designed to allow people to enforce their legal rights.

The other reason for according equality of arms between parties to proceedings is because it is necessary to protect the dignity of persons subject to the legal process. Ashworth and Redmayne make the 'obvious but important point' about criminal procedure, but which is also true of civil proceedings, that the legal process is concerned with the fairness by which the outcome is reached. The legal process is not just a mechanised assembly line in a factory, which can be judged by the quality (and cost) of the end product. The legal process involves people and it matters how people are treated.[21]

Justinian's *Institutes* state that: 'By nature, from the outset, all human beings were born free and equal.'[22] The Universal Declaration of Human Rights also states: 'All human beings are born free and equal in dignity and rights.' This principle provides the foundation for much of modern human rights jurisprudence. Applied to the legal process, this principle guarantees all individuals, regardless of race, colour, sex or sexual preferences, political or religious beliefs, the same process rights.

[21]Ashworth and Redmayne, (n 21) 23.

[22]Justinian, *Institutes* 1.2.2.

One process right guaranteed to all individuals regardless of their identity is the right to consult a lawyer in confidence when preparing for legal proceedings. Art 6(3)(b) expressly provides that everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing; or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require. Exactly when justice requires that a defendant be given legal assistance has not been fully worked out but, according to Ashworth and Redmayne, it certainly extends to any case where a defendant is liable to imprisonment.[23]

Although Art 6(3)(b) applies only to criminal proceedings, the ECtHR has effectively extended the same right to litigants in civil proceedings through a series of rulings. In *Golder v UK* the court held that the right to fair trial in Art 6 necessarily included a right of access to court, and a right to communicate with a lawyer for that purpose. Mr Golder was a prisoner who was prevented by the Home Secretary from contacting a lawyer with a view to pursuing a civil claim. The court held this was a breach of his right to fair trial under Article 6, stating:

> *It would be inconceivable.. that Article 6(1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court.*

The court recognised that a critical part of the right of access to court is the right to communicate with a lawyer both during and in anticipation of litigation, given that one

[23]Ashworth and Redmayne (n 21) 34 citing *Benham v UK* (App no 19380/92) (1996) 22 EHRR 293 .

of the principal means by which individuals enforce and defend their legal rights is by using the assistance of trained legal advisers.

In *Airey v Ireland* the ECtHR held that legal assistance may be necessary for a fair trial in family law proceedings, which were determinative of important family rights and relationships, and may have serious consequences for any children of the family.[24]

Later in *Steel and Morris v the UK* the ECtHR held that: 'it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively, and that he or she is able to enjoy equality of arms with the opposing side.' [25] In that case, McDonald's, a large multinational corporation which operated a fast food business, sued various individuals for defamation over leaflets the defendants had published protesting the corporation's record on environmental and social issues. The proceedings against the other defendants were withdrawn in exchange for an apology, but Steel and Morris chose to defend the action. The defendants had low incomes and were unable to afford legal representation. They were denied legal aid because legal aid was not available for defamation proceedings at the time. The defendants represented themselves throughout the trial and subsequent appeal, with occasional assistance from lawyers on a pro bono basis. The corporation was represented by specialist leading and junior counsel and solicitors. The trial lasted for 313 days, which at the time was the record for the longest civil trial in England. The defendants were found to have libelled the corporation and damages of £60,000 were awarded, which were reduced to £40,000 on appeal. The defendants

[24]*Airey v Ireland* (App no 6289/73) [1979] EHRR 305 . See also *McVicar v UK* (App no 46311/99) (2002) 12 BHRC 567 [61].

[25]*Steel and Morris v UK* (App no 68416/01) (2005) 41 EHRR 22 [59].

appealed to the European Court of Human Rights claiming, inter alia, that the government's failure to provide legal aid was a breach of their right to fair trial. The ECtHR agreed, ruling that the UK Government's failure to provide legal representation to the defendants in what were incredibly complex proceedings, had denied them the opportunity to present their case effectively, and thus breached their right to fair trial.

An important factor in the ECJ's reasoning was that Steel and Morris were defendants seeking to protect their right to freedom of expression, a right accorded considerable importance under the ECHR. Moreover, the financial consequences for the applicants of failing to verify each defamatory statement complained of were significant.[26]

Steel and Morris 'did not choose to commence defamation proceedings,' but this does not mean that the state can always deny legal aid to impecunious claimants in non family law proceedings. As the court made clear, whether the provision of legal aid is necessary for a fair hearing must be determined on the circumstances of each case, and will depend *inter alia* upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure, and the applicant's capacity to represent him or herself effectively.[27] In complex cases, where prospective claimants have been the victim of serious wrongs or suffered serious harm, the financial, physical and psychological consequences of being unable to enforce their rights (by obtaining redress and/or compensation for breach of those rights and consequent losses) can be very grave.

[26]Ibid [63].

[27]Ibid [62].

These cases demonstrate the importance of legal assistance in securing a person's right to fair trial. How, then, is a privilege over lawyer-client communications integral to the right to legal assistance in preparing for legal proceedings? The absence of a privilege does not prevent anyone from consulting a lawyer, but it may still constitute a practical barrier to persons obtaining effective legal assistance.

The significance of LPP to the right to legal assistance was spelt out by the European Court of Human Rights in *S v Switzerland*. The court noted that if the client did not have the right to communicate with his lawyer in confidence, the 'lawyer's assistance' guaranteed in Art 6(3)(c) 'would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.' [28] In providing an inviolable space, the privilege removes any fears a litigant may have about the disclosure of their case preparations to their prejudice, allowing them to talk candidly with a lawyer and disclose all the relevant facts relating to a dispute. Without a privilege, litigants may be inhibited from talking freely to their lawyer, and as consequence the lawyer will have only limited particulars about the facts of the case. This is bound to limit the lawyer's capacity to adequately prepare their client's case, and to make it more difficult for the lawyer to properly or efficiently present their client's case to the court.

Lawyers not being fully apprised of their client's case has the added disadvantage of discouraging settlement and/or reasonable settlements, because neither side's counsel is fully cognizant of the strengths and weaknesses of their own side's

[28] *S v Switzerland* (App no 12629/87; 13965/88) (1992) Series A no 220, (1992) 14 EHRR 670 , Commission's opinion at [80].

case, let alone the opponent's, until trial and therefore do not know whether to settle or on what terms.

Jessel MR famously articulated all these reasons for recognising a privilege in *Anderson v Bank of British Columbia*. He stated:

> By reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and… it is equally necessary, … that he should be able to make a clean breast of the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others: that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent…, that he should be enabled properly to conduct his litigation.[29]

This statement still provides the foundations for the English courts' approach to privilege in the 21st century, in declaring it a fundamental right on which the administration of justice as a whole rests.[30] Providing litigants with an inviolable space in which to prepare for litigation is necessary to protect the integrity of the legal process and the dignity of persons subject to the process In the case of *Campbell and Fell v UK* the European Commission on Human Rights stated that 'litigation privilege' is a generally acknowledged principle in the Contracting States, and that any denial of this privilege would amount in principle to an interference with the right of access to court protected by Art 6(1).[31]

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[29]*Anderson v Bank of British Columbia* (n 19) 649.

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

[31]*Campbell and Fell v UK* (App no 7819/77; 7878/77) (1983) 5 EHRR 207 [158].

While litigation privilege is crucial to facilitating access to justice, including access to legal assistance, at its core it represents a basic principle of procedural fairness. A person is entitled to put forward their own case to a court, including their own testimonial evidence, legal argument and submissions, and not be judged on preliminary drafts, proofs and preparatory materials setting out those arguments and evidence. There are few if any formal assessment procedures where the person being assessed can be judged on their preparation, whether it be a rehearsal or training or a practice exam. There are no convincing reasons for making the law enforcement process an exception to this basic principle of fairness. On the contrary the nature of the law enforcement process – and the important interests that are at stake – suggests that there is an even greater to need to entrench this principle of procedural fairness in legal proceedings.

Opening up a litigant's case preparation to scrutiny will dramatically increase the emotional strains on litigants in what is already a stressful process. The private and secure sphere provides an opportunity for a litigant to recollect and reflect on their evidence: what they knew, what they read, saw or heard, what they did or did not do, what they believed and why, and in the case of claimants, what injuries or losses they have suffered. Sometimes the relevant events in question can span years or decades. It is rare for a litigant to be able to recall all facts relating to a dispute at will and with precision. The process of putting these details in writing, or discussing them with a lawyer, can help a litigant to recall the details, confirm or clarify them, or even identify other relevant facts that they had overlooked or forgotten.

The need for a secure space in which a litigant can prepare for litigation is heightened by the rules requiring the early exchange of evidence on which a party intends to rely in civil proceedings. Traditionally witnesses had no role to play in the

pre-trial process. However in the last quarter of the 20th century, there has been a sea change in the courts' approach to case management in general, and the exchange of testimonial information in particular.[32] The Civil Evidence Act 1972 introduced a power to make rules for the exchange of expert reports, and in 1986 the courts were given the power to order the exchange of witness statements in advance of the trial. Zuckerman noted this rule 'expanded the scope of pre-trial disclosure deep into the realm of testimonial evidence, altering both the nature of the parties' *preparations for trial* and the mode of taking oral evidence at the trial itself.'[33]

The current rule CPR 32.4(2) provides that the court will order a party to serve on the other parties any witness statement of the oral evidence which the party intends to rely on in relation to any issues of fact to be decided at trial. The rule effectively forces litigants to prepare and finalise their evidence in writing prior to trial. If a litigant were able to inspect the process by which an opponent prepared their evidence, it would have the practical effect of giving litigants only 'one take' at recording their witness statement, for they are likely to be questioned at trial about any discrepancies between the final statement and earlier drafts.

Few witnesses, whether they be a journalist recording a story, or an author writing their memoirs, could produce an accurate account of what happened and why in just one draft. What sets litigants apart from these other witnesses is that their account is sworn evidence given as part of the testimonial processes of the court. And the penalties for giving false evidence or false information in judicial proceedings are severe. The CPR requires that much of the information a litigant must disclose to an opponent,

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[32]*Mercer v Chief Constable of the Lancashire Constabulary* [1991] 1 WLR 367 (CA) 373 (Lord Donaldson MR).

[33]Zuckerman (n 1) [19.2]. Emphasis added.

including any witness statements they intend to rely on, must be verified by a statement of truth. [34] The statement of truth requires the witness to affirm his belief that the facts stated in the document are true.[35] A person who makes or causes to be made a false statement in a document verified by a statement of truth without an honest belief in its truth, is liable for contempt proceedings.[36] In addition a witness who wilfully makes a statement in any judicial proceeding, which he knows to be false or does not believe to be true, is guilty of perjury.[37]

The threat of perjury and contempt proceedings provides powerful reasons for giving litigants a private space to reflect on, consider and prepare the evidence they will give on oath. Otherwise, every written statement, and every utterance they made in preparing for a proceeding, could potentially be used to convict them of an offence in that proceeding.

The US Supreme Court has also asserted in *Hickman v Taylor* that litigation privilege is valuable because it maintains the morale of lawyers; that opening up a lawyer's work product to inspection would have a demoralising effect on the profession.[38] There appear to be two strands to this argument. First, exposure might reveal that their work does not meet the standards expected of a lawyer with their level of training or experience; and second, that disclosure of a lawyer's work product might undermine the client's legal position. The first strand is completely without merit: most professionals, skilled tradespersons, and virtually every employee in the service sector (for example workers at call centres) regularly have their work recorded or observed as a

[34]CPR 32.4, CPR 22.1(c).

[35]CPR 22.3.

[36]CPR 32.14(2).

[37]Perjury Act 1911 s 1.

[38] *Hickman v Taylor* 329 US 495 (1947) 511.

means of quality control. There is no apparent reason why lawyers could not also cope with the rigours of working in a more transparent environment.

The second strand to the court's justification for privilege should be rejected insofar as it relates to a lawyer's morale. Professional associations promote legal advisers as independent and objective, highly trained professionals, committed to upholding the rule of law.[39] This view does not sit comfortably with the idea of lawyers being demoralised because their work product could be used to assist an opponent's case. Put at its highest, draft submissions of fact or law, or legal research, can help an opponent produce only better legal arguments or factual submissions. Justice Murphy famously justified the non-disclosure of an attorney's work product by stating that discovery was hardly intended to allow a litigant to conduct their case on the borrowed wits of an adversary. [40] This may be an accurate historical account, but this aspect of the adversarial trial process should be viewed as a cost of the privilege, rather than a reason for it. The possibility that a litigant might win their case because they could afford a better lawyer than their opponent, and not because of the merits of their claim or defence, is not something to be celebrated: on the contrary it is likely to bring the administration of justice into disrepute. Indeed, where there is a stark difference in the numbers and experience of the legal teams of each litigant, this could breach the right to equality of arms.

Nonetheless there are good reasons for extending a litigant's private and secure sphere to the work product of their lawyer. First, one of a lawyer's duties is to advise a client on the weaknesses in their case. A lawyer's work product as to the strengths and

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[39]See for example the Bar Council, "What Barristers Do" <www.barcouncil.org.uk/about/whatbarristersdo> accessed October 15, 2010.

[40]*Hickman v Taylor* 329 US 495, 67 S Ct 385 (1947) 516.

weaknesses of their client's case is often bound up in the process of advising their client. This is significant because the potential chilling effect *operating on the client* in the absence of a privilege extends not only to what they tell the lawyer, but also to what their lawyer might tell them about the dispute. Second, a lawyer's work product, while it might help an opponent better formulate their case, ultimately has limited evidentiary value. Submissions of fact or law are merely suggestions to the court as to how it should decide a case based on the evidence before it and the applicable law. The court is obliged to consider the evidence for itself, and it is exclusively the court's role to rule on the applicable law.

The risk that the different capacities of lawyers can alter the scales of justice for their clients is better dealt with through legal aid schemes, which ensure that all litigants are provided with quality legal representation when they need it. The right to equality of arms does not, and cannot, require the effects of resource inequality to be eliminated completely. It is impossible to devise a system in which economic resources make no difference in litigation.[41] The fact that one litigant retains Cicero does not entitle the other party to a counsel of equal skill, even if one could be found. Instead the principle of equality of arms dictates that the law should try to ensure, as much as possible, that litigants compete on a level playing field.

Given the importance of litigants having a private and secure sphere in which to prepare their case, it is hardly surprising that it represents a basic requirement of the right to fair trial. One might reasonably conclude therefore that the costs associated with the privilege are justified. Nonetheless, this conclusion is further strengthened by the

[41]Zuckerman (n 1) [2.139].

fact that the costs of litigation privilege, at least for individual litigants acting in good faith, are relatively limited.

The costs of privilege have been discussed in detail in chapters 1 and 2 and need not be repeated here. But it is worth bearing in mind the ill we wish to avoid or reduce when comparing the benefits and costs of the privilege. The primary cost of the privilege is the loss of evidence which may have probative value. But a litigant's own testimonial evidence is almost never 'lost'. In most cases the litigant will submit their own witness statement voluntarily, and if they do not, an opponent can still call them to give evidence. Any information contained in a draft statement which is not before the court is still compellable because the privilege does not protect a litigant's knowledge of the underlying facts, only their case preparation. Furthermore, a litigant's preliminary instructions or draft testimonial evidence is usually of negligible probative value because any discrepancies between their evidence and earlier drafts or notes of interview would in most cases be perfectly explicable, and reveal no dishonesty whatsoever.

The main cost of litigation privilege over the client's own communications and draft statements is that it makes it more difficult for a litigant to test the truthfulness of an opponent's evidence because there is a risk that lawyers could use the privilege to help their client concoct a false or misleading story to suit their cause. In other words, the cost of the privilege is that the evidence a litigant actually presents to a court may be false, and the privilege makes this falsity more difficult to detect.

However the reality in court is more complex. Where a litigant's case preparation is part of a scheme to present false evidence to the court it falls within the crime-fraud exception to privilege and is not protected from disclosure. This exception does not make it easier to detect the dishonesty. But the rules do provide extensive

facilities for litigants to test the credibility of an opponent's evidence, and major disincentives to giving false evidence, which reduces the risk of individual litigants' manufacturing false evidence under a false claim for privilege. First, an opponent can always cross examine a litigant on their evidence at trial. Cross examination is a powerful forensic tool for testing the credibility of a litigant's evidence, and often quickly reveals whether their evidence in chief is authentic or a story crafted by their lawyers. An opponent is also free to adduce evidence of any statements made by the litigant, whether orally or in writing, outside the confidential sphere protected by litigation privilege. An opponent can request, in advance of the trial, further information from an opposing party about their case, and the court may order a party to clarify any matter which is in dispute, or give additional information in relation to any such matter, whether or not the matter is contained or referred to in a statement of case.[42] The responses must be verified by a statement of truth.[43] Then there is the threat of contempt and perjury proceedings, and the risk of imprisonment that goes with conviction for such offences. All these factors either provide strong disincentives to manufacturing false testimony, or make it easier to detect, or both.

The above analysis about the value of litigation privilege, and its status as fundamental right, clearly applies to lawyer-client communications and their lawyer's work product, at least where the client is an individual. In the next chapter we look at the optimal scope of litigation privilege and, in particular, whether other materials normally generated as part of a party's preparation for legal proceedings should be protected from disclosure. But, first, we need to consider whether the rationale for litigation privilege outlined above applies to corporations.

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[42]CPR 18.

[43]CPR 22.1(b).

3.2 Does the rationale for litigation privilege apply to corporations?

The fact that litigation privilege is an aspect of the right to fair trial provides prima facie strong reasons for extending it to corporations. The very suggestion that the right to fair trial would be granted to some persons and denied to others is likely to bring the law into disrepute. Any person, whether natural or artificial, who is amenable to the legal process, because they are the subject of legal rights and obligations, is entitled to have their rights and obligations determined by a fair trial according to law. Unlike some other fundamental rights, the right to fair trial is not based on the nature and attributes of a legal person but flows from the fact of legal personality. Yet this statement is only the first stage of the inquiry. While a corporation is entitled to a fair trial as much as anyone else, the real question is to decide what is required for a corporation to be tried fairly.

There are a number of process rights that make up the right to fair trial, of which LPP is just one. Some process rights are obviously needed by all legal persons, from individuals to corporations and even the state. One example is the right to an independent and impartial tribunal. However there are some process rights where the case for affording it to all legal persons is debatable: for example, the privilege against self incrimination. The difference between these two process rights, and the justification for making some process rights dependent on a person's identity, is that while all process rights are concerned to protect a person's dignity and the integrity of the process, some process rights are directed more towards one of these goals than the other.

The US Supreme Court and the Australian High Court have taken the view that the privilege against self incrimination is more concerned with protecting a person's dignity and especially avoiding the cruel trilemma of punishment for refusal to testify, punishment for truthful testimony or punishment for perjury.[44] This trilemma obviously has no direct relevance to a company, which cannot speak for itself and testify to its own guilt. The trilemma justification for the privilege has been criticised on several grounds, including that while it might be inappropriate for the state to force defendants to cooperate in criminal prosecutions, it is not cruel.[45] Yet more nuanced accounts of the privilege, such as Redmayne's claim that it helps to preserve personal integrity and allows a person to distance themselves from the state when the state is at its most powerful, also seemingly have little relevance to corporations.

The point is that categorising a rule to be part of the right to fair trial does not automatically mean it should be available to all legal persons. Instead, it is necessary to examine the rationale for each rule on a case by case basis and consider its applicability to corporations.

It was submitted above that it was necessary to provide a private and secure sphere in which litigants can adequately prepare for litigation because it protects a person's dignity and the integrity of the legal process. This raises two questions. First, do corporations have dignity? Second, does the integrity of the legal process require granting a privilege to corporations? Each question will be dealt with in turn.

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[44] *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 (HCA) [33].

[45] On the grounds that it may be an inappropriate or harsh thing for the government to do, but hardly cruel: M Redmayne, 'Rethinking the Privilege Against Self-Incrimination' (2007) 27 *Oxford Journal of Legal Studies* 209 221-224.

3.2.1 Do corporations have dignity?

Whether corporations possess 'dignity', a concept which forms the basis of an individual's claim to certain fundamental rights, requires us to examine the nature of the corporation as a legal person.

An interesting feature about scholarship on a corporation's legal personality is the sheer volume of material produced in the 19th and early 20th centuries, and the dearth of it in the latter half of the 20th century. In 1938, Professor Martin Wolff noted that in Europe writers fell into two groups: those who had written on legal persons, and those who were going to. At the time he counted no fewer than 16 theories that attempted to account for the legal personality of groups or corporations.[46]

There are three historical reasons which might explain this. First, as Maitland observed in his famous essay 'Moral and Legal Personality', the law of persons – as the Romans coined it – has been fast disappearing with the trend towards universal recognition of the freedom and equality of all people.[47] Questions about legal personality and capacity for human beings are now largely confined to special categories, such as the rights and liabilities of people with intellectual disabilities, or of fetuses.

Second, the power and pervasiveness of corporations in society has steadily grown, to the point that few now seriously question the legal and policy decisions that

[46]M Wolff, 'On the Nature of Legal Persons' (1938) 54 LQR 494.

[47]F Maitland (tr) and O Gierke, *Introduction to Political Theories of the Middle Age* (CUP, Cambridge 1900) 68-9.

have been made in order to provide some kind of vehicle for carrying on activities which enjoy both separate legal personality and limited liability. Whereas the landmark decision of the House of Lords in *Salomon* may once have been a radical precedent, it is now settled doctrine.[48] The debate about corporate personality has moved on from examination of the nature of corporate personality, to arguments as to how best to deal with abuses of corporate personality – specifically, in what circumstances the 'corporate veil' should be lifted to ensure that those persons (or entities) who are really responsible for a state of affairs are held legally accountable for it.[49]

The third reason is what might be described as the triumph of legal positivism in the analysis of corporate legal personality. This trend, like the dominance of legal positivism generally, owes a great deal to Hart. In an article in the *Law Quarterly Review* in 1954 Hart observed that the question 'what is a corporation?' can cause a real headache, and has more chance of achieving a headache than it does revealing anything valuable about the personality of a corporation. Hart suggested that the correct question was: 'Under what conditions does the law recognise a corporation as a legal person, and what liabilities (and rights) are ascribed to it?'[50]

In setting out the question in this way Hart redirects the law's focus away from difficult sociological and moral questions as to what is a corporation, and places it firmly on the safer legal ground of examining the policy choices the law makes with respect to corporations as legal persons.

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[48]P Davies, *Gower & Davies' Principles of Company Law* (8th edn Sweet & Maxwell, London 2008) 177. At the time it was given the judgment was criticised as going too far: F Pollock (1897) 13 LQR 6-7.

[49] H Hansmann and R Kraakman, 'Towards Unlimited Shareholder Liability for Corporate Torts' (1991) 100 Yale LJ 1879.

[50]HLA Hart, 'Definitions and Theory in Jurisprudence' (1954) 70 LQR 37, 56.

Hart's approach has received endorsement by corporate law academics.[51] The position of the courts is more mixed. Some 20th century English cases appear to accept the German realist theory of corporations, which holds that corporations are, by their very nature, real persons and therefore ought to be recognised as separate from their members.[52] Some courts have developed doctrines of corporate criminal liability based on analogies with the human body.[53] However a recent decision from the Privy Council in *Meridian* sharply criticises the reasoning behind realist theories and the cases in which they have been adopted as an 'unhelpful metaphysic of companies'.[54] Lord Hoffman, who delivered the Council's opinion in *Meridian*, held that corporations were legal constructs, 'a set of rules.' In a dig at Gierke's realist theory of group personality Lord Hoffman stated: 'There is in fact no such thing as the company as such, no *Ding an sich*, only the applicable rules.'[55]

While the debate on the nature of a corporation may have gone to sleep for a while, it did not end completely. Another major trend in the second half of the 20th century has been the emergence and increasing importance of human rights law in shaping the rights and obligations of people in their relationships with each other, the state, and even the environment. A cornerstone of this emerging body of law, and most human rights instruments since the Universal Declaration of Human Rights, is the notion that all human beings, by their very nature, have an inherent dignity. This dignity

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[51]K Wedderburn, 'Corporate Personality and Social Policy: The Problem of the Quasi Corporation' (1965) 28 MLR 62, 70; Gower & Davies (n 54) 4 footnote 5; J Farrar and B Hannigan, *Farrar's Company Law* (4th edn Butterworth's, London 1998) 7.

[52] See, eg, *Willis v Association of Universities of the British Commonwealth* [1965] 1 QB 140 (CA).

[53]*Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL) 713.

[54]*Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC) 506.

[55] Ibid.

is worthy of recognition and protection, and forms the basis of a human being's claim to certain fundamental rights.

It was only a matter of time before the courts would have to consider whether, and if so the basis upon which, corporations were entitled to the same fundamental rights. The issue arose last year in the US in the politically charged context of campaign finance and freedom of expression. In *Citizens United v Federal Electoral Commission*[56] the Supreme Court ruled that the corporations were entitled to freedom of expression, not on the grounds that corporations had dignity, but rather that the First Amendment did not make distinctions based on the identity of the speech maker. The First Amendment prohibited Congress from fining or jailing citizens, or associations of citizens, who had engaged in political speech whether individually or through corporate forms. The Court was able to sidestep the question of whether corporations possess dignity by arguing that a right to freedom of expression was necessary to protect the rights of individuals. But this line of reasoning may not work for all human rights. For example, it may not be necessary to recognise a particular right for an entity in order to protect the same rights for its members, or there may be a potential conflict between a company and its members in relation to the interests the right is designed to protect.

It is therefore necessary to address the question of whether corporations have dignity as a reason for conferring rights to corporations irrespective of the interests of their members. Unfortunately the meaning of dignity even as it applies to human beings is contested, although there is near universal consensus that all human beings possess

[56] 130 S Ct 876 (2010).

dignity.[57] At the core of the understanding of dignity in most religious, philosophical, political and legal contexts is an ontological claim that human beings have intrinsic worth merely by their being human. There is also a relational claim that a human being's intrinsic worth should be recognised and respected by others, including the state. Hence, some forms of treatment by others are inconsistent with, or required by, respect for this intrinsic worth.[58]

Over the two millennia in which the concept of dignity has been used, various explanations have been put forward as to why human beings have it. This includes the suggestion they are made in God's image, that they have free will, they have the capacity to reason, and in recent times, that they are autonomous.[59]

Corporations possess none of these characteristics. Gierke famously argued that corporations were real organisms, that they possessed a will and a life of their own separate from their members, and that they ought to be recognised as moral agents. Maitland described Gierke's theory thus: '[The German Fellowship or group] wills and acts by the men who are its organs as a man wills and acts by brain, mouth and hand. It is not a fictitious person; it is a *Gesammtperson* and its will is a *Gesammtwille*.'[60]
A corporation is not merely the sum of its individual parts, or a collective name for them. Rather, the interaction of a group of persons over time for specific purposes, with or without a changing membership, has the effect of creating a separate and real person:

[57] C McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 European Journal of International Law 655.

[58]Ibid. 679.

[59]Ibid. 658-659.

[60]F Maitland (tr) and O Gierke (n 53) xxvi. Gierke's principal works on this subject was O Gierke, *Die Genossenschaftstheorie und die deutsche Rechtsprechung* (Wiedmann, Berlin 1887).

the corporation. To Maitland the claim of a group to legal personality was commonsense: 'the less we know of law, the more confidently we Englishmen expect that the organised group, whether called a corporation or not, will be treated as person: that is, as a right and duty bearing unit.'[61] Dicey was also a proponent of the realist theory:

> When a body of twenty, or two thousand, or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body, which by no fiction of law, but by the very nature of things, differs from the individuals of whom it is constituted.[62]

These scholars did not focus on the issue of dignity, which is perhaps not surprising given that the dignity of individuals, while important in political and religious discussion, had not yet been enshrined as the basis of human rights law. However it is reasonable to assume that if corporations 'by their very nature' are 'right and duty bearing units' – i.e. moral agents – then they would share at least some of the same essential features that give human beings dignity.

However the basic claim that groups are moral agents is not tenable. A group's 'will' is essentially derivative either from the will of its members or from the action of the group itself. In either case rules of attribution are required to determine what states of mind of natural persons, or acts of persons acting alone or with others, can be attributed to the group. As a consequence, defining the group and identifying its 'will' and its 'acts', necessarily involves an exercise in social, and legal, construction.

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[61]F Maitland (tr) and O Gierke (n 53), 64.

[62]A Dicey, 'The Combination laws as Illustrating the Relation Between Law and Opinion in England During the 19th Century' (1907) 17 Harv L Rev 511, 513.

One very important feature about group life that cannot be overlooked is that human beings have a fundamental right to associate with others, and that this right necessarily includes the right to form and join groups. The right to associate, however, says nothing about the nature of the group per se or its claims to moral agency. The right, which is said to have both an individual and a group aspect, protects the individual who chooses to belong to a group; and, more controversially, protects the autonomy of group members to organise their collective affairs free from state interference.[63] By implication the freedom to associate may impose a legal duty on the state not to break up or declare a group to be unlawful.

Freedom of association has been a critically important question in Europe because whether the state had legally sanctioned the group to which one belonged was often a matter of life or death.[64] The right to associate with others is now protected by Art 11 of the European Convention on Human Rights. It states: 'Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions…'. This right however does not require a state to recognise the group, it provides only that members of a group are free to carry out their activities. This point was made by the European Commission in *Sidiropoulos v Greece*.[65] In this case, Greece had refused to register a non-profit making association formed to promote the folk culture of an ethnic minority. The applicants complained that

[63]K Ewing, 'Freedom of Association' in C McCrudden and G Chambers (eds), *Individual Rights and the Law in Britain* (OUP, Oxford 1994) 239, 240, 253.

[64]And part of the power struggles in the middle ages between the state and groups who were perceived as a potential threat to it: P Birks (ed), *English Private Law* (OUP, Oxford 2000) 134.

[65]*Sidiropoulos v Greece* (App no 26695/95) (1999) 27 EHRR 633 [43]. In endorsing the Commission's opinion the ECtHR stated the capacity to form a group as a 'legal entity' was an important component of the right to associate 27 EHRR 659 [40]. This is a regrettably ambiguous phrase which can be interpreted to mean either that the state must permit the formation of lawful groups, or that the law must provide mechanisms for the creation of groups with legal personality.

this was a breach of their right to associate under Art 11. Because under Greek law the refusal to register the association had the effect of making it unlawful, both the Commission and the Court held that the decision breached the members' Art 11 rights.

The right to associate derives from communitarian notions of dignity, popular with social democrats, socialists and republicans in the 19th century.[66] In a text published in Paris in 1848, Charles Renouvier was able confidently to assert that a 'Republic is a state which best reconciles the interests and the dignity of each individual with the interests and dignity of everyone.'[67] However these communitarian notions of dignity do not extend to recognition of the dignity of groups. Instead they place a different emphasis on the relational implications of recognising everyone's intrinsic worth, in that the protection of the dignity of all persons, often requires restrictions on the liberty of individuals. These restrictions must be limited, because the concept of dignity does not support political theories which have in the past commanded considerable support, such as 'organic theories of nationalism that submerge the individual'.[68]

The best argument offered by Maitland for treating corporations as moral agents, focussed not on the nature of a group, but on the practical needs of its members and those who deal with groups. He stated:

> [Under English law the Group] lives at the mercy of its neighbours for a law suit will dissolve it into its constituent atoms. Nor is that all.

[66] McCrudden (n 63).

[67]C Renouvier, *Manuel Républicain des Droits de l'Homme et du Citoyen* (Garnier, Paris 1848, introduction by M Agulhon 1981) 93.

[68]G Neuman, 'Human Dignity in United States Constitutional Law' in D Simon and M Weiss (eds), *Zur Autonomie des Individuums: Liber Amicorum Spiros Simitis* (Nomos Verlagsgesellaschaft, 2000) 250.

> Sometimes its neighbours will have cause to complain of its legal impersonality. They will be thinking of it as a responsible right and duty bearing unit, while at the touch of law it becomes a mere many, and a practically, if not theoretically, irresponsible many.[69]

Law makers must recognise that persons have a right to associate with others in pursuit of collective goals. The law needs to provide rules regarding group activities that meet the legitimate expectations of group members and third parties, including the community as a whole. While this may not entail a right of groups to be treated as separate moral agents, there are enormous benefits to society in allowing groups to incorporate to create a separate entities with limited liability for their members. All economically advanced societies provide for corporate forms that possess features of separate personality and limited liability for their members.[70] Of course, conferring limiting liability on a corporation's members can prejudice the interests of third parties. For this reason regulation is needed to ensure the corporate form is not abused.

Maitland's 'legitimate expectations' argument for treating corporations as a right and duty bearing unit is a powerful one. Ultimately, however, it is an argument based on the practical implications of group activities and the policy choices a society must make about how to regulate them. It says nothing about the nature of the group itself.

Perhaps the final nail in the coffin of the realist argument that corporations should be recognised as independent moral agents, at least as a descriptive theory, is that it bears no resemblance to company law in the United Kingdom and in most other advanced societies. So far in this discussion on dignity the word 'corporation' has been used in its ordinary English meaning: i.e. a group. But a registered corporation is a

[69]F Maitland (tr) and O Gierke (n 53) 68.

[70]Gower & Davies (n 54) 176.

different beast altogether. Not all registered corporations are groups as a matter of fact, and strictly speaking none are as a matter of law.

Most, if not all, legal systems in developed societies recognise legal corporations which have only one member, or only one active member, or which are part of a corporate group which is ultimately controlled by a parent corporation. For these corporations it is usually impossible to maintain that *as a matter of fact* the corporation has a separate existence with a will of its own distinguishable from that of its members. Proponents of the realist theory did not accept these corporations as real and were critical of cases that treated such companies as separate entities.[71] For in such cases conferring personality on the corporation does not reflect reality, but effectively creates a smokescreen between the entity and its member/s, thereby permitting the members to limit their liability. In other words, these companies are legal fictions. The idea of the company as a legal fiction has been the prevailing theory of corporate personality in Europe for centuries, dating at least back to Coke's judgment in *Case of Sutton's Hospital.*[72]

The overwhelming majority of companies on the company register in England could bear the label of legal fiction, even from a realist's standpoint. Many small businesses are sole traders carrying on business as a corporation, and the Companies Act specifically permits the creation of companies with just one member. [73] Furthermore, a

[71]Wolff (n 52) 502 quoting Gierke (n 66) 835, 839.

[72] (1612) 5 Rep. 303; 10 Rep. 32b.

[73]Companies Act 2006 s 7.

large number of large and medium sized businesses are carried on through groups of companies in which corporations are wholly owned subsidiaries of other companies.[74]

At common law, the word company 'has no strict legal meaning'.[75] According to Davies, 'Companies are usually defined not by reference to any idea, but the laws pursuant to which they were created.'[76] Once again, Hart's influence in this approach is obvious.[77] A quick perusal of the Companies Act and the case law reveals that there are numerous types of entity that the law will recognise as a legal corporation. These include statutory companies, chartered companies and registered public companies limited by shares, private companies limited by shares, and private companies limited by guarantee.[78]

With all these potential variations, it is difficult to identify any underlying common thread that would reveal the 'essence' or fundamental nature of a registered company. As a matter of law, it would seem a corporation is whatever the law recognises to be 'a corporation'. Whatever the pre-juridical, or extra-juridical, facts on the ground may be from the sociological 'realist' standpoint, the act of incorporation radically transforms those background facts to create something entirely new. Indeed this was the very premise of the historic decision of the House of Lords in *Salomon*, which recognised the separate legal personality of corporations and the limited liability

[74]Gower & Davies (n 54) 178 .

[75]*Re Stanley* [1906] 1 Ch 131 (Ch) 134.

[76]Gower & Davies (n 54) 3.

[77]Hart (n 56) 56.

[78]G Morse (ed), *Palmer's Company Law* (2006 Update, vol 1, Sweet & Maxwell, London 2006), Part 2A. Private companies can also choose to be unlimited with or without a share capital.

of their members, whether or not a corporation was in any way 'independent' from its members. As a matter of *law they are independen*t.[79]

3.2.2 Is a corporate privilege necessary for the integrity of the legal process?

That brings us to the alternative basis for holding that corporations need a private and secure sphere to prepare for litigation: that it is necessary to protect the integrity of the legal process. Denying corporations the right to litigation privilege could be criticised on the grounds it would offer a distinct institutional advantage to other parties in litigation. It hardly seems fair that one party would be entitled to a private and secure sphere in which they can prepare for litigation while the other party must prepare their case knowing that their preparation will be scrutinised by their opponent and by the court. As an empirical matter, however, much litigation conducted by corporations is against other corporations, so at least in these cases there would still be equality of arms between the parties.

If the right to put forward one's own case, and not be judged on one's case preparation, is a basic principle of the procedural fairness of any form of legal adjudication then in principle all persons subject to the adjudication process should be entitled to this right.

The impact of the privilege on the way corporations prepare for litigation, including the frequency of lawyer-corporate-client consultations and the way in which

[79]*Salomon v Salomon & Co Ltd* [1897] AC 22 (HL) except where the corporate veil is lifted by statute or at common law.

corporations communicate with lawyers, is an important factor in this discussion. If removing the privilege would have no adverse impact on corporations then it is difficult to argue that a corporate privilege is necessary for the integrity of the process.

For most of the 20th century, corporations could not make an appearance in litigation other than through a lawyer.[80] However this rule has been relaxed. CPR 39.6 provides that a company may be represented at trial by an employee if the employee is authorised by the company to appear on its behalf, and the court gives permission. Accordingly there is at least a theoretical risk that some corporations would be less likely to consult a lawyer when preparing for litigation if their communications were compellable.

On the other hand there is some doubt that removal of the privilege would have the same chilling effect on corporations in litigation as it would have on individuals. Certainly disclosing information a company provides its lawyers when preparing for litigation could prejudice the company's legal position, just as much as it could prejudice an individual. However, corporate agents have strong incentives to provide full and frank instructions to their lawyers as a result of their contractual and fiduciary obligations to the company, particularly in the case of directors of large and public companies. These incentives are examined in detail in the discussion in chapter 5 on the incentives of corporate agents to take legal advice.

Deferring that discussion for the time being, one can nonetheless reasonably argue that the absence of a privilege is likely to make it more difficult for corporations

[80]*Charles P Kinnel & Co Ltd v Harding Wace & Co* [1918] 1 KB 405, 413.

to prepare their case adequately, with or without a lawyer's assistance. Corporate agents will always be concerned that their case preparation, including draft witness statements, strategy documents etc could be disclosed to the company's prejudice or to their own prejudice. In this regard corporations face many of the same problems individuals face in preparing for litigation, and usually on a much larger scale. The information corporations need to prepare for litigation is often in a diffuse form, spread across numerous corporate agents in different locations, including former employees. Relevant documents may also be stored in multiple locations. Even with strong incentives to assemble and pass relevant information on to their lawyers, this information must still be assembled. An agent's knowledge must be recorded, reviewed and refined to take account of other information that has come to light or new details that the agent recalls. Documents must be reviewed and checked against agents' accounts. If this entire process were compellable, corporate agents are bound to be wary of the impact on litigation of any discrepancies in the employees' accounts of what happened, no matter how honest or explicable they are. This in turn is likely to make corporate agents more cautious in preparing for litigation, perhaps altering the way in which they prepare for litigation or even the extent of their preparation. Nor would this caution on the part of corporate agents be improper or a dereliction of their duties to the company: it merely reflects an understandable desire not to give an opponent an unnecessary forensic advantage in litigation, or to create opportunities for cross examination which would prove costly and time consuming but have limited or negligible probative value. In this respect, an individual's due process right to be judged on the case they put forward, and not on one's case preparation, also applies to corporations.

To sum up, a corporation's right to litigation privilege is linked to the integrity of the legal process rather than to anything inherent to corporations per se. That conclusion may have ramifications for the optimal scope of a corporate of privilege. Because the rational for a corporate litigation privilege rests on the need to protect the integrity of the legal process, there may be scope for recognising an exception in cases where upholding a privilege claim would cause demonstrable harm to the legal process and the administration of justice. We will explore this idea further in the next chapter.

Conclusion

Over the centuries a number of rationales have been put forward to justify litigation privilege, most of which are unconvincing. These include protecting the honour of gentleman barristers, loyalty in the lawyer-client relationship, and a client's right to privacy. These rationales do not take account of the obligations on lawyers to maintain the confidences of their clients, nor the fact that other relationships based on trust and confidence are not protected by privilege, or that in many legal proceedings all relevant facts, no matter how private, are compellable.

The best rationale for litigation privilege is that every person has the right to prepare for litigation in a private and secure space, without the fear that their case preparation could be disclosed to their prejudice. This inviolable space, and the privilege which guarantees it, is necessary to protect a person's dignity and the integrity of the legal process, and is integral to the right to fair trial under Art 6 of the ECHR. Within this secure space, a person has the right to consult a lawyer to help them prepare and present their case effectively, and in some cases the right to fair trial requires that legal

assistance is made available to indigent litigants. Furthermore, at its core litigation privilege represents a basic principle of procedural fairness. A person is entitled to put forward their own case to the court – including the litigant's own testimonial evidence, legal argument and factual submissions – and not be judged on their case preparation. For all these reasons providing litigants with a private sphere in which to prepare for litigation, with the assistance of a lawyer, protects a person's dignity and the integrity of the legal process.

The fact that litigation privilege is protected by the right to fair trial provides strong prima facie reasons for extending it to corporations. However the right to fair trial is made up of a number of different process rights that perform different functions. The case for extending litigation privilege to corporations must be based on the fact that the rationale for the privilege, and the interests it is designed to protect, apply to corporations. It is submitted that, while corporations do not have dignity, the integrity of the legal process also demands that corporations can prepare for litigation in private, because they – just as much as individual litigants – are entitled to put forward their own case and not be judged on their case preparation.

Chapter 4 – The optimal scope of litigation privilege

Defining the optimal scope of LPP must take account of both the rationale for the rule and its costs. The opportunity to prepare for litigation in a private and secure sphere is part of the right to fair trial. On the other hand, the costs of litigation can be substantial. Therefore, the critical task is to ensure a person's private and secure sphere applies only to materials that require protection, and that all other relevant material remains compellable. The present chapter addresses three key questions about the scope of litigation privilege: which type of material should qualify for litigation privilege, when the material will qualify for privilege, and what is the nature of the protection that LPP should provide such material.

Clearly, the private and secure sphere must cover a person's communications with her lawyer in order to prosecute or defend legal proceedings. This is the archetypal situation to which LPP applies: if a case for privilege could not be made out for this situation, then one could not be made out for any situation. But litigants and their representatives routinely generate or collect other material when preparing for litigation, and it must be decided whether this material is worthy of protection. Such material includes: a lawyer's work product, meaning their mental impressions about the case, legal research, draft submissions and like materials; the work product of a litigant in person; communications with third parties; documents obtained from public sources, and copies of non-privileged documents belonging to the litigant that are selected by the lawyer as part of their brief.

This chapter argues that, because litigation privilege is designed to protect a litigant's case preparation, it should be irrelevant whether a litigant retains a lawyer for the privilege to apply. Thus the work product of litigants in person should be protected by the privilege.

The case for a privilege over third party communications and documents collected from public sources is not convincing. The standard justification for protecting this material from disclosure is that it protects the adversarial litigation process, removing parties' disincentives to collect evidence, and preventing them from engaging in 'sharp' practices or ambushing their opponents at trial. Yet litigants already have powerful incentives to collect evidence in support of their case, and there are now comprehensive rules governing the exchange of evidence during the pre trial process.

This chapter analyses recent attempts by the House of Lords in *Re L* and the Supreme Court of Canada in *Re Blank* to restrict the scope of litigation privilege over third party communications by limiting the proceedings to which it applies or by limiting its lifespan.[1] It argues that, while the Courts' aims are laudable, the rationale for the House of Lords decision is questionable and there are difficulties applying the Supreme Court's decision in practice. This chapter argues that the optimal solution is to abolish the privilege for these materials altogether.

[1] *Re L (a minor) (Police Investigation: Privilege)* [1997] AC 16 (HL); *Blank v Canada* [2006] 2 SCR 319.

If a privilege over third party communications or documents from public sources or the litigant's own files is retained, the boundary *between* litigation privilege and advice privilege will remain critical. A key question is: how far back before the commencement of proceedings does the litigation privilege reach? This chapter argues that the definition of reasonable anticipation of litigation, used by the Court of Appeal in *US v Philip Morris,* should be tightened so that litigation is reasonably anticipated only if it is more likely than not to follow.

One of the most important controlling devices for limiting when a document or communication will qualify for privilege is the legal purpose test. On all defensible rationales for LPP, communications or documents require protection only if they are made for a legal purpose. But the question is how significant must the legal purpose be? It is argued that the sole purpose test is the best available test i.e privilege will attach to communications or documents only if they are made for the sole purpose of litigation (or obtaining advice.) This test will allow both corporations and individuals to adequately prepare for litigation, but it will also help reduce the amount of evidence that is lost to the privilege.

Finally, the law needs to consider what type of protection the privilege provides qualifying material. At present, the privilege is a rule against compellability and not a rule of admissibility. This gives the client a private sphere, but not a secure one, in which to prepare for litigation. The lack of a secure space creates significant problems in practice, particularly for clients who inadvertently disclose privileged material or

have such material disclosed without their consent. If materials escape the private sphere, the privilege holder does not have an automatic right to their return, or an automatic right to prevent their use in legal proceedings. To redress this shortcoming, this chapter proposes that individuals should be given a 'use immunity', which would prevent any statements they make in a privileged context from being used in evidence against them.

By contrast, this chapter argues that a corporation's right to litigation privilege should be qualified using the US attorney work product doctrine as a model. The entity, like any legal person, is entitled to prepare for litigation in private and to be judged on the case it puts forward, rather than by its case preparation. However, it must be borne in mind that the preparation of the 'entity' is in practice the preparation of its agents, and often large numbers of agents. It is important that any probative evidence held by a company's agents, past or present, is not permanently lost under the cloak of the privilege. Accordingly, the entity's privilege should be qualified so that it gives way if the party seeking disclosure can show they have a substantial need for the material in preparing their case, and provided that the substantial equivalent of the evidence cannot be obtained by other means without undue hardship.

4.1 Which preparatory materials for litigation should qualify for privilege?

In chapter 3 we saw that there was a very strong case for protecting a client's communications with their lawyer while preparing for litigation, and a good case for

protecting a lawyer's work product. In the discussion that follows we consider the other categories of preparatory materials for litigation which might qualify for protection.

4.1.1 Work product of litigants in person

The case for protecting lawyer client communications and a lawyer's work product from disclosure applies with similar force to the work product of litigants in person. Indeed it is arguable that the private and secure sphere is designed to protect a litigant's case preparation rather than lawyer client communications per se. Therefore it should be immaterial whether the litigant chooses to prepare their case by themselves or with a lawyer's assistance. There is no English authority directly considering whether litigants in person are entitled to privilege. However, in his review of the law of privilege in *Ventouris v Mountain* Bingham LJ criticised the term legal professional privilege because it implies the privilege belongs to the lawyer, and suggests 'surely wrongly, that a litigant in person is denied, in preparing his litigation, the protection of secrecy which is enjoyed by a litigant who instructs a lawyer.'[2]

Protecting the work product of litigants in person is necessary to ensure equality of arms between the parties. Otherwise a litigant who could afford legal representation, or was eligible for legal aid, would enjoy a tremendous institutional advantage over litigants in person. In addition to the other obvious advantages enjoyed by represented litigants, they could prepare their own case secure in the knowledge that such preparations are exempt from disclosure *and* that any similar preparations made by their

[2]*Ventouris v Mountain (The Italia Express)* [1991] 1 WLR 607 (CA) 611. Laws LJ expressed a view that litigants in person were entitled to litigation privilege in *Kelly v Warley Magistrates Court* [2007] EWHC 1836 (Admin) [18].

self represented opponent are open to inspection. Each party, whether represented or not, has a private sphere in which they can adequately 'work up' their case, and draft their evidence (which must be exchanged in written form prior to trial) without fear that this preparation will be disclosed to their prejudice.

Zuckerman argues it is inconceivable that a judge would order the disclosure of the LIP's work product in such a case,[3] while the editors of *Phipson on Evidence* suggest that while the point has never been definitely decided, the answer is not seriously in doubt.[4] Arguably a harder question is whether privilege should attach to communications between a litigant and a non lawyer who assists a litigant prepare their case, for example a McKenzie friend.[5] The same issue is becoming increasingly important in the legal advice context where lawyers regularly compete with non lawyers to provide the same services.

4.1.2 Third party communications

Parties preparing for legal proceedings will often need to communicate with potential witnesses. Communications with these witnesses are privileged from disclosure. In recent years the English courts have strongly criticised litigation privilege as it applies to third party communications. Perhaps the staunchest judicial critic of this aspect of litigation privilege is Lord Scott, who in obiter remarks in *Three Rivers No 6* said:

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[3]A Zuckerman, *On Civil Procedure* (2nd edn Sweet & Maxwell, London 2006) [15.20].

[4] H Malek (ed), *Phipson on Evidence* (17th edn Sweet & Maxwell, London 2010) [23-111].

[5]Named after the case *McKenzie v McKenzie* [1970] 3 WLR 472 .

> The need to afford privilege to the seeking or giving of legal advice for the purposes of actual or contemplated litigation is easy to understand. I do not, however, agree that that is so in relation to those documents or communications which although having the requisite connection with litigation neither constitute nor disclose the seeking or giving of legal advice.[6]

Some two decades earlier Scott VC (as he then was) had also criticised the scope of litigation privilege as it applies to third party communications in *Re Barings plc*.[7] The case concerned the collapse of Barings Bank due to unauthorised share market trading which resulted in massive losses. The Secretary of State commenced disqualification proceedings against former directors of the bank including the applicant. The applicant sought disclosure of a report on the conduct of the bank's directors, which was prepared on behalf of the administrators in compliance with their statutory duty to report to the Department of Trade and Industry.[8] The Secretary of State claimed litigation privilege over the report, a claim which was met with 'incredulity' by Scott VC. He ordered the disclosure of the report on the basis that the existing authorities did not cover statutory reports, in which the author had no choice in producing the document. He went on to state that whether such reports were privileged depended 'on whether there is a public interest requiring protection from disclosure to be afforded to these reports that is sufficient to override the administration of justice reasons that are reflected in the discovery rights given to

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[6] H Malek (ed), *Phipson on Evidence* (17th edn Sweet & Maxwell, London 2010) [29].

[7] *Re Barings Plc* [1988] 1 All ER 675 (Ch).

[8] Insolvency Act 1986 s 7(3).

litigants.'[9] In the absence of a claim to public interest immunity...'if documents for which privilege was sought did not relate in some fashion to communications between client and legal adviser, there was no element of public interest that could override the ordinary rights of discovery.'[10]

The standard case for litigation privilege over third party communications is that it protects the adversarial litigation process by removing disincentives on litigants to collect evidence from third parties, and preventing them from engaging in 'sharp' practices and ambushing their opponents at trial. There is no shortage of judicial pronouncements endorsing this rationale. One notable statement comes from Lord Wilberforce in *Waugh v British Railways Board*, where the House of Lords adopted the dominant purpose test for litigation privilege. His Lordship stated:

> The exigencies of the adversary system of litigation [require that] a litigant [should be] entitled within limits not to disclose the nature of his case until trial. Thus one may not see the proofs of the other side's witnesses or the opponent's brief or even know what witnesses will be called: he must wait until the card is played and cannot try to see it in the hand.[11]

The idea underlying this and similar statements is that it would be unfair for one party to see the proof's of the other side's witnesses before trial without their agreement.[12] Fairness in this context is essentially a twofold concern. First, as with a

[9]*Re Barings Plc* [1988] 1 All ER 675 (Ch) 691.

[10]Ibid 681-682.

[11]*Waugh v British Railways Board* [1980] AC 521 (HL)[1980] AC 521, 531.

[12]*Re Saxton (decd), Johnston v Saxton* [1962] 1 WLR 968 (CA) 972 (Lord Denning).

litigant or their lawyer's work product, there is a potential free rider problem: litigants are not able to enjoy the fruits of their own labour without their opponent taking advantage of and using the evidence they have gathered. Second, in an extension of the argument for protecting lawyer-client communications, the absence of a privilege would have a chilling effect on litigants, discouraging them from collecting evidence for fear the witnesses' evidence might hinder rather than help their case.

While there may be strong moral arguments against free riding in many areas of life, free rider concerns ought to be rejected as having little relevance to the administration of justice. As already mentioned, the litigation process is not designed to ensure that the side with the best lawyers, and the most resources, wins. More often than not this would be the outcome if the law adopted rules that avoided any possibility of 'free riding.' Where resource inequality in the litigation process is stark it may breach the principle of equality of arms. Rules against free riding necessarily increase the effects of resource inequality and information asymmetry between litigants, which disclosure rules attempt to minimise. The disclosure obligations in the civil litigation process are the very antithesis of rules against free riding. The rules require litigants to reveal information to their opponent precisely because it might assist their opponent's case.[13] In the criminal sphere, the principle of equality of arms has crystallised as the right of a defendant to have disclosure of 'all material evidence for or against the accused', subject to circumscribed exceptions such as protection of the public interest.[14]

[13]CPR 31.6.

[14] *Edwards v UK* (1993) 15 EHRR 417; *A and others v United Kingdom* (2009) 49 EHRR 625.

Reducing the effects of resource inequality on the litigation process is one moral concern. On the flipside, free riding in the evidence gathering process might work an economic injustice: why should I pay for my opponent's case preparation when they are trying to defeat my case? What this argument overlooks is that the research product of both parties would be open to inspection by each other. In any event, concerns about economic unfairness could be alleviated by a rule that requires parties seeking disclosure of their opponent's research product to contribute to its cost.[15] In the absence of agreement between the parties on what represents an equitable contribution, the court could decide the issue. At most, an equitable contribution would be half the cost of the research, and often significantly less. The research product remains the property of the litigant and they can use it for any purposes they wish and for all time, whereas the opponent may only use the material for the litigation at hand, as guaranteed by their implied undertaking to the court.[16] Thus research product will not always have the same economic value for all parties. Second, because one of the underlying problems with the privilege is its effects on resource inequality, an equitable contribution must take into account the other litigant's capacity to pay for the research product.

Rules that encourage the parties to share the costs of the evidence gathering process are a sensible way of promoting proportionality in the costs of litigation. The principle that the costs of litigation should be proportionate to its value and importance

[15] N Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System* (OUP, Oxford 2003) 27.35.

[16] CPR 31.22.

is now enshrined in the overriding objective of the CPR.[17] A feature of the CPR is that it encourages and requires co-operation between the parties, and with the court. CPR 1.3 requires the parties to co-operate with the court in achieving the overriding objective. Co-operation is now a byword of the civil litigation process and, within this framework, moral concerns about free riding look out of place.

A slightly better case for litigation privilege over third party communications is not a moral argument against free riding, but rather a concern about the practical consequences of allowing free riding in the evidence gathering process. Andrews takes up the point by suggesting that removing privilege could reduce the overall quality of fact finding in civil litigation: 'If litigant A knows that, should he uncover unfavourable information during his inquiry into the facts of a dispute, this information will no longer be privileged and instead it will be open to inspection by his opponent, is A not less likely to spend money and time searching for that information?' [18]

The flaw in this argument, which Andrews acknowledges, is that litigants already have powerful incentives to collect evidence in support of their case. He recognises that the governing factor in collecting evidence may be that each party will do what seems necessary and practicable in order to win the case, even if there is a risk that some of this private investigation may back fire. With respect, this governing factor is nothing less than an institutional imperative, dictated by the burden and standard of proof used in civil litigation. Unless a claimant presents credible evidence that their

[17]CPR 1.1.

[18] Andrews (n 15) [27.41].

claim is made out on the balance of probabilities the claim will fail. Obviously a claimant must always submit evidence in support of their claim. Once the claimant submits credible evidence in support of their claim, the defendant has little practical choice but to respond by putting on their own evidence challenging the claim's merits.

There are many situations in which the trier of fact can more readily draw inferences from evidence that is uncontested. The point was neatly summarised by JD Heydon: 'a party against whom evidence on a particular issue has been given will often be well advised to adduce evidence on it in order to avoid defeat, or even be obliged to do so in consequence of a presumption of law.'[19]

The incentives created by the burden and standard of proof in civil litigation point in the same direction: claimants and defendants need to collect and put on evidence if they are to have any chance, or any realistic chance, of successfully prosecuting, or defending, a claim. Once claimants put on evidence that a court can safely accept, the defendant is effectively bound to adduce the best evidence in support of their case if they wish to avoid defeat. And where a court orders the parties to exchange witness statements at the same time, which the court has the power to do under CPR 32.4(3), neither can afford to second guess the other party and assume they will not put on credible evidence.

[19]JD Heydon *Cross on Evidence* (7th Australian edn, Lexis Nexis Sydney 2004) [7205]. See also *DPP v Morgan* [1976] AC 182 (HL) 200.

Andrews' argument may have greater force in criminal proceedings where defendants have the option of putting the prosecution to the proof of its case. Forcing defendants to disclose unused (and presumably unhelpful) expert evidence may chill defence investigations, and might breach the principle that defendants should not be forced to actively help the prosecution prove its case. On the other hand, there seems no good reason why defendants should be allowed to paint a potentially misleading picture of the evidence to the court by selectively relying on favourable expert evidence, whilst maintaining privilege over unfavourable evidence on the same issue from the same or other experts. [20]

The next argument in favour of litigation privilege over third party communications is that it stops litigants delaying the evidence gathering process, so as to deny their opponents an opportunity to examine it in advance of the trial. The result is that opponents can be ambushed at trial or taken by surprise. This argument is very weak because the question of *when* evidence is exchanged is logically distinct from the question of *what* evidence must be exchanged. The risk of trial by ambush has virtually disappeared in recent years because of a sea change in the courts' approach to case management and the timing and manner in which parties adduce evidence. For sometime now the rules have comprehensively regulated the timing of exchange of the testimonial and documentary evidence on which a party intends to rely. We have already set out the terms of CPR 32.14, which requires litigants to serve on the other parties in advance of the trial any witness statements of the oral evidence on which they intend to rely at trial. If a party fails to serve a witness report as directed by the court

[20] M Redmayne, 'Disclosure and its Discontents' (2004) *Criminal Law Review* 441, 453-454.

they cannot call the witness to give evidence unless the court gives permission.[21] An application for permission to call a witness notwithstanding the default to serve a witness statement is considered an application for relief from sanction, and the court will take into account the criteria set out in CPR 3.9 in deciding whether to grant relief, including the effect non-compliance has had, and granting relief would have, on the other party.[22] In relation to experts, CPR 35.4(1) provides that no party may rely on expert evidence without the court's permission. A court is hardly going to grant a litigant permission to adduce expert evidence if the opponent will not have adequate time to consider the evidence before trial and respond to it if necessary. For this reason a court may refuse late applications to adduce expert evidence.[23]

The rules governing the exchange of evidence on which parties intend to rely, are according to Lord Donaldson, designed to (a) to identify the real issues in dispute and (b) to enable each party to assess the relative strengths and weaknesses of his own and his opponent's case at the earliest possible moment, and well before any trial.[24] In stark contrast to the case for privilege over third party communications advanced by Lord Wilberforce in *Waugh*, civil litigation is now more a process where the parties' 'cards are placed on the table face up.'[25]

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[21]CPR 32.14.

[22]*Bansal v Cheema* [2001] CP Rep 6 (CA).

[23]*Calenti v North Middlesex NHS Trust LTL* (QBD April 14, 2001).

[24]*Mercer v Chief Constable of the Lancashire Constabulary* [1991] 1 WLR 367 (CA) 373. See also *Nederlandse Reassurantie Groep Holding NV v Bacon & Woodrow Ernst & Young and Swiss Bank Corporation (No 2)* [1995] 2 Lloyd's Rep 404 (QB) 408 (Colman J).

[25]*B v John Wyeth & Brother Ltd* [1992] 1 WLR 168 (CA) (Lord Woolf).

If the benefits of litigation privilege over third party communications are marginal, one might question whether its benefits outweigh the costs. Those costs, it can be recalled from the discussion in chapter 1, are substantial. Litigation privilege does not merely deny a litigant the chance to see the card in the opponent's hand before they play it, to use Lord Wilberforce's phrase. Rather, they may never see the card at all because the opponent can choose whether to adduce the evidence, or maintain a claim for privilege. Of course the evidence of the third party is still compellable, but it may be lost to the adjudicative process for a number of reasons: i) an opponent is unaware of the third party's identity or that they have relevant evidence to give; ii) an opponent cannot afford to obtain the witness' evidence because there would be significant expenses in locating, and travelling to take a statement from them. Or where the potential witness does not co-operate voluntarily, they cannot afford to meet the witness' expenses in giving evidence and thus cannot comply with the requirements of issuing a witness summons under CPR34.7 iii) the witness is no longer available, or can no longer give reliable evidence due to the passage of time. Secondly, privilege over third party communications allows a litigant to shop for favourable evidence, or to continue the analogy, a litigant can keep buying more cards, and discard unfavourable ones, until it believes it has a winning hand. This exercise increases the costs of litigation and is of questionable value to the adjudicative process.

In light of the substantial costs of privilege over third party communications, and its marginal benefits, it is not surprising that Lord Scott stated in *Three Rivers No 6* that

the scope of litigation privilege warranted re-examination. In the next section we look at some attempts by courts to limit the scope of privilege over third party communications.

4.1.3 Reforms to LPP regarding third party communications

The two most notable judge led reforms of litigation privilege in recent years are the decisions of the House of Lords in *Re L* and the Supreme Court of Canada in *Blank v Canada.*[26] In the former their Lordships limited the types of proceedings to which litigation privilege applied, while in the latter, the Supreme Court limited the lifespan of the privilege. While the courts' concern to limit the loss of evidence contained in third party communications is laudable, the methods both courts use to achieve this objective are not without difficulty.

The logic of the decision in *Blank* is hard to fault. If the purpose of litigation privilege is to provide a private and secure sphere in which a litigant can prepare for *pending or anticipated litigation*, there seems little reason to continue to exempt the information from disclosure once the litigation is at an end. The real difficulty emerges when applying the rule in practice. The problem, as the Supreme Court itself noted, is defining the litigation in issue, and when it ends.

[26]*Re L (a minor)* (n 1); *Blank v Canada* [2006] 2 SCR 319, 2006 SCC 39 (Supreme Court of Canada) (n 1).

Justice Fish stated that the function of litigation privilege is to protect the efficacy of the adversarial process.[27] But many legal disputes are not neatly packaged into one legal proceeding between two adversaries. Although regrettable, it is not uncommon for legal disputes between the same or related parties to be waged over several cases, each involving different claims and counter claims. Often some of the claims are not even concerned with the underlying legal dispute, but events that took place during the litigation itself. The litigation over Iraq's seizure of Kuwaiti aircraft in the lead up to the first Gulf War is one example. The Blank litigaton is another. The Blank 'saga', as Fish J described it, began in 1995 when the Crown laid charges alleging breach of reporting requirements, and alleged pollution of the red river, against a company of which Blank was a director, Blank and Gateways Industry Limited. The charges relating to reporting requirements were quashed in 1997 and pollution charges were quashed in 2001. In 2002, the Crown laid new charges by way of indictment, and stayed them prior to trial. Blank and Gateway then sued the federal government in damages for fraud, conspiracy, perjury and abuse of its prosecutorial powers. Blank made repeated attempts to obtain documents from the government. He made requests in the penal proceedings and under Freedom of Information legislation, but these were denied by the government on various grounds including legal professional privilege. It was the application for production under Freedom of Information legislation that eventually found its way to the Supreme Court.[28]

[27] *Blank v Canada* (n 1) [27].

[28] *Blank v Canada* (n 1) [12]-[14].

There are also cases where there are numerous, even thousands of adversaries. They may not be known when one prospective litigant communicates with a third party in anticipation of litigation, and they may not even have a cause of action at the time the evidence is obtained. This is common in mass tort cases where there is a long latency period between exposure to a toxic substance and the onset of injuries.

In *Blank* the Supreme Court effectively decided that in defining litigation it was appropriate to err on the side of protection of third party communications rather than disclosure. Fish J, who delivered the majority's reasons, stated:

> Litigation is not over until it is over: it cannot be said to have terminated… where litigants or related parties remain locked in what is essentially the same legal combat. [Litigation] includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or 'juridical source'). Proceedings that raise issues common to the initial action share its essential purpose would in my view qualify as well.[29]

This definition, the judge noted, would include litigation arising out of mass harms where the parties were different, and the specifics of each claim were different, but there were common underlying liability issues. Using this definition, British American Tobacco's 'Buerger disease' memo discussed in Chapter 1 and any information on Buerger's disease collected by BAT, would qualify for privilege in any claim where the relationship between smoking and Buerger's disease was a fact in issue. Indeed BAT could reasonably argue that they collected information on Buerger's

[29]Ibid [34], [39].

disease for the purpose of preparing for any litigation brought by any person that allege a causal relationship between smoking and the disease. It was not obtained to defend litigation against Jane or John Doe, and BAT probably did not know the names of potential litigants suffering from Buerger's disease, when they obtained the evidence. The logical end point of Fish J's broad definition of litigation is that information obtained by the prospective litigant could remain permanently privileged for the purposes of any litigation in which the information may be relevant. When litigation is defined so broadly it is hard to envisage cases where a document covered by litigation privilege would not continue to be privileged for the purposes of any subsequent litigation. If the litigation does not arise from the same juridical source, or involve common liability issues, it is unlikely to be relevant to the proceeding in which production is sought.

The decision in Blank could possibly be distinguished on the grounds that Blank's application for documents was under Freedom of Information legislation[30], rather than an application for production in the course of litigation. Fish J acknowledged that there may be situations where the government may have to disclose information under freedom of information legislation, even if the information may still have qualified for privilege in subsequent litigation under the court's broad definition of litigation.[31] However in Blank's case, his civil claim was still pending. One of the reasons that Blank undoubtedly wanted the documents, if not at the time he made the

[30]Access to Information Act, RSC 1985.

[31]*Blank v Canada* (n 1) [53].

application then by the time he commenced civil proceedings, was to further his civil claim against the crown.

On the other hand, if litigation is defined too narrowly, the Canadian approach could work an injustice if we assume that the rationale for litigation privilege over third party communications is sound. How can the Supreme Court so confidently assert that a civil claim based on the way criminal proceedings were prosecuted is not the same litigation 'defined broadly'? Fish J emphasised that the civil and penal proceedings did not share the same juridical source.[32] It is doubtful whether this is a helpful distinction. Many counter claims in litigation do not involve the same juridical source, although the facts to which they relate are similar if not identical. For example, in a claim for payment of a debt the defendant may counter claim for negligence as the reason for withholding payment. Or a claim for unfair dismissal might be met with a counter claim for breach of confidence. Should privileged communications prepared for one of these claims be compellable in the other? Would it make any difference if the claims were brought in separate proceedings? The solution adopted by the Supreme Court of Canada could be criticised as being illusory if litigation is defined too broadly, and unjust if it is defined too narrowly, and it seems difficult to apply it to any particular case in a way that avoids both results.

Perhaps the better way of resolving *Blank* would be to rely on the crime fraud exception defined broadly as outlined in chapter 1. Fish J observed that 'The litigation

[32] Ibid [43].

privilege would not…protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. It is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day.'[33]

In *Re L* the House of Lords also honed in on the relationship between litigation privilege and the 'adversarial' process, as the reason for restricting its scope. However in Re L the court was not concerned with deciding when the privilege came to an end, but whether the privilege ever covered third party communications in connection with proceedings which were not adversarial. The case was a family law proceeding. A child, L, was admitted to hospital in an unconscious state having consumed a quantity of methadone. The local authority obtained an emergency protection order from the magistrates' court, and then instituted care proceedings in the county court under section 31 of the Children Act 1989. In those proceedings, the mother claimed L had accidentally drunk the methadone, and obtained an expert report from a chemical pathologist as to whether L's medical condition when admitted to hospital was consistent with her account of events. While attending a case conference, the police learned of the existence of the report, and sought its disclosure for the purposes of investigating criminal offences. The Judge ordered its disclosure.

On appeal the House of Lords considered, inter alia, whether the expert's report was protected by legal professional privilege. The court ruled by a 3 to 2 majority that the report was not privileged. A critical factor in the majority's decision was their

[33]*Blank v Canada* (n 1) [44].

conclusion that care proceedings were essentially 'non adversarial.' Section 1(1) of the Children Act stated that when a court determines any question with respect to the upbringing of a child the child's welfare shall be the paramount consideration. Accordingly the aim of care proceedings was to ascertain what was in the best interests of the child rather than determine the rights of opposing litigants.

The next step in the majority's reasoning is not so clear. First, Lord Jauncey held that because care proceedings were essentially non-adversarial, and that litigation privilege was essentially a creature of adversarial proceedings, it was a matter for the House to decide whether litigation privilege should apply to care proceedings. He concluded that it did not. But Lord Jauncey went on to state that litigation privilege was excluded by necessary implication from the terms and overall purpose of the Act. Looking to the applicable statute to determine whether it has expressly or by necessary implication abrogated or restricted privilege is consistent with previous authority[34], although the minority strenuously disagreed that the Children Act intended to abrogate legal professional privilege. Yet the idea that litigation privilege does not apply to care proceedings because they were not adversarial is controversial. And if the court did reach this conclusion, it is respectfully submitted they erred in doing so.

In a strong dissenting judgment Lord Nicholls argued that attaching the labels of inquisitorial or adversarial to proceedings throws no light on the question of whether litigation privilege ought to be available to a person who is a party to the proceedings.

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[34] *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 .

He stated the question is not whether the proceedings are adversarial or inquisitorial, but what is required if the proceedings are to be conducted fairly.[35] If we return to first principles, it is hard to see why the rationale for litigation privilege would not apply equally to *all* legal proceedings, whether adversarial or inquisitorial. The privilege provides a private and secure sphere in which parties can adequately prepare their case, without fear that this preparation will not be disclosed to their prejudice. The mistake made by the majority is the assumption that privilege over third party communications is an aid to the 'adversarial contest.' If there is no opponent, but merely interested parties who are responsible for the welfare of a child, then presumably there is no need for rules preventing one party from seeing the cards in another party's hand. Family law proceedings are conducted in this spirit. In granting permission to L's mother to disclose court papers to the expert for the purposes of obtaining a report under rule 4.23, the Judge ordered that the identity of the expert be disclosed, and his or her report to be filed – and thus could be inspected by all other parties.

However the potential chilling effect of compulsory disclosure of one's case preparation is not in any way lessened if the other parties are not 'opponents', formally or otherwise. The chilling effect of compulsory disclosure is not limited to a fear that other parties will see the material, but extends to what they may *do* with it, and most importantly of all, whether *the court* will take it into account in reaching its decision. Quite obviously, legal proceeding described as inquisitorial or investigative can have

[35] *Re L (a minor) (Police Investigation: Privilege)* (n 1) 32.

just as much impact on a party's legal rights and obligations as a proceeding described as adversarial. As Lord Nicholls stated:

> A father who is alleged to have sexually abused his stepdaughter…can hardly be blamed if he regards (child care) proceedings as no less confrontational and adversarial than other civil proceedings.[36]

Lord Nicholls acknowledged that the requirements of fairness can vary widely from one type of proceeding to another, and depend on such matters as the nature of the proceedings, the subject matter being considered, the rules governing the conduct of the proceedings, the parties involved, the composition of the tribunal, and the consequences of the decision. However, some aspects of the right to fair trial are a prerequisite for any hearing that determines a person's civil rights and obligations or criminal culpability. Prior to *Re L* it was assumed that litigation privilege was one of these prerequisites. Re L was decided before Art 6 of the ECHR was incorporated in English domestic law via the Human Rights Act 1998, though Lord Nicholls raised the possibility that the unavailability of the privilege might deny a parent a fair hearing contrary to Art 6. In defence of the majority in *Re L*, their judgment was limited to third party communications, and it is far from clear that the private and secure sphere guaranteed by art 6 should cover third party communications.

[36] *Re L (a minor) (Police Investigation: Privilege)* (n 1) [31].

While limiting the scope of litigation privilege over third party communications may be laudable and defensible, those restrictions should not be based solely on the fact that proceedings in English courts are less adversarial than they were previously.

The distinction between adversarial and inquisitorial proceedings is unhelpful in the present context. Most legal proceedings in both common law and civil law courts contain a mixture of rules that could be described as having 'inquisitorial' or 'adversarial' features. The English legal system has moved away from the traditional adversarial model where the parties control virtually all aspects of their dispute, and the court merely decides the dispute put it to by the parties when called on to do so. The CPR reforms recognised that a high degree of pro-active case management by the court, and co-operation between the parties and the court, is needed if the court is to deal with cases justly. On the other hand, even in systems traditionally defined as inquisitorial, the ECtHR has recognised that a core component of the right to fair trial is that proceedings are 'adversarial,' in the sense that the parties have a right to see the evidence and arguments put against them and have an opportunity to respond.[37]

Despite the potential difficulties in the majority's reasoning in *Re L* the same result could have been achieved in other ways. First, the decision in *Re L* could have been justified, as Zuckerman argues, by recognizing that litigation privilege may be curtailed in the interests of child welfare.[38] This would be compatible with the

[37]*Ruiz-Mateos v Spain* 16 EHRR 505 (ECtHR) [63] relative to proceedings before the Constitutional Court.

[38]Zuckerman (n 3) [15.113].

requirements of Art 8, which allows restrictions for a legitimate aim or public interest, provided that the curtailment is reasonably proportionate to such aim or interest. But the right to fair trial under art 6 is not qualified,[39] so we cannot avoid confronting the question whether the right to adequately prepare for litigation includes a right to communicate with third parties in confidence.

Unfortunately there is no ECtHR case law on point, but it is submitted the question ought to be answered in the negative. The process of collecting evidence from third parties could be viewed as part of a litigant's case preparation, and such preparation should not be intruded on without good reason. This is a fair argument, but it should not be overstated given the nature of the 'preparation' in issue. Third party communications do not disclose the draft proofs of a litigant's own evidence, or the mental impressions of lawyers about the case, or draft legal or factual submissions. They contain the evidence of third parties voluntarily given to one of the litigants. This evidence is not confidential and it remains compellable at trial. Third party communications may also provide insights into the legal strategy of the parties, but where the rules have deliberately shunned the idea of litigation as a game, the disclosure of such insights could actually be considered a benefit to the litigation process for the same reasons that the early exchange of witness statements is considered to improve the process. While Member States might choose to protect third party communications, it is submitted it is not a requirement of Art 6.

[39]Though the right, by its very nature, calls for regulation by the state and is therefore limited by rules: *Golder v UK* (1979–80) 1 EHRR 524 [38].

To conclude this part of our discussion, the case for protecting third party communications from disclosure is weak. The attempts by the courts in the UK and Canada to restrict the scope of the privilege are not without difficulty. Another possible reform not discussed here would be to qualify the privilege over third party communications so that the party seeking disclosure could inspect the material if they could show they had a substantial need for the material in order to prepare their case, and its substantial equivalent could not be obtained by other means without undue hardship. This is the rule for third party communications in the United States, under the attorney work product doctrine.[40] While qualifying the privilege would be an improvement on the current position, because the benefits of a privilege over third party communications are negligible and its costs are substantial, a qualified privilege may be an unnecessary compromise which leads to costly satellite litigation. The optimal solution would be to abolish privilege over third party communications altogether. If the privilege were abolished the court should have a discretionary power to order litigants who request copies of their opponent's research, to make an equitable contribution to the cost of its production.

4.1.4 Documents

There is doubt about the scope of the privilege covering documents collected or copied for the purposes of litigation. The general rule as expounded by the Court of Appeal in *Ventouris v Mountain* appears to be that a pre-existing document does not become privileged merely because it is obtained by a party in connection with

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

litigation. Nor will a document that is not privileged when a party receives it, become privileged because a solicitor makes a copy for litigious purposes.[41] However, there are exceptions to this rule. Where a non-privileged document which does not belong to the client is copied for the purposes of preparing for litigation, the copy is privileged from disclosure even if the original would not be if the party had the original. This exception is based on a half page judgment of the Court of Appeal in *The Palermo* in 1883.[42] Some commentators suggest there is another exception based on a decision of the Court of Appeal in the following year, *Lyell v Kennedy*, to the effect that where a legal adviser *copies* or *assembles* unprivileged documents in connection with litigation the copies or documents assembled are privileged if their disclosure would betray the trend of advice given to a client or the lawyer's litigation strategy. [43] The editors of *Phipson on Evidence* claim that the rule in *Lyell v Kennedy* is broader than that in the *Palermo* because it applies to originals, and not just the making of copies. [44] Whether this exception is one or two separate rules, the cases are not easy to reconcile with *Ventouris v Mountain*. And all agree that the rules on privilege over copies and original documents obtained in connection with litigation are confusing, liable to encourage technical disputes[45] and as Bingham LJ put it, 'ripe for authoritative consideration.'[46] The origins of the rules were formulated at a time when there were radically different culture of recording, storing and reproducing

[41]*The Italia Express* (n 2).

[42]*The Palermo* (1883) 9 PD 6.

[43] *Lyell v Kennedy* [1881–5] All ER Rep 814.

[44] Malek (ed) (n 4) [23.47] cf A Zuckerman (n 3) [15.72] who argues that the cases stand for the same proposition: copies are privileged if made in connection with litigation.

[45]Or a game played for the benefit of lawyers: *Lubrizol Corp v Esso Corp* [1992] 1 WLR 957.

[46]*The Italia Express* (n 2) 617.

documentary evidence, long before photocopiers and computers revolutionised these activities and blurred the distinction between copies and originals.[47] In the 21st century the guiding principle on this issue should be to ensure that all relevant non-privileged documentary evidence is available to the court, and the court can properly assess its weight.

The traditional case for extending privilege to documents obtained for the purposes of litigation is the same as the case for privilege over third party communications: that each party is solely entitled to the fruits of her own case preparation. As Cotton LJ said in *Lyell v Kennedy*, the very fact of the solicitor having collected or copied certain documents 'might shew what his view was as to the case of his client.'[48] A party should not be entitled to such insights into their opponent's views of the case or their strategy.

Similarly, all the arguments against attaching privilege to third party communications apply equally to the collection of documents in anticipation of litigation. In discussing documents it is important to distinguish between material that is obtained from public sources, and documentary information held in a party's own files. In *Sumitomo Corpn v Credit Lyonnais Rouse Ltd* the Court of Appeal held that the rule in *Lyell v Kennedy* did not apply to documents copied or selected by the

[47]C Hollander, *Documentary Evidence* (8th edn Sweet & Maxwell, London 2003) 206.

[48]*Lyell v Kennedy* , 26, [1881–5] All ER Rep 814 at 825. This passage was cited by Bray in his influential treatise on discovery: E Bray, *Principles and Practice of Discovery* (Vol 2 1885) 392.

lawyer which were the client's own documents. [49] Therefore the rule only applied to public documents which were copied or selected by a lawyer in preparing for litigation.

But it still must be questioned whether this narrower version of the rule serves a useful purpose. Disclosure of the information may reveal a party's legal strategy, but where a party must serve all the evidence on which they intend to rely at trial in advance, this strategy would be revealed sooner rather than later anyway. The editors of *Phipson on Evidence* argue that keeping a lawyer's thinking or strategy secret could hardly justify exempting the information from the adjudicative process altogether, which is possible if the lawyer has collected originals.[50] It would also be true if the documents collected are no longer available in the public domain. Furthermore, if what is in issue a dispute is whether a party knew of the information, then a party should not be able to hide behind the privilege to deny it had the information in its possession.

Finally, the rule governing documents copied or collected for litigation is difficult to reform in a way that would reduce its costs without also defeating the purpose of the rule. At the very least, the rules in the *Palermo* and *Lyell v Kennedy* should be modified so that privilege attaches to a document only if the original or another copy is still available and can be adduced in evidence. It has already been held

[49]*Sumitomo Corporation v Credit Lyonnais Rouse Ltd* [2001] EWCA Civ 1152 .

[50]*Malek (ed)* (n 4) [23-49].

that the rule in *The Palermo* does not apply where the litigant formerly had, but does not now have, the unprivileged original in his possession, for the copy is merely a replacement he was bound to produce anyway. [51]

To give effect to this change, a party claiming privilege would need to disclose the basic particulars of the documents copied or selected by the lawyer, so that an opponent can check whether the originals or other copies have been disclosed by the client or are publicly available. If they have not been disclosed, or otherwise not available, then the court should order their disclosure. However in disclosing that their lawyer copied or selected the documents, the litigant would also disclose any strategy which is apparent from the choice of documents copied or selected. The law can either ensure the documentary evidence is available, or keep secret a party's strategy in selecting the documents, but it cannot do both. Faced with this choice and the limited value of the benefit at stake, the law should choose to ensure the evidence is available. As we saw earlier in this chapter, there are no longer any convincing arguments in favour of protecting a party's litigation strategy now that it is generally accepted that litigation should be conducted as transparently as possible; with the parties' cards on the table, face up. Accordingly the privilege for documents copied or collected in connection with litigation, whether from a client's own files or from public sources, should be abolished.

[51] *Dubai Bank v Galadari* 1990 1 Ch 98 (CA).

4.2 When will a document or communication qualify for litigation privilege?

Having identified the types of communications or documents that may qualify for litigation privilege, we now need to identify *when* they will qualify for litigation privilege (recognizing that some material might also qualify for legal advice privilege). There are two main preconditions for a valid claim to privilege: whether a document or communication has the requisite connection with litigation and whether it was made for the requisite legal purpose. Each will be dealt with in turn.

4.2.1 The connection with litigation

If the law offers protection to third party communications made in connection with litigation, while limiting legal advice privilege to lawyer-client communications, it is critical to define what is meant by 'connection with litigation.' Resolving this issue is not simply a matter of examining whether a communication was made for the purposes of litigation. The law must also decide what constitutes litigation and, if protection is to be offered to communications made in anticipation of litigation, how likely litigation must be before the privilege will apply.

We have already addressed the definition of litigation in our discussion of the House of Lords judgment in *Re L*. Litigation cannot be confined to 'adversarial proceedings' , but must as a matter of fairness extend to any process in which a person's

legal rights, or obligations, or legal culpability, is determined. This process may be in a court, or a specialist tribunal, or even a determination by minister of state as to a person's legal rights.[52]

As to how far back in time the privilege should extend before litigation begins, it must be acknowledged that a claimant's case preparation necessarily includes *preparing to commence* proceedings. For defendants who have notice of a potential legal dispute their preparation invariably includes preparing to defend possible proceedings. Hence if litigation privilege is needed to protect a party's case preparation, the protection cannot only cover materials brought into existence after litigation starts. But it is harder to say how far back in time the protection of litigation privilege should extend, when there is always a possibility, however remote, that people may end up in litigation. At a subjective level, some people are absolutely convinced they will be sued or prosecuted but never are, and were never likely to be.

One thing is clear: the likelihood of litigation must be decided objectively for otherwise the paranoid would enjoy much greater protection from disclosure than the optimistic or naive. Anticipation of litigation must be reasonable. Nevertheless, it is impossible to eliminate the effect of subjectivity altogether on the degree of protection afforded by litigation privilege. If a person does not consult a lawyer or third party in order to prepare for litigation, but merely for the purposes of fact finding or to review

[52]For example, the Home Office makes decisions on matters relating to immigration and asylum and appeals from these decisions are heard by a Tribunal known as the First-tier Tribunal Immigration and Asylum Chamber pursuant to the Tribunals, Courts and Enforcement Act 2007.

their own practices and procedures for example, the communication will not satisfy the requisite legal purpose even if litigation was imminent.

The question of how likely litigation needs to be before privilege will attach to third party communications is extremely important in the case of corporations. Corporations that operate in industries known to cause harm to the environment and human beings, could conceivably cloak vast areas of their operations under the cloak of privilege, if they conduct those activities expressly on the basis of preparing for litigation. Corporations which operate in industries that give rise to regular litigation, have an even greater ability to keep vast areas of their operations secret. Yet it is precisely in such contexts that one could argue that an effective law enforcement process requires a high degree of disclosure and transparency.

To avoid a blanket of secrecy descending over companies' operations in areas where what they do really matters to people and the environment, the meaning of anticipated litigation needs to be carefully defined by the courts, and kept within reasonable limits. The current position is that for the privilege to come into play there must be a definite prospect of litigation in contemplation by the client, and not a vague anticipation of it.[53] What this means was examined by the Court of Appeal in *USA v Philip Morris Inc*, which involved a field of law – tobacco litigation – where proceedings are virtually constant. [54] The Court conceded a precise answer was difficult,

[53]*Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1972] 2 QB 102 (CA) 130.

[54]*USA v Philip Morris Inc* [2004] EWCA Civ 330, [2004] 1 CLC 811 .

but indicated litigation will only be reasonably anticipated if it is more than a mere possibility. On the other hand, the possibility of litigation does not need to exceed 50%.[55]

It is submitted that the Court of Appeal's position in *USA v Philip Morris* is too lax. Interestingly, the tobacco industry urges upon the courts a dramatically tighter definition of 'anticipated litigation' when it comes to the thorny issue of what legal consequences can follow if a company destroys its documents when litigation is anticipated but no proceedings are extant. On this score, British American Tobacco has argued that anticipation should be confined to cases where the actual identity of a prospective litigant is made known by way of letter of demand.[56] It is difficult to see why the meaning of 'anticipated' should be different for these two rules. One is designed to ensure that evidence which is potentially relevant to anticipated litigation will be available in the litigation; the other is designed to allow parties to adequately prepare for the litigation.

The tighter definition of anticipated offered by British American Tobacco would provide too little protection for persons preparing for litigation. Even were litigation virtually certain, if the identity of the eventual litigant or litigants were not known, or if known they had not communicated to the putative defendant their legal demands, then the privilege would not apply. In the case where this strict test was urged on the Court, the Judge asked counsel for the defendant that if his client was Union

[55]Ibid [68].

[56]*McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73 (22 March 2002) [282].

Carbide, would it be possible to say that litigation is not reasonably anticipated after the explosion at Bhopal, when it knew that US trial lawyers are flying in to interview survivors, but didn't know the names of the dead or injured and no one had threatened litigation? [57]

This strict test is also defendant centric and difficult to apply to claimants. In many cases claimants will form the view that their legal rights were breached, or they have rights which can be asserted, long before they communicate with a putative defendant or even before they have ascertained the identity of a defendant they may have a claim against.

In the past some judges have suggested that the degree of anticipation required should be higher than where the Court of Appeal has currently set the bar. In the 1893 case of *Collins v London General Omnibus Co* Wills J postulated circumstances such that 'no reasonable person could doubt that an action would follow' while Charles J defined reasonable apprehension of litigation as 'when there is a high probability, amounting to certainty action will ensue.'[58] In *US v Philip Morris* the trial judge referred to a 'real likelihood of litigation'. While Brooke LJ used the terminology 'reasonable prospect' instead, he found that the trial judge had not misdirected himself when he used the words 'real likelihood' of litigation when the judgment was read as a whole.

[57]Ibid Transcript of hearing 25 February 2002.

[58]*Collins v London General Omnibus Co* (1893) 68 LT NS 831 .

All of these tests represent points on a spectrum with greater or lesser clarity. All the tests are liable to criticism from those who would prefer a different form of words or a different point on the spectrum. In the author's view, litigation can be reasonably anticipated when it is more likely than not to follow. This test would allow putative litigants the opportunity to make inquiries to ascertain their legal position and prepare for litigation, whilst minimizing the amount of evidence lost to the privilege. This will not stop the privilege cloak descending over the operations of companies involved in near constant litigation, but the risk of this happening will be reduced by abrogating the privilege over third party communications. We are also still to consider the level of protection of the corporate privilege, so there may be other ways of limiting the cloak of secrecy over materials generated or obtained by companies to defend future litigation including qualifying the corporate privilege.

4.2.2 The requisite legal purpose

For a document or communication to qualify for privilege it must be made for a legal purpose, otherwise the privilege would allow clients to permanently avoid the disclosure of sensitive information merely by sending it to a lawyer. The purpose test is needed for both the litigation and the advice limbs of privilege. The key question is how significant the legal purpose of a document or communication should be for it to qualify for privilege.

There are four main tests that could be utilised, although it is possible to formulate variations for each of them:

I. The document or communication must have been made in the course of consulting a lawyer providing professional legal services.

This is the most liberal test. It requires only that there be some causal nexus between the document or communication and the legal service being provided and confers broad protection from disclosure. The test is widely used in the United States. However, because lawyers are increasingly providing an array of non-legal services, to adopt this test would be effectively to detach the privilege from its rationale of facilitating access to legal advice and assistance.

II. The document/communication must have been made for *a* legal purpose

This was the rule in England & Wales before the dominant purpose test was adopted by the House of Lords in *Waugh v British Railways Board.* The chief criticism of the 'a purpose' test was that it provided too much protection from disclosure, by covering non-legal information that would have been compellable but for the fact it was contained in a communication that also had a legal purpose. Under this test there was considerable scope for corporations to conceal sensitive non-legal information by incorporating it in a communication to the company lawyer, seeking advice or assistance.

III. The document/communication must be made for the dominant purpose of obtaining or providing legal advice.

This is the current test in England & Wales, most other jurisdictions in the Commonwealth, and for EU community law. The reason for its widespread acceptance is that it is expressly designed to limit the loss of non-legal information to the privilege rule on the one hand, whilst not undermining the purpose of the privilege on the other hand. Whether the dominant purpose test actually achieves its intended use was discussed in chapter one, and will not be repeated here.

IV. The document must be made for the sole purpose of obtaining or providing legal advice.

This is the strictest test that can be adopted. In the words of one American commentator, it implements Wigmore's instrumental rationale for privilege 'with a vengeance'.[59] The rationale for the sole purposes test is twofold. First, where a communication has multiple purposes, only one of which is a legal one, no privilege is needed to facilitate the communication because the client would still have made the communication to pursue his non-legal purposes. Second, there is no reason in principle for protecting from disclosure communications that have non-legal purposes.

[59] E Imwinkelreid, *The New Wigmore: A Treatise on Evidence* (Aspen Law & Business, New York 2002) 828.

The sole purpose test was adopted by the High Court of Australia in 1976. In 1999 in *Esso v Federal Commissioner of Taxation*[60] the same court adopted the dominant purpose test instead, on the grounds that the sole purpose test was too narrow, and had 'altered the balance…to the other extreme' of disclosure of corporate communications to the detriment of protecting confidential communications between corporations and their lawyers.[61] The Court stated:

> If it is to be taken literally, one other purpose in addition to the legal purpose, regardless of how relatively unimportant it may be, and even though, without the legal purpose, the document would never have come into existence, will defeat the privilege.[62]

The inference is that the sole purpose test works an injustice to parties who make a communication with a dual purpose, where the non-legal purpose is merely incidental to the legal purpose. In such cases, the client is forced to disclose the contents of the communication even though the bulk of it is dedicated to obtaining legal advice, or preparing for litigation, and such information should ordinarily be exempt from disclosure.

On its face this is a powerful argument. But what it overlooks is that lawyer-client communications do not take place in a vacuum: they occur against the backdrop of the rules of compulsory disclosure, and the content of the privilege rule itself. In a jurisdiction that adopts a sole purpose test, clients who are anxious about the possible

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[60] [1999] HCA 67, 201 CLR 49.

[61] *Esso v Federal Commissioner of Taxation* (1999) 201 CLR 49 (HCA) [73]. The dominant purpose test has prevailed in England & Wales since *Waugh v British Railways Board* (n 11).

[62] Ibid [58].

disclosure of what they tell their lawyer will no doubt ensure that all such communications are made solely for the purpose of obtaining legal advice or preparing for litigation.

Moving from a dominant purpose test to a sole purpose test will not 'trap' a well informed client: it merely alters their legitimate expectations as to what information is immune from disclosure, and accordingly it will alter the way in which they communicate with their lawyer. The information which needs protection – the legal purpose regarding advice or litigation – would continue to be protected from disclosure, because virtually all lawyer-client communications would be made exclusively for legal purposes.

But what then is the position or fate of the uninformed client? Could they be caught out by the sole purpose test because they are unaware that even a trivial non-legal purpose could defeat the privilege? This risk is more apparent than real for a simple reason. The client who is unaware of the privilege rule is not likely to be concerned about the risk of disclosure. Clients ordinarily acquire their knowledge of the privilege rule *from* their lawyer in the initial consultation before any disclosures have been made. This is particularly important for the client who may be anxious about the risk of disclosure of her communications. The lawyer can reassure her client that what she tells her is immune from compulsory disclosure provided her sole purpose is to obtain legal advice or prepare for litigation. The client will then tailor her communications accordingly.

On the other hand, the client who decides to communicate with her lawyer for a dual purpose, without first checking whether it is immune from disclosure, is unlikely to be concerned about the risk of compulsory disclosure of that information. In addition, adopting a sole purpose test would not make any difference to a client's decision as to whether to consult a lawyer *to get legal advice or assistance*. Instead the sole purpose test would influence a client's decision about any *other purposes for which they consult a lawyer*.

It is submitted that a sole purpose test would not inhibit clients acting in good faith from consulting a lawyer or being fully frank in their communications. The test would provide adequate protection for the client who wishes to ascertain their legal rights and obligations or requires a secure sphere in which to prepare for litigation. It is important to distinguish here between non-legal purposes and non-legal information. Clients are still able to submit non-legal information to their lawyers for advice. The role of the lawyer is to provide advice on the client's affairs, whatever they may be. It is not the lawyer's role to provide marketing advice to the client, for example, but rather to advise the client on the legal implications of their marketing strategies and/or what the relevant regulatory regime permits and prohibits.

An advantage of the sole purpose test is that it makes it more difficult for a client to deliberately conceal information from disclosure. This is because, if the communication is to pass the sole purpose test, the information it contains is likely to

exist in another form which remains compellable. Take, for example, an internal investigation by a company as to whether its employees committed any regulatory breaches. Were the only details about what happened – what the employees know or did or did not do – contained in the request for legal advice, the communication would not satisfy the sole purpose test. Rather the communication would have a dual purpose: first, the business purpose of corporate management acquiring information held by its employees as to what happened; and, second, the legal purpose of obtaining advice about the legal implications of this information. Whether such a communication could pass the dominant purpose test is a difficult question, and will often require not only an examination of the communication itself but of all the surrounding circumstances, including the state of mind of the corporate agent/s who authorised the communication. By contrast, when applying the sole purpose test the answer is straightforward.

The proposition that privilege should apply only to lawyers solely providing legal services might appear inconsistent with the vision of a more deregulated and integrated legal services market, long advocated by competition authorities, and brought into effect by the Legal Services Act 2007. As outlined in chapter 1, the Act will allow businesses to provide legal services to their customers and lawyers to go into businesses with other professionals. The idea is that the client can use a one stop shop to obtain, for example, both marketing advice and legal advice about its marketing strategies; or, as the Ministry of Justice puts it, 'integrated legal and other professional services'.[63]

[63] Facilitating the provision of these services is one of the purposes of the Act: Ministry of Justice 'Legal Services Reform Fact Sheet: Alternative Business Structures' 9 June 2008 http://www.justice.gov.uk/publications/abs-fact-sheet.htm (last visited 20 October 2009).

The first thing to be said about this new landscape for legal services is that adopting a sole purpose test for LPP would not prevent clients from using one stop shops. Clients, of course, would be free to obtain integrated legal and professional services: the question is whether communications provided to a multi-disciplinary partnership for the purposes of obtaining integrated legal services should be immune from compulsory disclosure. In chapter I, it was argued that applying the dominant purpose test to communications regarding integrated legal services would be very difficult to apply in practice. There is a real risk that the amount of evidence lost to the privilege would increase significantly.

A strength of the sole purpose test is that because it is a "bright line" rule, it is normally easier to apply in practice. Once it is clear that a communication contains a non-legal purpose the inquiry is complete. For clients using one stop shops, if their needs include legal advice they must structure their communications in such a way that the request for legal advice and the instructions regarding same are quarantined from any communications prepared for the purposes of obtaining non-legal services. This may make the one stop shop service slightly less 'seamless', and will also require corporations to split their communications. This is a cost of the sole purpose test, but it is a small price to pay for the privilege of being able to avoid compulsory disclosure of communications seeking or obtaining legal assistance.

However the sole purpose test has weaknesses. A sole purpose test for privilege may not cover a category of communications where there is a real risk of chilled

candour in lawyer-client communications without a promise of confidentiality: namely, communications between corporate counsel and corporate employees as part of internal investigations into things done by employees in the course of their employment (or office) that could make both the corporation and the employee liable.

In *Grant v Downs* Mason, Stephen and Murphy JJ stated that the process of management ascertaining what its agents did, or knew, or witnessed as part of an internal investigation, is primarily a business purpose, not a legal one, even if that information is intended to be passed on to the company's lawyers for advice. [64] That may be true, but it is also arguable that company employees who are interviewed as part of the internal investigation, need an assurance that communicating with corporate counsel about the company's affairs will not adversely affect their own legal position if they were involved in or responsible for those affairs.

The dilemma facing individual employees in this situation is not solely a product of the purpose test. The corporate privilege belongs to the entity, not the employee. Thus there is a risk that the employee's communication could be disclosed without their consent. In addition, there is nothing to stop company managers ordering their employees to communicate directly to senior management or corporate counsel about any matters related to their employment. The privilege cannot protect an employee who is put under the pump by company management. This is obviously a complex issue. There is a full discussion of the effect of LPP on the behaviour of corporate agents in

[64] *Grant v Downs* (1976) 135 CLR 674 (HCA) 677.

the next two chapters (on legal advice privilege), including ways of maintaining an open dialogue between employees and corporate managers in the context of internal investigations, with or without a corporate privilege.

Subject to adequately addressing the potential chilling effect on corporate agents, or at least not worsening the position of corporate agents, it is submitted that law makers should adopt the sole purpose test in preference to the dominant purpose test. Because it is easier to apply in practice, more effective in limiting the amount of evidence that is lost to the privilege, and still ensures that clients are able to communicate in confidence with their lawyers for the purposes of preparing for litigation or obtaining legal assistance, one might readily conclude that it is the best purpose test available.

4.3 The nature of protection afforded by litigation privilege

Our final task in this chapter is to consider the nature of the protection provided by litigation privilege. What type of protection should the documents and communications that qualify for privilege receive in the case of individuals and corporations? The position of individuals and corporations will be dealt with separately.

4.3.1 Making the confidential sphere secure for individuals

The rationale for litigation privilege – that it is necessary to provide litigants with a private and secure sphere in which they can adequately prepare for litigation – arguably tells us exactly what type of protection litigation privilege should provide. If a person is

told they can speak freely to their lawyer in preparing for litigation, and that their communications will not be open to scrutiny, the privilege must provide both a *private and secure* sphere.

Under the current law, the privilege provides a right to resist compulsory *disclosure*. Therefore the privilege protects only the privacy of a communication or document, as opposed to its use if it is disclosed. However, the law cannot guarantee privacy as a matter of fact. There is always a risk that privileged information will be inadvertently disclosed or disclosed without the client's consent. Hence, the law of privilege must also protect communications that have escaped the confidential sphere, and yet the protection it affords the privilege holder in such circumstances is surprisingly weak.

A party who inadvertently discloses a document during the disclosure process in civil litigation receives some protection under the CPR. CPR 31.20 states that where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the permission of the court. The first time the Court of Appeal considered this rule, in *Al Fayed*, it held that whether it granted permission to use privileged material was a matter for its discretion.[65] In exercising its discretion the court should have regard to the existing case law on when a court will restrain the use of material which has been inadvertently disclosed or disclosed without authorisation.

[65] [2002] EWCA Civ 780.

Unfortunately, what the case law establishes about the use of privileged material which has escaped the secure sphere is not entirely clear. The problem can be traced back to two conflicting authorities from the Court of Appeal nearly a century ago. [66] In the 1898 case of *Calcraft v Guest* the Court held that secondary evidence of a privileged communication (i.e. a copy or note of it) can be tendered in evidence.[67] Yet in the later case of *Ashburton v Pape* the Court of Appeal held that the innocent client also has the right to seek an injunction in equity restraining a person who has come into possession of their privileged communications from using or further disseminating it.[68]

In the 1987 case of *Goddard v National Building Society* the Court of Appeal sought to reconcile the authorities by holding that the rule in *Calcraft* prevailed, unless an injunction pace *Ashburton* had been obtained prior to any attempt to adduce the communication in evidence. This approach disadvantages a party who is unaware that their confidential communications have been disclosed, or lacks the ability to obtain an injunction at short notice. It also raises the unfortunate prospect of a race to the court. Nourse LJ went on to state in *Goddard* that, when an injunction was sought to restrain the use of privileged material, the court should grant it, subject to well established equitable defences, for example, excessive delay in seeking the injunction.[69]

However in the later case of *Istil v Zahoor*, Collins J (now on the Supreme Court) appeared to hold that the court had a broader discretion as to whether to grant an

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[66] J Auburn *Legal Professional Privilege: Law and Theory* (Hart Oxford 2000) 247-249.

[67] [1898] 1 QB 759 (CA).

[68] *Lord Ashburton v Pape* [1913] 2 Ch 469 (CA).

[69] [1987] QB 640 (CA). See also *Webster v James Chapman & Co (a firm)* [1989] 3 All ER 939 (Ch) where Scott V-C said that an injunction restraining use is a matter of discretion [at 944-45].

injunction.[70] In *Istil* the defendant acquired emails suggesting that the claimant had relied on evidence from a third party knowing the third party had forged evidence. The claimant sought an injunction restraining the use of the emails on the grounds they were covered by litigation privilege. Collins J held that the court was entitled take into account the public interest in deciding whether to grant the injunction. Relying on the principle that there is no confidence in an iniquity,[71] the Judge ruled that the public interest in the proper administration of justice meant that no injunction should be granted.

The uncertain status of privileged communications that have escaped the confidential sphere is also partly due to the fact that the privilege is a common law right, whereas historically the only remedies available to the privilege holder once material had escaped the confidential sphere lay in equity. While the common law privilege is absolute, the first rule of equity is that all relief is discretionary.[72] Furthermore claims for an injunction to restrain the use of privileged material were normally based on the equitable doctrine of breach of confidence. The iniquity exception to the duty of confidence is broader than the crime fraud exception to legal professional privilege. In the words of Lord Denning, 'it extends to any misconduct of such a nature that it ought in the public interest to be disclosed to others.'[73]It was this distinction that enabled Collins J to decline to grant an injunction in *Istil* notwithstanding his view that the

[70] *Istil Group Inc v Zahoor* [2003] EWHC 165, [2003] All ER 252 (Ch).

[71] *Initial Services Ltd v Putterill* [1967] 3 All ER 145.

[72] *Al Fayed & Ors Commissioner of Police of the Metropolis* [2002] EWCA Civ 780 [16x].

[73] *Initial Services Ltd v Putterill* [1968] 1 QB 396, 405.

crime-fraud exception did not apply because the 'fraud' had been perpetrated by a third party rather than by the client.

The tendency of courts to apply the rules on breach of confidence in applications to restrain the use of privileged material overlooks the fact that the material in question is confidential because it is privileged, and lawyer-client communications are quite different from other categories of confidential information such as personal data or commercial secrets. The law in this area is confused and unsatisfactory. It seems demonstrably unfair that the level of protection afforded to a privilege holder should be reduced merely because the material has been disclosed by mistake, or through no fault of their own.[74] This is an unacceptable state of affairs if law makers acknowledge, as they should, that the privilege is a fundament right. People should not lose fundamental rights by inadvertently leaving their rights on the bus, or having the bag in which they are stored pinched. However such an outcome is possible under the current law of privilege. One solution to the specific problem in *Istil* would be to expand the reach of the crime fraud exception so that it covers evidence that is produced or acquired by unlawful means, as the editors of *Phipson on Evidence* suggest.[75]

That still leaves the prospect of the race to the court, set up by the decisions in *Calcraft* and *Ashburton,* and that even if the privilege holder wins the race, the court may still use its discretion to refuse the injunction. Both outcomes could be avoided if the law were to recognise that privilege were both a rule of (non)compellability and a rule of (in)admissibility. Of course the right to withhold disclosure is academic when

[74] J Auburn, Legal Professional Privilege: Law and Theory 258-259.

[75] Phipson on Evidence 17th edn (n 6) [26-76].

the information has already been disclosed, but it is precisely when privileged information has escaped the confidential sphere that rules against the use of such information are most needed.

The rationale for privilege requires, and the rhetoric of the courts assumes, that communications between a client and her lawyer when preparing for litigation receive absolute protection. In order to give such protection, the law should recognise that individual clients have a right to resist disclosure of their confidential communications with a lawyer *and* that, when an individual communicates with a lawyer, their statements cannot be used in evidence against them in any proceeding.

Zuckerman has long argued that the need for a private and secure sphere in which to prepare for litigation supports not only a rule of immunity from compulsory disclosure but also a rule of inadmissibility. He argues that a litigant's preparatory materials, or what a client tells their lawyer in private, should be inadmissible as truth of the facts stated therein.[76] If anything, the scope of immunity proposed by Zuckerman is too small, for a common way in which documents are used against witnesses is as evidence of prior inconsistent statements. To prevent use of privileged material to prove, for example, that a claimant was driving on the wrong side of the road, but to allow it as evidence that he previously stated he was driving on the wrong side of the road and that his sworn evidence that he was driving on the right side of the road lacks credibility, runs the risk of gutting the value of the immunity by the back door. Instead the immunity should prevent *any use of statements* made under the privilege cloak

[76] Zuckerman (n 3) [15.22] – [15.31].

against the person who made them. Facts observed in the course of the relationship, including the identity of the parties, would remain compellable.[77]

There is little risk that making the privilege a rule of inadmissibility would result in over protection of preparatory materials for litigation. The immunity would attach only to materials that the law deems deserving of protection. If a communication does not meet all the other preconditions of a privilege claim, then no privilege applies whether as a rule against compellability and/or admissibility.

In recent times, courts have begun to recognise that privileged material requires protection both within and outside the confidential sphere, and that the rules governing such material should be the same regardless of whose possession they are in. Nor should the result of an application to restrain their use depend on the way in which it is framed. In each case the juristic basis of the claim is that the information is privileged. Unfortunately, when the Privy Council made this point in *B v Auckland District Law Society*[78] it did so in precisely the wrong situation: where the privilege holder had voluntarily and consciously chosen to disclose privileged material. When a party waives the privilege, they waive their right to a private and secure sphere. As such, making privilege a rule of inadmissibility would not affect the current rules on waiver, including the rules preventing partial and selective waiver of privileged material. If the privilege holder chooses to release or use the contents of their privileged material, they are choosing to waive the privilege expressly or by implication. In doing so, the material becomes subject to the general rules governing the disclosure and use of information.

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[77] C Tapper, *Cross & Tapper on Evidence* (12th ed Oxford OUP 2010) 439.

[78] *B v Auckland District Law Society* [2003] UKPC 38, [2003] AC 736 [71].

The material can be compelled where statute confers such powers, or used as evidence in court subject to the rules of procedure and evidence.

The rules against partial and selective waiver are necessary to ensure fairness in legal proceedings and to maintain public confidence in the correctness of judicial decisions. In some situations a privilege holder will selectively release privilege material, or release privileged material to a select number of people, for the purposes of obtaining an advantage in court, or investigations, or negotiations or whatever. There is nothing objectionable about that. However to allow a person to release privileged material on terms, specifying the people who can have it and the purposes for which it can be used, risks making a mockery of the idea that the privilege is based on the need for a 'private and secure sphere'.

The privilege is a shield, not a sword. Before a party uses their privileged material to obtain a forensic advantage, they would do well to remember that most swords are double edged. For this reason authorities like *B v Auckland District Law Society*, which allow a party to maintain a privilege claim over material they have voluntarily provided to law enforcement agencies, although laudable in their desire to encourage co-operation with legal investigations, are problematic.[79] The principle that waiver is for all time is one that the courts can and should apply, at least in cases outside of litigation. Within the context of litigation, the extent of any waiver is governed by principles of fairness. A party is entitled to specify the extent of any pre-trial waiver,

[79] Another example is *British Coal Corp v Dennis Rye Ltd (No 2)* [1988] 1 WLR 1113.

provided all material relevant to the issue in question is disclosed, so as to avoid creating a misleading picture of the evidence.[80]

Where there is need for investigators to have access to privileged material, their powers to compel such material should be clearly set out in statute, including any restrictions on its use. In the absence of a compulsory order to produce information, a client should be advised not to voluntarily disclose their privileged material to a law enforcement agency if they do not wish it to be used for other purposes, or by other people.

This is how the use immunity operates in the context of the privilege against self incrimination. On the one hand, it allows law enforcement agencies to compel people to provide information or evidence which can be used to further their investigations and obtain other evidence to secure the person's conviction. On the other hand, it denies law enforcement agencies and prosecutors use of evidence in criminal proceedings which may be critical to proving a person's guilt. This compromise is though to be compatible with the privilege against self incrimination, based on comments of the ECtHR in *Saunders v United Kingdom*.[81] Saunders had made under compulsion statements to law enforcement agencies investigating breaches of the Companies Act 1985, which were then used against him at trial. The court ruled that the use of Saunders' statements at his trial breached his right to fair trial under Art 6. The court's 'sole concern', it said, was 'with the use made of the relevant statements made at the applicant's trial'. If

[80] Described in *Dunlop Slazenger Int Ltd v Joe Bloggs Sports Ltd* [2003] EWCA Civ 901 as a rule against cherry picking.

[81] (1997) 23 EHRR 313.

information provided under compulsion can be used at trial to convict the person who provided it of an offence, this constituted a breach of Art 6. [82]

Use immunity in criminal investigations is a compromise between the competing interests of securing convictions and protecting people from being placed under an obligation to co-operate with the prosecution. But some compromises deliver the worst of all possible worlds, because in trying to balance competing interests, they fail to protect or promote any of them. Such criticisms have been levelled at use immunity in criminal investigations.[83]

There would be no such compromise in the case of legal professional privilege, because the use immunity would be in addition to, rather than a substitute for, the right to resist compulsory disclosure. Nonetheless, where law makers deem it necessary to 'abrogate' the privilege, it is conceivable they may elect to abrogate only the immunity from disclosure whilst preserving the privilege holder's use immunity.

4.3.2 A qualified privilege for corporations?

In chapter 3 we concluded that, like individuals, companies are entitled to prepare for litigation in private and be judged on the case they put forward rather than on their case preparation. However, because a company's preparation for litigation can involve many

[82] (1997) 23 EHRR 313 [67]. The court took the same approach in *Heaney and McGuiness v Ireland* (2000) 33 EHRR 12 and *Martinnen v Finland* (App no 19235/03) [2009] ECHR 19235/03.

[83] S Sedley, 'Wringing Out the Fault: Self incrimination in the 21st Century' (2001) 52 NILQ 107, 120.

corporate agents, there is a greater risk that the evidence held by individual employees of the company may be lost to the privilege. So is there a way of reconciling a corporation's right to prepare for litigation in private with the need to ensure the evidence of their agents, and other probative information contained in the company's files, is not lost to the privilege? One possible solution would be to qualify the privilege for corporations so that the privilege would give way where there was a greater public interest in disclosure of a document or communication.

Several prominent US scholars have advocated a qualified privilege for corporations, including Imwinkelreid,[84] and Alexander. Alexander supported a qualified privilege as the necessary safety valve for a broad definition of the corporate client. He wrote:

> To maximize the social utility of the privilege, a broad approach should be taken with respect to the number of employee communications that qualify for privileged treatment; but when this standard is combined with the traditional absolute nature of the privilege, the result in some cases may be an unwarranted frustration of society's interest in fair and accurate adjudication.'[85]

The idea of qualifying the privilege has no shortage of critics, especially in the Commonwealth. The main criticism is that it is inherently uncertain. Clients have no way of knowing whether their communications with a lawyer will be disclosed. This

[84] Imwinkelreid (n 58) 227; V Alexander, 'The Corporate Attorney - Client Privilege: A Study of the Participants' (1989) 63 St John's L Rev 191, 377.

[85]Ibid. Alexander 377, 380.

defeats the very purpose of the privilege. An uncertain privilege can be little better than no privilege as even the US Supreme Court noted in *Upjohn*.[86]

In *R v Derby Magistrates* the House of Lords strongly rejected any attempt to qualify the privilege, no matter how compelling a need there is for an exception in an individual case.[87] In *R v Derby* the issue was whether evidence tending to establish the innocence of a defendant charged with murder could be compellable as an exception to the privilege. X was charged with murdering a girl. He initially admitted guilt but shortly before the trial he changed his story and blamed his stepfather. He was acquitted at the trial. Many years later the stepfather was charged with the murder. At the committal proceedings, counsel for the stepfather sought to cross examine X about instructions given to his solicitors after his confession but prior to his retraction. X refused to waive privilege but the magistrates and the divisional court ordered the instructions to be disclosed, holding that the court had to weigh the competing interests of keeping lawyer-client communications private and the interests of the administration of justice in ensuring all relevant evidence is available to the court. The House of Lords set aside the disclosure order stating that the privilege was an absolute right, which was itself the product of a balancing exercise between these competing interests. There can be no further balancing exercise in individual cases because if the privilege is to have its intended effect of encouraging candour in lawyer-client communications it must be operative at the time the communication is made: i.e. the client must have a guarantee that what they tell the lawyer will not be disclosed without their consent *before* they talk

[86] *Upjohn Co v United States* 449 US 383, 101 S Ct 677 (1981) 396-397.

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

to their lawyer. The editors of *Phipson on Evidence* point out that it is hard to imagine a more compelling exception if one were to be recognised: documents which could provide a defence to a charge of murder.[88] But the House was unmoved because the privilege, and the guarantee of confidence it confers, 'is a fundamental condition on which the administration of justice as a whole rests'.[89]

The decision of the House of Lords in *R v Derby* would support, and arguably even require, an absolute privilege which is both a rule of non-compellability and inadmissibility. In some respects the arguments in favour of a qualified privilege are the opposite to those supporting a rule of inadmissibility. But it can be recalled from chapter 3 that there are important differences in the rationale for litigation privilege for individuals and for corporations. The right of corporations to prepare for litigation in private was based on the need to protect the integrity of legal proceedings. On occasions more harm can be done to the integrity of proceedings by denying the court access to relevant and often determinative evidence, than is done by intruding on a party's case preparation. The scenario in *R v Derby* may be one such instance where it is justified for a court to intrude on a party's case preparation.

At any rate, intruding on a corporation's case preparation is likely to cause far less harm than intruding on an individual's. Without a private and secure sphere in which to prepare for litigation, there is a real possibility that individuals, with all their foibles and fears, may distort or limit their case preparation in such a way that they are

[88] H Malek (ed) *Phipson on Evidence* (n 6) [23-11].

[89] *R v Derby Magistrates' Court, ex p B* [1996] AC 487 (HL) 507.

unable to properly defend themselves or establish their legal rights. By contrast it is doubtful whether the company, or specifically those in control of it, needs *an absolute* assurance that the company's case preparation will not be disclosed in order to pursue or defend the company's legal interests successfully. Certainly companies have no such guarantee based on the current laws of privilege.[90] An important finding of Alexander's study was that counsel frequently advised their corporate clients that the privilege may not be held for one reason or another.[91] 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. Perhaps this can be explained by the fact that the behaviour of rational agents is strongly influenced by probabilities. A client who is told there is 95% 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% 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 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 recognising the public interest in disclosure outweighed

[90]C Tapper, 'Prosecution and Privilege' (1997) 1 Int J of Evidence and Proof 5, 13.

[91] Alexander (n 84) 266.

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. Yet this wrongly assumes all exceptions to privilege operate in the same way. An exception to privilege could be governed by a balancing exercise, so that the court in each case weighs up the arguments in favour of protecting the information from disclosure, and the arguments in favour of its disclosure. This is what the court does in deciding whether to uphold a claim for public interest immunity.[92] However an exception could also be established by a rule which prescribed that privilege applies except where a specific set of circumstances (X) exist, in which case a privilege claim will not be upheld.[93] An exception for evidence establishing innocence, as was urged on the court in *R v Derby*, could be adopted using this method. The court would not need to weigh up anything. Rather it would need to decide whether the circumstances X exist (namely that the evidence may assist an accused defend a charge of murder, or perhaps some other serious indictable offence), so that the privilege will not apply. It would also be possible to limit the exception so that privilege is overridden *only* for the purposes of defending a murder charge or other indictable offence, and privilege could continue to subsist in the document for any other purpose.

The attorney work product doctrine in the US under rule 26(b)(3) works in a similar way, and could be used as a model in introducing a qualified privilege for corporations. The attorney work product doctrine was developed by the US Supreme

[92] *Conway v Rimmer* [1968] AC 910 .

[93] Tapper (n 90) 18.

Court, in *Hickman v Taylor*.[94] The case arose from the sinking of a tugboat, in which several crew members died. An attorney for the tug owners obtained signed statements from the surviving crew members, and also interviewed other witnesses, in some cases making notes of the interviews. In subsequent litigation the plaintiffs sought the statements, both written and oral. The defendants and their attorney refused to disclose them and were held in contempt. The Court of Appeal overturned the contempt finding, and the Appeal Court's decision was upheld by the Supreme Court. 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'.[95] 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. In deciding whether to grant disclosure of an attorney's work product, including draft witness statements, the court needed to balance these competing interests.

There is a substantial body of case law in the US on what exactly must be shown before the privilege over a litigant's work product will be displaced. Historically some courts indicated that the party seeking discovery must show 'good cause',[96] while other courts required a 'showing of necessity or justification' – adopting the language used in *Hickman v Taylor*.[97]

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

[95]Ibid 511.

[96]E.g. *Bourget v Government Employees Ins Co* (1969) 48 FRD 29 (District Court of Connecticut) 33.

[97]*Hickman v Taylor* 329 US 495, 510.

The scope of the qualified attorney work product doctrine was clarified in 1970 when Federal Rule of Civil Procedure 26(b)(3) was adopted. The rule provided 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 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. Where the witness is no longer available, or the witness can no longer remember the events in question, a court is likely to order the production of a witness statement.

Rule 26(b)(3) does not require the court to engage in a balancing exercise between 'the competing interests of full disclosure and protection for the fruit's of the lawyer's labor'.[98] On the contrary, the rule itself is the product of a balancing exercise, to borrow the words of Lord Taylor, between the need to ensure that a client can prepare for litigation in private, and the need to ensure other litigants can access probative

[98] *United States v Swift & Co* (1959) 24 FRD 280 , 284.

evidence. A qualified privilege like 26(b)(3) cannot enable corporate agents to predict at the time of making a communication whether a court will order its disclosure, because the evidentiary needs of a future opponent cannot be foreseen. But corporate agents will know the circumstances in which disclosure is likely to be ordered, and can make a working assessment as to the likelihood that the evidence of their employees will be relevant to future disputes, and whether it is still likely to be accessible to an opponent with reasonable effort.

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.[99] Similarly, a qualified privilege cannot guarantee the continuing existence of relevant evidence for an opponent. No one can stop time, or ensure the preservation of all material that *may* be relevant to future legal disputes. But where the material does exist – and in the situation under consideration it is preserved in one of the party's own files – the court can ensure that other parties with a legitimate interest in the information are able to access it.

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

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[99]*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 Wisconsim Corporation* (1980) 86 FRD 160 (District Court of Wisconsin).

a) Any communication or document prepared by a corporation or its legal representatives for the sole purpose of litigation are privileged from disclosure, unless the party seeking its 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; 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 qualifying the privilege would ensure the evidence held by employees is not permanently lost to the privilege, there is a risk that it may deter some corporate agents from talking candidly with corporate counsel. Some of the executives and lawyers interviewed in Alexander's study on corporate privilege suggested that a qualified privilege would reduce candour in lawyer-client communications, at least in relation to more sensitive issues such as internal investigations or litigation, although it would not reduce the level of consultation.[100] Interestingly, the results suggested that qualifying the privilege would be more damaging for candour amongst upper management than lower level employees.[101] In chapters 5 and 6 it is argued that such fears are out of place in the second decade of the 21st century. The decision making process of directors of publicly listed and large private companies as to when to obtain

[100] Alexander (n 84) 369-376.

[101] Ibid 381.

advice and what information to put before the lawyer is unlikely to be influenced, and ought not be influenced, by the availability or scope of the privilege.

At any rate, it ought to be recognised that disclosure will be ordered only if the evidence contained in privileged material is no longer practically available by other means. For that to be the case, the employee who made the communication would themselves no longer be available to give evidence. It is doubtful that agents would be concerned about the disclosure of information they provided to corporate counsel at a time when they are no longer working or involved with the entity, and no longer available to give any evidence, or any reliable evidence. The main reason that employees may fear disclosure is if the statements they make could be used against them personally, but because the corporate privilege belongs to the entity, individual agents already run the risk that the company could disclose their communications without their consent. At least with a qualified privilege the decision to order to disclosure would rest with an independent and impartial court applying clear rules.

Conclusion

This chapter sought to identify the optimal scope of litigation privilege for both individuals and corporations. The guiding principle in this task was to provide sufficient protection for communications and documents that need protection in light of the rationale for litigation privilege, whilst ensuring that material which does not require

protection remains compellable. The optimal scope of a litigation would look something like this:

I. For individuals any material that qualifies for privilege should be immune from compulsory disclosure, and any statements made by a privilege holder in a privileged document or communication should be inadmissible against them for any legal purpose.

II. Corporations should be entitled to a qualified litigation privilege using the US attorney work product doctrine as a model. The privilege provide a right to resist disclosure, which would give way if the party seeking disclosure can show she has a substantial need for the material in order to prepare her case, and that she is unable without undue hardship to obtain substantial equivalent of the material by other means. The material would remain privileged for any other purpose.

III. Lawyer client communications in preparing for litigation must qualify for privilege, and with it a lawyer's work product.

IV. The case preparation of litigants in person must also qualify for privilege.

V. Privilege over communications with third parties should be abolished, and the court given a discretionary power to order a litigant who requests an opponent's research product to contribute to its cost.

VI. Litigation privilege over documents copied or collected for the purposes of litigation should be abolished.

VII. The privilege should apply to all legal proceedings which determine a person's legal rights and obligations, including tribunal proceedings and legal determinations by state agencies or ministers.

VIII. For litigation privilege to apply to third party communications brought into existence before litigation has commenced, it must have been produced when litigation is more likely than not to follow, judged objectively.

IX. A document or communication will only qualify for privilege if it was made for the sole purpose of preparing for litigation or obtaining legal advice.

Chapter 5 - The rationale for legal advice privilege and its relevance to corporations

Historically litigation privilege was the only form of privileged recognized by the courts. It was not until 1833 that the courts first recognized an 'advice' privilege unconnected with litigation.[1] As recently as 2004 the House of Lords gave a resounding endorsement of legal advice privilege in *Three Rivers No 6*. Nonetheless the courts support for the privilege is far from unanimous and doubts about the value of advice privilege still persist. In two separate rulings in the *Three Rivers* litigation the Court of Appeal questioned whether a client needed a privilege to talk candidly to their lawyer where the purpose of a communication was to obtain legal advice unconnected with litigation. Lord Justice Longmore and Lord Justice Phillips noted that the client's self interest in obtaining accurate advice provided sufficient incentives for the client to disclose all relevant facts to the lawyer. [2] Their Lordships analysis is particularly apposite to corporations. And while the House of Lords may have wanted to end the debate on legal advice privilege, it may not have achieved that aim. As recently as 2009, a High Court Judge suggested 'that the conclusion underlying LPP that there is a need for absolute confidentiality in respect of legal advice may need revisiting.'[3]

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[1] *Greenough v Gaskell* (1833) 1 My & K 98, 39 ER 618 .

[2] *Three Rivers District Council v Governor and Company of the Bank of England (Disclosure) (No 5)* [2003] EWCA Civ 474, [2003] QB 1556 [26] and *Three Rivers DC v Governor and Company of the Bank of England (No 6)* [2004] EWCA Civ 218, [2004] QB 916 [39].

[3] *R (Prudential Plc) v Special Commissioner of Income Tax* [2009] EWHC 2494 (Admin), [2010] All ER 1113 .

This chapter argues that the most convincing rationale for advice privilege is what Zuckerman has termed the rule of law rationale. The rationale, which was endorsed by Lord Scott in *Three Rivers No 6*, is based on two propositions. First, everyone has a right to know the law and understand their legal rights and obligations. Given the principal means by which people acquire knowledge of the law in modern society is by consulting trained legal advisers, access to legal advice must be protected. The rule of law rationale says something at a general level about the proper relationship between the state and individuals, and the state's authority to impose binding rules on those subject to its jurisdiction.

The second part of the rule of law rationale is the empirical assumption that compulsory disclosure of lawyer-client communications would lead to fewer lawyer-client consultations and reduced candour in those consultations. If correct, the absence of a privilege is bound to inhibit a person's capacity to gain an understanding of their rights and obligations. While self interest will generally motivate clients to consult a lawyer and talk candidly about their affairs where no litigation is in prospect, in some situations some people might genuinely fear disclosure of their communications with a lawyer. For example, a client may be more concerned about protecting her reputation, or maintaining relationships with others, than her own self-interest in getting accurate advice.

The normative and empirical aspects of the rule of law rationale for privilege are based largely on the needs and behaviour of individuals, and have limited relevance to

corporations. The proper relationship between corporations and states raises different considerations to those governing the relationships between individuals and the state. There are sound policy reasons for imposing higher standards of disclosure on corporations, and expecting higher standards of behaviour from corporate agents, to encourage greater legal compliance by corporations and arguably better corporate governance.

The best argument for a corporate advice privilege is that it can help promote voluntary compliance, by encouraging corporate agents to obtain advice and talk candidly to their lawyers about the company's affairs. However it is doubtful that privilege actually provides agents with such an incentive in practice. Some 500 years after the privilege first emerged, English law still has no rule or even guidelines as to which agents represent the 'corporate client' for the purposes of LPP. This uncertainty in the scope of the privilege undermines its value. If corporate agents cannot be sure that what they tell their lawyers will be kept confidential there is a risk that they will not reveal all relevant information to their lawyers. Moreover the various agents who *might* be part of the corporate client are subject to different and sometimes conflicting interests. This undermines the value of a privilege.

Directors of publicly listed and large private companies are subject to a range of laws and corporate governance principles that have reduced the need for a privilege. More stringent obligations have been imposed on directors to stay properly informed about the company's affairs as part of their duties of 'diligence' and 'skill and care.'

These changes have now been codified in section 174 of the Companies Act 2006, and the new derivative action under Part 11 of the Act will make it easier for individual shareholders to commence derivative actions for breaches of directors' duties. The UK also has a voluntary but influential corporate governance code for publicly listed companies, which requires the adoption of internal risk management and audit systems.[4] In practice, these changes will require directors to obtain more advice, including legal advice, about the company's affairs, and actively monitor legal compliance by the company. In some cases directors may also be able to rely on the fact that they sought legal advice to defend claims they breached their duties to the company.[5] While these changes have weakened the case for an advice privilege for large and public companies, they do not apply with the same force, and some do not apply at all, to small private companies. Hence small companies may still need or benefit from a privilege.

At the other end of the corporate ladder, employees who may have some personal liability arising out of a suspected legal breach – the quintessential scenario in which a privilege might induce greater candour in the lawyer client relationship – are likely to be reluctant to talk candidly to the company lawyer once they discover that the privilege belongs to the entity, and can be waived without their permission. By contrast employees who have no personal interest in a suspected breach, and are merely witnesses, arguably need no more incentive to talk to the lawyer than an order from their superiors.

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[4] Financial Reporting Council, 'Combined Code on Corporate Governance' <http://www.frc.org.uk/corporate/combinedcode.cfm> accessed 19 January 2010.

[5] *In Re Green v Walking (Ortega Associates (In Liquidation))* [2007] EWHC 2046 (Ch); [2008] BCC 256.

5.1 The Rationale for Advice Privilege

When Lord Broughman extended lpp to advice unconnected with litigation in *Greenough v Gaskell* he justified the decision in the following terms:

> If the privilege was confined to communications connected with suits begun, or intended or expected or apprehended, no-one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous.[6]

No doubt one of the motivating factors in extending the privilege beyond legal proceedings was that with the increasing complexity of society in the 19th century the need for professional legal assistance also increased, and the lawyer's office replaced the courtroom as the primary venue for legal services. Yet this development in the law was not just a logical extension of an existing legal rule to changing social circumstances. The difference between the courtroom and the lawyer's office can be a fundamental one: not in the physical setting, but rather the stage at which and the *reasons* for which the client is seeking legal assistance.

Lord Broughman's analysis is perfectly defensible to the extent that it recognizes the value in obtaining advice before any dispute has arisen, or offence committed, in relation to the very matters that at some point may become the subject of a dispute. What his Lordship's analysis assumes however, without substantiation, is that the

[6] *Greenough v Gaskell* (n 1) 103.

privilege is *needed* to secure access to legal advice in circumstances where there are no prospects of litigation. The theory that there would be reduced candour in lawyer client communications and fewer consultations without the protection of privilege has less force in an advice context. The client seeking legal assistance for the purpose of litigation, and the client who seeks purely legal advice, have divergent interests when it comes to deciding whether to consult, and what information to disclose, to a lawyer. One wants to win their case, the other wants accurate legal advice so that they can protect their legal rights, or avoid liability or culpability. Self interest would tend to motivate the client seeking purely legal advice to provide full disclosure of all relevant facts. The client wants the right advice and any advice not tailored to the true facts may be of little help, however accurately it may state the law. The same is not true of litigation, because the litigant has an interest in only putting forward the facts most favorable to their case. As Longmore J expressed it in *Three Rivers No 5* for the client who is seeking purely legal advice 'the prospect of winning or losing a particular case will normally do nothing to cloud his judgment as to what facts he places before his legal adviser.'[7]

Both the timing of and reasons for requesting advice are critical factors in influencing what information a client will impart to their lawyer. The question is not solely whether litigation is foreseeable at the time the advice is sought. There is always a possibility of litigation if the client does not follow their lawyer's advice, and ends up breaching a law. Rather the key issue is whether the advice is sought before, during or

[7]*Three Rivers No 5* (n 2) [26].

after the events that may give rise to legal liability. If the advice is sought ex ante (for example in relation to the legality of a business proposal, or when a client wants to know what a law requires her to do) then self interest will motivate disclosure. Even if the events in question have already been set in train, but can still be set right before any legal breaches occur, the client has every interest ensuring her lawyer is fully apprised of the facts. The client needs accurate legal advice so that she can comply with the law, or take appropriate steps to protect her rights. Ignorance of the law is no excuse. Likewise incomplete or inaccurate legal advice is no excuse and not much help either.[8] So when a person needs legal advice, it would be foolish of them not to make a 'clean breast of it' to their lawyer.

The force of the 'self interest motivates disclosure' analysis can be seen when the lawyer client relationship is compared with other professional relationships built on trust and confidence which work without a privilege. Take, for example, the doctor patient relationship. The self-interest in obtaining an accurate diagnosis provides a strong motivation for the patient to fully disclose all potentially relevant information to the doctor. An incorrect diagnosis is of no value to the patient and could worsen their medical condition. Similarly there is no value to a client in obtaining advice that is wrong, and considerable risk to them if they choose to rely on it. Failing to talk candidly to the lawyer means the client may be wasting time and money, or risking serious legal consequences.

[8] An action for professional negligence may lie if the advice was negligent.

The doctor–patient relationship might be distinguished from the lawyer client relationship on the grounds that legal rights and obligations are often inter-personal, and inherently controversial. However many aspects of the doctor patient relationship are also inter-personal, such as the treatment of contagious or communicable diseases. Diagnosis and treatment of such diseases would seem to be the quintessential case where a doctor-patient privilege is necessary to encourage patients to seek medical treatment and be candid with their doctor. Ironically however, in some jurisdictions including England & Wales doctors have compulsory reporting obligations when treating patients with certain communicable diseases.[9]

Another professional relationship that functions adequately without a privilege in a controversial area is the accountant-client relationship. The question of whether I pay my fair share of tax may lack the immediacy of interpersonal legal rights, but it still affects the level of taxes others must pay, or the quality of services they can expect to receive from the government.

The fact that people frequently retain accountants to provide legal advice on tax matters, even without a privilege, was one of the reasons why the High Court declined to extend the privilege to the process of obtaining legal advice from accountants in *Prudential v Special Commissioners*.[10] Charles J also stated that the market for legal advice from accountants suggests 'that the conclusion underlying LPP that there is a need for absolute confidentiality in respect of legal advice may need revisiting.' He

[9] Under the Public Health (Infectious Diseases) Regulations 1988 doctors in England & Wales have a statutory duty to notify a 'Proper Officer' of the Local Authority of suspected cases of certain infectious diseases including, for example, hepatitis A, B and C.

[10] *R (Prudential Plc) v Special Commissioner of Income Tax* (n 3) [80].

noted that there were many areas of life where there is a need for full and frank disclosure if an advisor is to be in a position to give fully informed advice. But 'a general right to refuse disclosure of communications between client and professional adviser has not been given, and it seems that this has not led to assertions by non lawyers and their clients that full and frank communications between them is inhibited.' Nor did Prudential assert that full and frank disclosure between clients and their accountants was inhibited.[11]

The Court of Appeal upheld the Trial Judge's decision. The Court held it was bound by the decision in *Wilden Pump and Engineering Co v Fusfield* that LPP was only available in respect of communications for the purpose of getting or giving legal advice from or by members of the legal profession.[12] Even if it were not bound, the question of what other relationships should qualify for a privilege is a matter best dealt with by Parliament.[13]

Notwithstanding these doubts about the need for a privilege over advice unconnected with litigation, the House of Lords defended legal advice privilege as a fundamental right in *Three Rivers No 6.* Lord Scott stated:

> [The authorities] recognize that in the complex world in which we live there are a multitude of reasons why individuals, whether humble or powerful, or corporations whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognize that the seeking and giving of this advice so that the clients

[11] Ibid [72].

[12] *Wilden Pump and Engineering Co v Fusfield* [1985] FSR 159 (ChD).

[13] *R (Prudential Plc) v Special Commissioner of Income Tax* [2010] EWCA Civ 1094 [83]-[84].

> may achieve an orderly arrangement of their affairs is strongly in the public interest.[14]

This is a powerful statement but relying on the decisions of previous courts to demonstrate the value of a rule does not establish its value in the real world: to individuals and corporate agents contemplating whether to get advice and what to tell their lawyer. Lord Scott went on to offer a normative justification for advice privilege. His Lordship acknowledged that in many cases clients would have no inhibitions in providing their lawyers with all relevant information without an assurance of non-disclosure. Nonetheless, principles of fairness and the rule of law justified retention of the privilege. In a society where the controlling framework was a belief in the rule of law, communications between clients and lawyers, whereby the client is seeking legal advice in the management of their affairs, should be secure against the possibility of scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else. His Lordship endorsed Zuckerman's description of this principle as the 'rule of law rationale.'[15]

Zuckerman's thesis was that from the outset LPP was justified by more than the need to secure professional assistance in legal proceedings. The privilege rested on principles of the rule of law itself. He states:

> The law accords rights and imposes obligations, which in turn can be enjoyed and enforced only if persons are aware of them and understand their implications. A system of rights and obligations must therefore

[14] *Three Rivers DC v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610 [34].

[15] Ibid [34].

> allow adequate facilities for gaining an appreciation of the law, otherwise people would not be able to arrange their affairs according to the law or to pursue their rights in the courts. Since the advice of well qualified lawyers is one of the principal means by which to gain the necessary knowledge of the law, access to legal advice must be encouraged and protected.[16]

The right to know the law reflects a basic moral principle. No one can be made subject to laws of which they have no knowledge or opportunity to gain that knowledge. Zuckerman picks up on this idea in the second edition of his book, quoting Lon Fuller: 'there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that…is kept secret from him…or[is] unintelligible.'[17]

At a general level therefore, the rule of law rationale says something about the moral agency of human beings, the authority of law over them, and the relationship between them and the state. Human beings are independent moral agents. In a legal system based on the rule of law, for there to be a moral obligation to comply with a law – by virtue of its status as law - the law must meet certain conditions. In *The Morality of Law* Fuller identified eight such condition or 'elements' of the rule of law: the second was the requirement to publicize the law and the fourth was the need to make rules understandable.[18] Another feature of the relationship between individuals, the law and the state is that the proper point of law is human beings and their welfare.[19] This explains why protecting the relationship between the individual and the state, and often

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[16] A Zuckerman, *Civil Procedure* (Lexis, London 2003) 532-3.

[17] L Fuller, *The Morality of Law* (Yale University Press New Haven 1969) 39.

[18] Ibid.

[19] J Finnis, 'Natural Law Theories' The Stanford Encycopedia of Philosophy (Spring 2007 Edition) <http://plato.stanford.edu/archives/spr2007/entries/natural-law-theories/> Section 2.

protecting the individual from the state, is a principle that runs through so many parts of the law, including, not surprisingly, the rules on LPP.

If the right to gain an understanding of the law is a precondition of state's authority to impose binding rules on those within its jurisdiction, and necessary to promote human welfare, the rule of law rationale more directly supports an entitlement to legal advice and assistance than it does a right to communicate in confidence with a lawyer when you can afford to retain one. As discussed in chapter 3 positive rights to legal assistance are guaranteed in certain circumstances where there is a lot at stake. But to guarantee legal assistance to everyone in respect of all matters is an expensive burden that many states cannot meet. Furthermore, guarantees of legal assistance can be rendered practically ineffective, as the ECtHR observed, if the client has a real apprehension that communications with their lawyer may be disclosed to their prejudice.[20]

For Zuckerman legal advice privilege is designed to facilitate the practical fulfillment of the right to know the law, by guaranteeing people access to lawyers without the fear that their communications may be subject to compulsory disclosure. It follows that this 'rule of law rationale' is still based on the reduced candour theory: in the absence of a privilege persons may refrain from disclosing confidential information to their lawyer, or from seeking legal advice altogether, and such outcomes are bound to inhibit the capacity of people to gain an understanding of the law. However in

[20]*S v Switzerland* (App no 12629/87; 13965/88) (1992) Series A no 220, (1992) 14 EHRR 670 [48].

emphasizing the normative importance of providing people with facilities to acquire knowledge of the law, the rule of law rationale provides the framework for assessing the credibility of the reduced candour theory. Because of the importance of the underlying right at stake, the value of the privilege cannot be reduced to a mathematical equation, counting all the situations where the privilege encourages greater consultation and candour against those situations where it has no discernible effect. Rather, if there is a *real possibility* that in some cases clients will refrain from seeking advice or disclosing all the relevant facts to their lawyer without a promise of confidentiality, then an advice privilege can be justified given the importance of the right to know the law in a system based on the rule of law.

Even staunch opponents of the privilege must concede that the reduced candour theory may prove correct in some instances. Although most people usually have a strong self interest in obtaining accurate legal advice and disclosing all relevant facts to their lawyer, there are a number of situations where the self interest analysis falls down, or is irrelevant.

The archetypal case for legal advice privilege is where a client seeks advice in relation to past events. If the client has done X, but has no knowledge whether X is lawful and if unlawful whether it can be rectified, she may wish to obtain advice as to whether X will give rise to legal liability. Without a privilege the client faces a difficult dilemma between getting advice to clarify her legal position at the risk of having those communications disclosed to her prejudice, or to refrain from obtaining advice and

living with the attendant uncertainty regarding her legal rights and obligations. The latter outcome would be particularly unfortunate for both the client and the goal of encouraging legal compliance if X could in fact be rectified so as to make it legal. Sometimes a person's involvement in past events can become the subject of quasi legal proceedings. An inquest is a case in point, as noted by Lord Carswell in *Three Rivers No 6*.[21] The case for advice privilege in such circumstances is the same as the case for litigation privilege. The client needs legal advice and/or assistance to protect their legal position, and a secure zone in which to take advice and prepare their response to any requests or summons to give evidence or produce documents about the matter.

The second category of cases where a privilege is needed is where the client's predominant concern is to protect personal relationships, sensitivities and reputations, rather than their own self interest. The classic example considered in *Three Rivers No 6* is the testator who wishes to instruct a solicitor to draw up his will. Lord Rodger noted that the instructions of a client may be motivated by 'jealousies, slights, animosities and affections, which the testator would not wish to be revealed but which he must nevertheless explain if the solicitor is to carry out his wishes.'[22] There may be doubt about whether such sentiments of the testator are relevant to the validity of his will. Lord Phillips of the Court of Appeal implicitly made this point in *Three Rivers No 6* when he stated that there is little reason to fear that communications between solicitor and client would be inhibited if the privilege were not available in those

[21] *Three Rivers No 6* (n 14) [115].

[22] Ibid [55].

circumstances.[23] Nonetheless, Lord Rodger probably has the better of the argument so far as the value of the privilege is concerned because the correct question is not whether such matters are irrelevant, but whether *the client knows* it is irrelevant. Given the client is most likely to acquire such knowledge by obtaining advice from his lawyer, there is a risk that without a promise of confidentiality, the client may be so concerned about the disclosure of his motivations that he will materially alter his instructions.

Third, critics could persuasively argue that there is an air of unreality about the 'self-interest motivates disclosure' analysis. It presumes that clients always know what is their best interests, and how those interests can be furthered when making decisions about consulting a lawyer and what information to put before the lawyer. Human beings are not always rational, and because of our varied levels of education, intelligence, and experience with the legal system, it may be that many persons out of fear or misapprehension believe that in some situations they should avoid getting legal advice, or should tell their lawyers as little as possible about their affairs. A recurring theme in the Australian authorities reiterating the importance of the privilege as a fundamental right is the need to protect the 'liberty' and 'dignity' of all persons, especially the 'ordinary citizen', the 'unintelligent' and the 'ill-informed', in their dealings with the state.[24] In these decisions, one can find traces of the theory developed by Zuckerman, and endorsed by Lord Scott, that legal advice privilege plays a role in maintaining an appropriate balance in the relationship between state and individual.

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[23] *Three Rivers No 6* (CA) (n 2) [39].

[24] *Baker v Campbell* (1983) 153 CLR 52 (HCA) 95, 120; *A-G for the Northern Territory v Maurice* (1986) 161 CLR 475 (HCA) 484.

5.2 Does the rationale for legal advice privilege apply to corporations?

Recognising the value of advice privilege in the circumstances described above raises some fundamental questions about the case for affording it to corporations. The situations in which there is a strong likelihood of reduced candour in the absence of a privilege relate largely to the needs and behaviour of individuals. Indeed as Lord Rodger noted in *Three Rivers No 6* the rationale for the privilege 'is rooted in an aspect of human nature.'[25] The question is whether these aspects of human nature, which justies advice privilege for the individual, are relevant to corporate clients as an empirical matter, and whether they should be taken into account as a matter of policy. It is nonsensical to talk about the 'jealousies, animosities and affections' of an artificial entity, or its dignity. How many corporations fall into the category of 'ill-informed' and 'inexperienced', such that they may not appreciate that it is in the company's interests to disclose all the facts to the company lawyer? And how many corporations act irrationally, contrary to the interests of their members? The probable answers are not many, especially in the case of large corporations. Even if there are significant numbers of irrational and ill-informed corporations, there is a further question as to whether the law should tolerate such standards of conduct from corporations and their agents. As we will see in the next section such standards are increasingly no longer acceptable and there are concerted efforts by law and policy makers to improve them.

[25] *Three Rivers No 6* (n 14) [54].

In discussing the standards of 'corporate behaviour' it should be stressed we are not talking about the behaviour of individuals qua individuals acting on their own behalf, but in their capacity as agents of an artificial entity, which the law treats as a separate legal person from its members. These artificial entities - creatures of the law - enjoy various privileges and powers not available to natural persons, the most prized of which is limited liability. Whether these special powers and privileges entitle the state to more closely regulate corporations is a contested question within corporate law,[26] but 'no serious commentator on the subject supposes that limited liability cannot be the subject of abuses which the law ought to seek to regulate.'[27] Similarly, corporate law gives rise to a number of agency problems, which lawmakers regulate in order to minimize the risk of self dealing and incompetence by corporate agents.

The legislature has always attached conditions to incorporation, including publicity (reporting) requirements, capital requirements, and legal requirements. These requirements are designed to protect the corporation's members, its creditors and the wider community. One of the legal requirements of incorporation is that a putative company must be dedicated to exclusively lawful purposes.[28] Granting a privilege to corporations is a means of encouraging corporate agents to take advice so that they can ensure the entity's purposes are carried out in a lawful manner. Increasingly however,

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[26] See e.g. J Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (OUP, Oxford 1995) 27.

[27] P Davies, *Gower & Davies' Principles of Company Law* (8th edn Sweet & Maxwell, London 2008) 198.

[28] Companies Act 2006 s7(1).

governments are opting for laws and policies designed to force corporate agents to obtain advice and achieve compliance, rather than relying on the privilege carrot alone.

It is difficult to justify the corporate privilege as a means of maintaining a proper relationship between the state and corporation. The case law on the privilege against self incrimination is apposite here. In the United States and Australia the privilege against self-incrimination, which is partly designed to maintain a fair balance between individual and state[29] was denied to corporations on the grounds that the relationship between corporations and state raised quite different considerations in determining what information law enforcement agencies could legitimately demand from corporations. In *Hale v Henke* United States Supreme Court stated:

> It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not …inquire how those franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. [30]

In the Australian High Court case of *Environment Protection Authority v Caltex Refining Co* Mason CJ and Toohey J said something similar:

> …we reject without hesitation the suggestion that the availability of the privilege to corporations achieves or would achieve a correct balance between state and corporation. In general, a corporation is usually in a stronger position vis a vis the state than is an individual; the resources which companies possess and the advantages which they intend to enjoy, many stemming from incorporation, are much greater than those possessed and enjoyed by natural persons. The doctrine of the

[29] J Wigmore, *On Evidence* (vol 8, 4th edn McNaughton Revision, Little Brown & Co, Boston 1961) 353.

[30] *Hale v Henke* 201 US 43 (1906) 45.

> corporation as a separate legal entity and the complexity of many corporate structures and arrangements have made corporate crime and complex fraud one of the most difficult areas for the state to regulate effectively. [31]

In other words the nature of the relationship between corporation and state, if anything, justifies greater accountability and disclosure from corporations, rather than a right of corporations to 'distance' themselves – to use Redmayne's account of the privilege - from authorities conducting investigations or prosecuting them.[32]

The best argument for extending legal advice privilege to corporations is an instrumental one. The privilege is said to promote the same desirable behaviour in corporations that it promotes in individuals, encouraging more consultation with lawyers and greater candour in lawyer client communications, and ultimately greater legal compliance. The US Supreme Court, the House of Lords and the High Court of Australia have all expressed this view when affirming their support for corporate privilege.[33]

It is far from axiomatic that the privilege influences corporate behaviour in the same way it influences individuals. The privilege is supposed to encourage a client to seek advice more readily and be more candid when doing so. However in large corporations there is rarely one person who has both the authority to seek advice and the

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[31] *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 (HCA) 500.

[32] M Redmayne, 'Rethinking the Privilege Against Self-Incrimination' (2007) 27 Ox J LS 209, 232. In contrast to the US and Australia, the privilege is available to corporations in England & Wales: *Triplex Safety Glass Co Ltd v Lance Gaye Safety Glass (1934) Ltd* [1939] 2 KB 395.

[33] *Three Rivers No 6* (n 14) [34]; *Upjohn Co v United States* 449 US 383, 101 S Ct 677 (1981) 389-94; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 (HCA) [103], [108].

actual knowledge of the issues on which the advice is being sought. If the privilege is to perform its intended function it must guide the behaviour of the multiple actors that make up the corporate client. However directors and ordinary employees are subject to different obligations and often have different interests from each other and the entity. Therefore the effect of the privilege on these agents needs to be considered separately. Then there is the problem that the "confidence" belongs to the entity, and so the power to waive privilege resides with those who control the company, not with the agents who were party to the communication. This rule is bound to reduce the candour of some agents when talking with corporate counsel, because the information they provide counsel can be disclosed without their consent.

One of the differences between corporations and individuals cited as a reason in *favour* of a corporate privilege is that corporations are subject to an ever increasing array of complex laws and regulations. Compliance with these laws would be virtually impossible without taking legal advice, and guaranteeing corporations the right to communicate in confidence with counsel is an effective way of encouraging corporations to get legal advice. This is the position of most lawyers associations and corporate lobby groups. For example, 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.[34]

[34] American Bar Association, 'Taskforce on Attorney Client Privilege Report' 2005) <http://www.abanet.org/buslaw/attorneyclient/home.shtml> accessed 19 January 2010.

Were the risk of compulsory disclosure of lawyer –client communications to have a chilling effect on corporations, the inevitable result would be reduced legal compliance especially in areas that are heavily regulated. The laws governing trade and commerce is one heavily regulated area where corporations dominate and the line between prohibited conduct and legitimate commercial behaviour is not always an 'instinctive matter.'[35]

On first reckoning it would seem a no brainer that the privilege should be extended to corporations - to enable their human agents to take the necessary steps to ensure compliance with the law. While the argument is superficially attractive it can be turned on its head. The fact that corporations are subject to an often bewildering array of regulations means that their agents have little choice but to obtain accurate legal advice about the company's affairs. Legal assistance might be necessary to help management understand the regulatory environment in which they operate, to carry out internal investigations into possible breaches of the law, and even to structure day to day business transactions. Put simply most large corporations are virtually dependent on accurate legal advice in conducting their businesses, and thus need little incentive in the form of a privilege to obtain it.

Some empirical support for the argument that corporations depend on advice irrespective of the scope of the privilege, can be found in Alexander's study on

[35] *Upjohn v US* (n 33) 392-393.

corporate privilege in 1989. [36] Remarkably, Alexander's study is the only empirical study to date on the effects of the privilege on corporate behaviour. It comprised 182 interviews with corporate executives, in-house counsel, external corporate attorneys and Judges in Manhattan.[37]

The study found that lawyers were 'virtually omnipresent' at the larger corporations surveyed.[38] One of the executives surveyed 'summarized an apparently widely shared view when he said "The benefits [of legal advice] outweigh the costs [of disclosure]. You have to run a business and the attorney-client privilege is only one of many factors to worry about."'[39] Another important finding of Alexander's study was that even a significant percentage of in-house counsel had doubts about whether the privilege promoted candour between them and their corporate employer/client. Only 62% of in-house counsel who were interviewed, compared to 88% of external counsel, thought that the privilege encouraged corporate employees to be more candid when talking to lawyers.[40] A recurring theme in the responses of in-house counsel with doubts about the value of the privilege was that employees would be candid even without a privilege in *their companies.* Various reasons were offered for this view, including that the company operated in a highly regulated 'fish bowl environment'; that employees

[36] V Alexander, 'The Corporate Attorney - Client Privilege: A Study of the Participants' (1989) 63 St John's L Rev 191.

[37] Ibid 202.

[38] Ibid 273.

[39] Ibid 370.

[40] Ibid 244.

know "they'll be fired" if they are not candid with counsel; and that "communications must go on, with or without the privilege."[41]

The results of Alexander's study provided qualified support for a corporate privilege, but also demonstrated its limitations and suggested that the importance of the privilege in promoting candour may be overstated. Some of the other key findings were:

I. Three quarters of corporate executives believed that the privilege encouraged candour on the part of corporate executives;[42]

II. executives' interaction with counsel relied more heavily on their trust and experience with that counsel, than knowledge of privilege laws. If rapport was established executives would continue to consult these counsel even if the privilege were abolished or curtailed;[43]

III. if the privilege were abolished executives would put fewer things in writing and be more circumspect in written communication. Most oral consultations would continue to be as candid as in the past;[44]

IV. a small minority of clients would be completely deterred from consulting a lawyer if the privilege were abolished, and a significant minority would be dissuaded from being completely candid during the consultation;[45]

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[41] Ibid 277.

[42] Alexander (n 36) 246, 261.

[43] Ibid 225, 248, 263, 269-270.

[44] Ibid 264, 370-371, 374.

[45] Ibid 295.

V. employees at lower levels of the corporate hierarchy generally know little about the corporate privilege;[46]

VI. in their discussions of the privilege with corporate representatives, most lawyers indicate that claims of privilege may not be upheld for one reason or another,[47] and

VII. assertions of privilege claims often lack merit.[48]

The opinions of corporate executives and counsel, although important and insightful, cannot be the final word on how privilege affects corporate behaviour. These persons have a vested interest in maintaining a broad corporate privilege and are likely to overstate its importance. Putting aside the participants' vested interests, qualitative surveys do not always accurately measure the effect of rules on people's behaviour as distinct from how people feel about a rule. As Pollard writes:

> …social psychology studies indicate that people are often unable to say what really motivated them. [E]mpirical studies relying on self reporting about whether the existence of a privilege affected the privilege holders' behaviour are inherently indeterminate.[49]

An analysis of the different actors that make up the corporation, their interests and the laws affecting them, is an objective and probably more reliable guide to the effect of the corporate privilege.

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[46] Ibid 266.

[47] Ibid.

[48] Ibid.

[49] D Pollard, 'Unconscious Bias and Self Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege' (1999) 74 Was L Rev 913, 999.

One of the most striking features of corporate actors' interests and the laws governing them is the changes that have occurred since Alexander conducted his study. We will consider the position of directors and ordinary employees in turn.

5.2.1 The position of directors

Probably the biggest changes to corporate law in the UK in terms of its potential impact on the corporate privilege are changes to content of directors' duties. The most important duty of directors in this regard is the duties of diligence, care and skill owed to the company. Historically these duties were given a lax interpretation by the courts, and required the director simply to exercise the level of skill or care he or she possessed.[50] Of course if the director was a professional and experienced business-person, as was frequently the case, in practice this test would require a high degree of skill and care. But in light of the realities of modern corporate life, where many directors are highly paid professionals and ordinary shareholders have little say in their appointment or removal, the courts have gradually moved to impose an objective standard of diligence, care and skill.[51] This shift has been codified in section 174 of the Companies Act 2006 which provides that 'a director of a company must exercise reasonable care, skill and diligence' and defines reasonable care as follows:

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[50] *Re City Equitable Fire Insurance Co* [1925] Ch 407 .

[51] *Dorchester Finance Co v Stebbing* [1989] BCLC 498 (Ch) (decided in 1977); *Norman v Theodore Goddard* [1991] BCLC 1027 (Ch); *Re D'Jan of London Ltd* [1994] 1 BCLC 561 (Ch). The latter two decisions were influenced in part by the standards imposed on directors under the Insolvency Act 1986.

> This means the care, skill and diligence that would be exercised by a reasonably diligent person with (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions carried out by the director in relation to the company, and (b) the general knowledge, skill and experience that the director has.

Under the new test, the director's personal skills can only add to the standard of care that they would otherwise be required to meet.

The significance of this duty to corporate advice privilege is straight forward. Simply put, the obligation to be diligent and exercise reasonable skill and care in managing the company for executive directors, or guide and monitor the management of the company in the case of non-executive directors, means that both types of directors have an extremely strong incentive, if not a practical requirement, to get accurate legal advice about the company's affairs.

This is not a legal duty in the strict sense. The authorities demonstrate a strong reluctance to prescribe the content of the diligence duty in the abstract, [52] and they are highly unlikely to hold that section 174 imposes a *legal* obligation to take advice about the company's affairs. Nonetheless, what the courts have been willing to do is lay down guidelines as to the minimum level of diligence and care that can ordinarily be expected of the reasonable director. It is apparent from these guidelines that in many situations getting accurate legal advice is a practical necessity for the reasonable director. In

[52] See eg Parker J in *Re Barings plc and ors (No 5), Secretary of State for Trade and Industry v Baker and ors (No 5)* [1999] 1 BCLC 433 (Ch) 489; *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.

Daniels v Anderson[53] the New South Wales Court of Appeal sought to outline the level of diligence, skill and care reasonably required of a director. The decision has been endorsed by the High Court in England & Wales as accurately reflecting English law.[54] The requirements that can be discerned from the judgment in *Daniels* include: (i) become familiar with the business of the company; (ii) guide and monitor the management of the company; (iii) *get outside specialist advice on issues of substantial importance*; (iv) u*nderstand the regulatory environment in which the company operates and measures taken to comply with that environment,* and (v) d*o not 'shut eyes' to corporate misconduct.*[55]

The requirements highlighted in italics virtually demand directors obtain legal advice. It is almost inconceivable that a director could obtain a thorough understanding of the regulatory environment in which the company operates without obtaining legal advice. At the same time, advice about the regulatory environment will be a vital means of educating directors on what measures the company must adopt to achieve compliance. Similarly the need to obtain specialist advice on issues of substantial importance will invariably require directors to obtain legal advice where those issues have a legal dimension. Finally, the requirement not to shut eyes to corporate misconduct will require directors to establish internal controls which will throw up problems in delegated areas whilst there is still time to do something about them, and

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[53] *Daniels v Anderson* (1995) 37 NSWLR 438 (New South Wales CA).

[54] *Re Barings plc (No 5)* (Ch) (n 52) 488.

[55] This list is based on a summary compiled by R Smerdon, *A Practical Guide to Corporate Governance* (3rd edn Sweet & Maxwell, London 2007) 93 Emphasis added. The original discussion by the Court of Appeal can be found in *Daniels v Anderson* (n 53) , 500–505.

ensure thorough internal investigations are carried out when evidence of legal breaches emerge. All this requires the assistance of lawyers.

Directors' duties also influence the content and candour of lawyer-client communications, not just the frequency of consultation. The requirements on directors outlined in *Daniels* are not mere formalities or a box ticking exercise[56] that can be satisfied by obtaining a legal opinion no matter how general or brief it might be. Directors must get *accurate and relevant* advice about the company's affairs so it can actually guide their decision making. To get accurate and relevant legal advice directors must provide full and accurate instructions to their lawyer.

While there are no authorities directly on point, some support for this proposition can be found in cases where directors have sought to rely on their legal advice as a defence to a claim they breached their directors' duties, or as grounds for an application to be exonerated for a breach of duty. In *Australian Securities and Investments Commission (ASIC) v Macdonald* the corporate regulator brought proceedings against the directors of James Hardie Limited, arising out of the corporate restructure already discussed in Chapter 1. ASIC alleged that the entire James Hardie board had breached their duties of diligence and care by approving misleading public statements regarding a proposed corporate restructure.[57] The restructure was a complex

[56] This is a common criticism of corporate governance rules: K Keasey et al, 'The Development of Corporate Governance Codes in the UK' in K Keasey et al (eds) *Corporate Governance: Accountability, Enterprise and International Comparisons* (John Wiley, Chicester 2005) 21, 42.

[57] *Australian Securities and Investments Commission v Macdonald (No 11)* [2009] NSWSC 287 (re breach of directors duties); *Australian Securities and Investments Commission v Macdonald (No 12)* [2009] NSWSC 174 (re application by directors to be exonerated for breach, and declaration of penalties).

one, involving a series of transactions one of which required court approval. Hardie obtained extensive expert and legal advice on how to achieve the restructure and its potential ramifications, but as the Royal Commission into the restructure subsequently concluded, none of that advice examined the underlying of merits of the transaction. The Royal Commission's final report stated:

> [Amongst all the] solicitors acting for JHIL, for the outgoing directors of Coy and Jsekarb, and for the incoming directors, no one expressed any view on the merits of the underlying transactions. The nature of directors' duties was discussed at length, the subjects to which the duties relate were not.[58]

The directors' principal defence to ASIC's claim they breached their directors' duties was that they did not see, or approve, the misleading statements to the market about the restructure.[59] The outcome of the case therefore turned largely on the evidence as to what transpired at the board meeting, rather than whether the directors were entitled to rely on legal and other expert advice in approving and announcing the restructure. The Court held that the directors did see and approve the misleading statement,[60] although this finding was overturned by the Court of Appeal.[61]

Beyond the factual dispute, both courts accepted that, in principle, directors could rely on legal advice as a defence to a breach of duty on the grounds that they had acted reasonably, or in support of an application to be relieved of liability on the

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[58] D Jackson, 'Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation' (NSW Government, Sydney 2004) [29.16].

[59] *ASIC v Macdonald (No 11)* (n 57) [191].

[60] Ibid [221]-[225].

[61] *Morley & Ors v ASIC* [2010] NSWCA 331 [796].

grounds that they acted honestly in the circumstances.[62] However the instant case was not one of 'reasonable reliance.' The issue turned largely on the meaning and import of words in public announcements. The directors were intelligent and experienced business people, who understood the importance of the sufficiency of funding of the restructure and its communication to stakeholders. Accordingly the directors could be expected to apply their own minds to whether such an important announcement was misleading, and not just rely on assurances from management or advisers.[63]

The High Court of England & Wales held in *Re Ortega Associates Ltd (in liq) v Walking*[64] that where directors *reasonably* rely on experts, such as legal advice, they may escape claims of breach of duty of care, and in any event may have good grounds for being excused for the breach under s1157 of the Companies Act 2006. The case concerned an application by the liquidator of a company for a declaration under s212 of the Insolvency Act 1986 that Walking, a former director, was liable to repay £443,000 misappropriated from the company. Walking's fellow director, O, had been engaged in a scheme to defraud HM Customs & Excise over VAT by filing false VAT repayment claims. Walker reported the matter to Customs & Excise and then took legal advice about what his duties were in the circumstances, and particular whether his common law and fiduciary duties as director conflicted with the duty under the Proceeds of Crime Act 2002 'not to tip off' his fellow director in a way that is likely to prejudice an investigation. He was advised by his solicitor that he should not do anything that would

[62] The application for relief was pursuant to s 1317S(2) of the Corporations Act 2001(Cth) cf Companies Act 2006 s1157.

[63] *Morley & Ors v ASIC* (n 61) [817] - [821]; *ASIC v Macdonald (No 12)* (n 57) [75]-[78] .

[64] *Ortega* (n 5).

tip off his fellow director. Unfortunately, C&E failed to act promptly on Walking's disclosure, and as a consequence the director O was able to abscond with the money.

Walking defended the claim that he had breached his director's duties, by arguing that he had obtained legal advice about how he should discharge those duties, and followed the advice he received. The court held it cannot be a requirement that a director should take advice from a solicitor in case such as the present, because many directors may not need to do so. However the fact that a director has taken advice will be a relevant and important factor when determining the validity of an allegation against him that he has acted in breach of his duties.'[65]

The important point to make is that if reliance on advice is to be reasonable, it must be relevant to the matter/s under consideration by a director so that it can actually inform their decision making process. To ensure the advice is relevant, a company has little choice but to provide full and accurate instructions. This may include, depending on the context, a request to the lawyer to give an unfettered opinion about the legality of the matter/s in question and what would be a prudent course of action in the circumstances.

When all the above factors are taken into account, it would a be a foolhardy director who is prepared to go into the witness box facing allegations that they breached their duties under s 174, and admit that they did not obtain detailed legal advice about

[65]Ibid [36].

matters of substantial importance to the company which have a legal dimension, or fully disclose all relevant information to the lawyer about the matter. Similarly, it would be a weak defence for a director to claim that she took legal advice, but only orally, on the matter under consideration.

In most cases detailed and relevant legal advice will be a necessary, but not sufficient, part of a director's defence against an alleged breach of section 174. As Palmer's Company Law puts it: 'The general duty of care and skill, by its very nature, means 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.'[66] Finally, following the decision in *Ortega*, even if a court declines to find that the failure to obtain legal advice amounts to a breach of director's duty under s174, obtaining advice may provide directors with a defence to an allegation of breach of duty to the company.

The need to get legal advice on important matters affecting the company, as part of the duty under s 174, will also apply to executive directors even when they are carrying out the day to day management of the company. This is because the courts do not distinguish between the duties of directors acting in that capacity, and the duties of directors when acting as managers.[67] Thus executive directors must also comply with the same standards of expected of them as directors, - including the need to get advice where appropriate - when carrying out the day to day management of the company.

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[66] G Morse, *Palmer's Company Law* (Release 123, Sweet and Maxwell, London 2009) [8.2813].

[67] Davies (n 27) 485.

Thus far we have considered how the standards imposed on directors promote compliance by providing directors with incentives to obtain legal assistance. However the extent to which directors' duties promote compliance is not merely a function of the relevant standard. Rates of compliance are also linked to the probability of enforcement, whether achieved through formal court proceedings or informal mechanisms such as the imposition of reputational sanctions.[68]

Directors' duties are owed to the company and therefore enforceable only by the company,[69] although law enforcement agencies can also take certain actions against directors based on their conduct as directors. The standard remedy for a breach of duty is compensation to recompense the company for the harm caused to it by the director's breach. Research by Armour suggests that the level of formal private enforcement of directors' duties is extremely limited, however there are various mechanisms used to secure compliance by informal means including the Combined Code on Corporate Governance.[70]

The lack of private enforcement may be partly attributable to civil costs and funding rules which can make legal action prohibitive, as well as difficulties with rules of standing and the substantive law. In the UK, prior to 2006 the likelihood of a company bringing an action against individual directors was limited by the rule in *Foss*

[68] J Armour 'Enforcement Strategies in UK Corporate Governance' in J Armour and J Payne (eds) Rationality in Company Law (Hart, Oxford, 2009) Chapter 3, 71, 73-74.

[69] A fact confirmed in section 170 in respect of the statutory duties in Part 10 of the Companies Act.

[70] Armour (n 68) 102.

v Harbottle,[71] which significantly restricted the right of individual shareholders to bring derivative claims on behalf of the company. However the 2006 Companies Act has made it easier for shareholders to commence litigation for breach of directors' duties. Part 11 of the Act creates a new derivative claim which can only be continued with the court's permission, and it puts the decision about whether it is in the best interests of the company for litigation to be commenced in the hands of the court. Furthermore, the factors that would normally have doomed a derivative claim under the rule in *Foss v Harbottle*, for example the possibility of ratification by the shareholders, is now only one factor that the court takes into account in deciding whether to grant permission for the litigation to continue.[72] It is possible therefore that there will be more private formal enforcement of directors' duties in the future.

Formal enforcement of rules in the UK has been left largely to public agencies, and rather more work is done by such agencies than is commonly thought to be the case.[73] One method for public enforcement of directors' duties which is relevant to the present discussion is The Company Directors Disqualification Act 1986 (CDDA). Section 6 of the (CDDA) provides that, on application, the court shall make a disqualification order against a person who is or has been a director of a company which has at any time become insolvent (whether whilst that person was a director or subsequently) and whose conduct as director (whether taken alone or in conjunction with his conduct as a director of any other company) makes him unfit to be concerned in

[71] *Foss v Harbottle* (1843) 67 ER 189 (Ch).

[72] Companies Act 2006 s 261, 263.

[73] Ibid 119.

the management of the company. The Secretary of State has the power to apply for a disqualification order. In practice this function is performed by the Department of Business, Innovation and Skills. The Act has been a major tool in maintaining at least minimum standards of diligence, care and skill on the part of directors.[74]

The CDDA adds to the incentives on directors to obtain advice and assistance. A serious failure by a director to exercise reasonable care, skill, and diligence may warrant disqualification under s 6(1).[75] Accordingly, where a company is or becomes insolvent, and the failure of a director to take legal advice or establish internal legal compliance controls amounts to incompetence, it could be used as grounds for an application for disqualification. [76] Furthermore, under section 9A a court must make a disqualification order where a company breaches competition law and the court is satisfied that the conduct of a director of that company makes him unfit to be concerned in the management of a company. Thus directors of even financially healthy companies would be well advised to get accurate advice about the company's obligations in relation to competition law.

The emergence of corporate governance codes has also added to corporations' incentives to obtain legal advice and provide complete instructions to their lawyers.

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[74] As of 2007 disqualification orders were being made at a rate of about 1200 per year: G Morse, *Palmer's Company Law* (Release 112, Sweet and Maxwell, London 2007) [8.1702]. Because listed company insolvencies are rare, most applications for disqualification are brought against directors of small companies: ibid 99-100.

[75]S Mortimore (ed), *Company Directors: Duties, Liabilities and Remedies* (OUP, Oxford 2009) [28.146].

[76]*Re Barings plc (No 5)* (n 52) In Barings directors were disqualified for failing to have internal control systems in relation to trading activities in an overseas subsidiary.

Policy makers and interested parties have put a lot of work into producing corporate governance codes which set out 'best practices,' and the result in the UK is the Combined Code on Corporate Governance. The code applies only to publicly listed companies and its essential features remain voluntary, but it also contains concrete reporting rules. Specifically there is 'comply or explain' rule in relation to the code. The Financial Services Authority Listing Rule 9.8.6 requires a company to confirm it complies with the code's provisions or give reasons for its non-compliance. Equally importantly the code, and the work that went into its development, has been influential in the reforms to the Companies Act and the courts' interpretation of directors' duties at common law. [77]

One aspect of the code that has significance to the debate on corporate privilege is that it requires companies to adopt internal risk management and audit systems including financial, operational and compliance controls.[78] The 'Turnbull Guidance on Internal Control', which is annexed to the code and provides guidance to companies on how to apply the code, defines the 'Elements of a sound system of internal control' as follows:

> [T]he policies, processes, tasks, behaviours and other aspects of a company that, taken together:
>
> - [help] the safeguarding of assets from inappropriate use or from loss and fraud and ensuring that liabilities are identified and managed;
> - help ensure the quality of internal and external reporting…

[77] Davies (n 27) 492.

[78] Combined Code on Corporate Governance (n 4) Main Principle C2 and Code Provision C.2.1.

- help ensure compliance with applicable laws and regulations. [79]

Once again the need to obtain legal advice as part of these compliance and risk management measures is so obvious it hardly needs stating. Being voluntary the code is unlikely to exert much influence over directors' decision making regarding very sensitive corporate actions in individual cases. However much of the guidance is directed towards setting up risk management systems, to avoid compliance problems arising, or to ensure they can be dealt with promptly when they do arise. Research indicates that 'most companies comply with most aspects of the code', and that the level of compliance has increased,[80] perhaps indicating a gradual cultural shift in investors' and managers' attitudes to corporate governance.

It would be unsurprising if companies are voluntarily electing to follow the Turnbull Guidance on Internal Control to help ensure legal compliance. Corporate managers have practical, commercial and legal incentives to remain fully acquainted with the company's affairs, and to order their employees to talk to them directly and/or the company lawyer. To pursue its commercial interests and defend its legal position, a corporation needs to know what their agents have done or not done in the course of their employment, and to be able to access knowledge held by their employees. Imwinkelreid states that, in the context of an internal investigation:

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[79] Financial Reporting Council, 'Turnbull Guidance on Internal Control' 2005) <http://www.frc.org.uk/corporate/internalcontrol.cfm> accessed 19 January 2010 [19].

[80] Armour (n 68) 103-104.

> …the entity can gain a measure of effective control over the employee's knowledge only by having the employee reduce the knowledge to writing. In most cases, rational control group members will be inclined to order the employee to immediately consult with its counsel.[81]

A counter argument to the claim that rational directors would always get accurate legal advice and assistance to help manage the company's affairs is that this analysis is naïve. The agents of a company are, after all, fallible human beings, and corporate agents have career and economic incentives, and social pressures, to put the short term financial success of the company above everything else. So far as the legal analysis is concerned, such a criticism only holds if we ignore the fact that the directors not acting on their own behalf, but as agents of the entity, and in that capacity they are subject to a combination of binding rules and standards (and 'voluntary' codes) that place great importance on legal compliance.

From a practical point of view it may strike business people as naïve to think that directors and senior managers would always seek legal assistance and advice about the company's affairs, and give complete and accurate instructions, when they know that those instructions and advices will be the first thing that government regulators or their opponents look to should the matter become the subject of an investigation or dispute. This may be true of some corporate managers, at least at present. Over time however, if the standards imposed on directors are clear, and the consequences of non-compliance are equally clear and serious, then there should come a point when corporate directors accept that seeking accurate and complete legal advice is something

[81] E Imwinkelreid, *The New Wigmore: A Treatise on Evidence* (Aspen Law & Business, New York 2002) 758.

they must do as a matter of course. No doubt the vast majority of directors already take this view.

5.2.2 The position of directors in small private companies

Assuming that the corporate law and governance changes discussed above reduce the need for a privilege for directors of large and public corporations, the obvious question that arises is whether this analysis also applies to small companies? The short answer is that it does, but not to the same degree. S174 of the Companies Act makes clear that the standard of care and diligence required of directors is based on that which can reasonably be expected of directors carrying out similar functions on behalf of the company. Thus as a director takes on more functions in relation to the company, for example he becomes an executive director, what is required of him to discharge his duty of diligence, care and skill will also increase. That principle also applies to different types of executive directors, and non–executive directors, and between different types and sizes of company.[82] Thus directors of large and public companies are likely to need to get legal advice more often than directors of small and medium sized enterprises. In many instances the functions carried out by directors of small and private companies are more limited than those of directors of large and public companies. Reporting and regulatory requirements often impose less stringent obligations on smaller companies, and because their activities are more limited in scope, the matters that directors of small companies need to attend to or take into account are typically more limited also.

[82] Davies (n 27) [16-13] 490-491; *Ortega* (n 5) [28] citing *Re Baring Plc* (n 52).

Given the lower levels of care and skill required of directors of smaller companies, it would be difficult to sustain an argument that a director of a small company acting reasonably would always obtain advice on all matters affecting the company that have a legal dimension. Similarly the argument that the size, significance and complexity of a corporations' affairs means that they have little choice but to obtain accurate legal advice, has less traction in the case of small businesses whose activities are usually more limited in scope.

Further differences between the standards of conduct required, or expected, of directors of large and small companies can be found in the combined code of corporate governance. The code only applies to publicly listed companies. Small and medium sized companies are normally private, and private companies comprise the vast bulk of companies on the company register.

There is one area where directors of small companies have a greater incentive to obtain advice than their counterparts in large or public companies. Reliance on legal advice can provide a defence to a claim of breach of directors' duties if reliance on the advice is reasonable. [83] Reliance is more likely to be reasonable if directors are dealing with complex matters with which they have limited experience or knowledge. Most directors of large companies are highly qualified and experienced so the situations where they have to rely exclusively on expert advice, without exercising their own

[83] *Ortega* (n 5).

independent judgment, will be few in number. By contrast, directors of small companies with fewer qualifications have a greater chance of successfully mounting a reasonable reliance defence.

Taking into account all of these factors it is fair to suggest small companies have fewer incentives than large companies to obtain accurate legal advice in the absence of a privilege.

On the other side of the ledger, directors of small companies are also more likely to have greater disincentives to talk candidly to corporate counsel in the absence of a privilege. In the case of small companies, the individual agent's interests are often heavily intertwined with the corporation's interests. The 'company's actions' are often the actions of a single agent, who may also be the sole director and shareholder.[84] The agent may be reluctant to obtain advice regarding the entity's affairs for fear that what they tell the lawyer about the company could be compellable from the company and used against them in litigation.

In some ways the decision making processes for agents of small companies with regard to legal advice more closely resembles the decision making processes of individuals acting on their own behalf than directors of publicly listed and large companies. This is so even though the director of the small company is acting qua agent of the company.

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[84] The Companies Act 2006 specifically permits the creation of companies with just one member: s 7.

In light of the incentives and disincentives on agents of small companies to take advice in the absence of a privilege, one has to conclude that the reduced candour theory may have some merit in the case of small private companies.

There are a number of creative solutions that would allow directors of small companies to obtain confidential advice without a privilege for the entity. Individuals, including a sole proprietor, could continue to obtain advice protected by privilege in their individual capacity. The communications would attract privilege even if the individual sought advice about the entity's interests, for as Lord Rodger noted in *Three Rivers No 6* a client is entitled to obtain confidential legal advice about another person's legal affairs.[85] In the case of a one man company no problem of waiver would ever arise, because the agent need not disclose the advice to anyone. In a two or three man company the agents could obtain advice as joint clients, and thus all would have the capacity to obtain and consider advice in a shared confidential sphere. However these solutions become less practical as the size of the company increases.

Whether the benefits of a privilege for small companies are sufficient to justify a privilege for such companies, or all companies, or whether a separate rule should be introduced for small companies is examined in chapter 6.

[85]*Three Rivers No 6* (n 14) [56].

5.2.3 The position of employees

Any assessment of the value of a corporate privilege must take account of the interests of company employees. The information which might affect the company's legal position is often held by ordinary employees, so their co-operation is crucial if companies are to obtain accurate and relevant legal advice. But there are questions about how significant the privilege is to ordinary employees deciding whether to talk candidly to corporate counsel about what they know, or did, or witnessed.

The privilege's role in securing employees' co-operation is probably negligible when compared with the ordinary obligations, pressures and incentives to co-operate with management that are part of any employment relationship. Arguably an employee needs no more reason to talk candidly to corporate counsel than an order from her superiors to talk. In practice there may be situations where ordinary employees second guess an order from their superiors, thinking that if they tell the truth it could be harmful to the company, and in turn their position within the company. Accordingly, employees might decide they should tell corporate counsel what they think the company wants them to say. This risk is undoubtedly a real one, but it is not a convincing argument for recognizing the privilege. Firstly, this problem exists independently of the lawyer-client relationship and conferring a privilege over such communications won't eliminate it. Some corporate employees may be reluctant to speak honestly to their superiors in any context, fearing the consequences of revealing information or opinions that might upset their superiors. This dynamic is a byproduct of a management culture – and a bad

management culture at that – which is hardly in the objective interests of the company. Much of the work on corporate governance, especially the Combined Code, is designed to foster a culture within companies which emphasizes the early identification of problems, rather than denying their existence or avoiding dealing with them.[86] If this work is successful in creating an improved management culture, it should over time influence the behaviour of mid level managers, who can start rewarding rather than punishing candour in the work place. Furthermore, if management were making a conscious decision to encourage their employees to be frank with corporate counsel, but sought to discourage them from being similarly frank in communications with management (which are compellable), this is likely to constitute evidence of an attempt to conceal sensitive information under the privilege cloak, rather than a bona fide attempt to obtain legal advice. If so, the communication might not qualify for privilege under the dominant purpose test in the first place.

The main reason why an employee might be reluctant to co-operate with corporate counsel is because they have some personal interest in the matter and potential criminal or civil liability. This is the quintessential scenario in which a promise of confidentiality can play an active role in encouraging the employee to talk candidly. But it is precisely in these circumstances that the corporate privilege is of questionable value *to the employee.* For in the case of corporate privilege, the ‘‘confidence’’ does not belong to any individual corporate agent but to the entity itself, and the power to waive

[86] Financial Reporting Council, 'Turnbull Guidance on Internal Control' (2005) <http://www.frc.org.uk/corporate/internalcontrol.cfm> accessed 19 January 2010 [21].

privilege over communications resides with the corporation. In practice this means that the fate of a communication rests not with the employee who made it, but with their superiors, or their colleagues, or future boards, or administrators representing hostile creditors. The fact that the individual employee who communicates information to the company lawyer does not have control over the communication, is bound to make some employees who are concerned about their legal position less willing to talk candidly to the company lawyer.[87]

One writer has suggested that a corporate privilege can still serve its intended purposes if the employee is under the (mistaken) belief that they can keep the information confidential.[88] This is probably right in so far as it relates to the decision making of individual employees. As Alexander's study found, 53% of the lawyers surveyed believed that virtually 'no one at any level of the corporate hierarchy is aware that the privilege does not belong to them personally.'[89] The conditional promise of confidentiality that comes with a corporate privilege, even if its effect is misunderstood by employees, may help foster an open dialogue between corporate agents and corporate counsel.

However basic principles of fairness require that employees, including individual managers, are warned that what they tell the company lawyer could be disclosed without their permission, and used against them in court. The privilege should

[87] The question was not put directly to the executives interviewed in Alexander's study (n 36) 251.

[88] T Glynn, 'Federalizing Privilege' (2002) 52 Am U L Rev 80, 80-81.

[89] Alexander (n 36) 249.

not 'become a trap' for employees who, believing that their communications are confidential, incriminate themselves before persons who might use the admissions to their own advantage.[90] Nor is this prospect far-fetched. Certainly corporations will not throw their employees 'to the regulatory wolves', as Wright and Graham graphically put it[91], by voluntarily disclosing privileged information unless it is clearly in their interests to do so. In most cases disclosure of the information will also undermine the company's legal position, and being seen to 'sell out' its employees may have a long term adverse impact on employee morale, and the company's performance. But corporate managers may come to the view that their commercial interests are better served by disclosing privileged information even if it undermines their employee's interests. Alternatively, where the corporation and the individual employee are both potentially liable to civil sanctions there is a conflict of interest, which those controlling the company might seek to exploit. And where companies go into bankruptcy, the administrators in charge of the company represent hostile creditors. They may elect to pursue some or all individual corporate agents who have breached duties to the company in order to increase the assets available to meet creditors' claims.

There can also be a conflict in interest in cases of criminal liability. Corporations might 'plea bargain' with regulators, seeking lenient treatment in exchange for co-operating with investigations into the conduct of corporate employees. This practice is relatively common in the US. Until recently, the Department of Justice had a policy of

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[90] *United States v Kovel* 296 F2d 918 (2nd Cir, 1961) 922-923.

[91] C Wright and K Graham (eds), *Federal Practice and Procedure* (vol 24, 2nd edn West Publishing, St Paul 1986) 2007 Supplement 67.

regularly demanding corporations waive privilege over internal investigations and witness statements in return for lenient treatment in prosecuting decisions and sentencing applications.[92] Corporations almost always acceded to such requests. This experience highlights the limited nature of the protection a corporate privilege provides individual managers and employees.

The DOJ's policy was highly controversial and the American Bar Association and corporate interest groups successfully lobbied the Government and the Congress to curtail the practice.[93] Yet the underlying cause of the problem is not a regulator flexing its muscle, but the rule that the privilege belongs to the entity and not the employee who communicates the information. So long as this remains the rule there will always be the prospect of those controlling the corporation hanging their employees or former employees out to dry if they decide it is in the entity's interests to disclose the relevant information.

The fact that the individual agents do not control the information they provide corporate counsel undermines the case for a corporate privilege, simply because it may chill candour in the very agents who need a promise of confidentiality. However, giving individuals greater control over their communications with corporate counsel is not so easy, and undesirable from the corporation's perspective.

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[92] As set out in a 2006 DOJ policy document known as the 'McNulty Memorandum': see L Griffin, 'Compelled Co-operation and the New Corporate Criminal Procedure' (2007) 82 NYU L Rev 311.

[93] See American Bar Association, 'Independence of the Legal Profession: Attorney-Client Privilege, Work Product, and Employee Legal Protections' 2009) <http://www.abanet.org/poladv/priorities/privilegewaiver/> accessed 19 January 2009.

Sexton claims that the rule that the privilege belongs to the entity, and risks this poses to individual employees, may be amenable to a technical solution. It has long been the case that the privilege can be held by more than one person, either as joint clients or because they share a common interest.[94] Sexton argues this rule should be adapted to the company/employee relationship so that a corporation could not waive privilege unless the employee who communicated the confidential information also agreed to waive privilege.[95] However the joint and common interest privileges have their own problems when applied in corporate contexts. Joint interest privilege protects the communications of clients who jointly retain a lawyer. Many corporations would be reluctant to have their lawyer's loyalties divided between them and the employee, especially where there is a conflict of interest. There is also Court of Appeal authority that a claim for common interest privilege cannot be maintained in the case of a conflict.[96] Secondly corporations would also be reluctant to give a veto to individual employees over the release of information which belongs to the company. Faced with this unpalatable prospect, companies may simply choose to order employees to talk to them directly or face dismissal. As already mentioned the privilege cannot protect individuals from their ordinary employment obligations. The third and related point is that the joint and common interest privilege creates a shared zone of privacy in which the clients can take advice, and consistently with this principle while the privilege prevents the communications from being disclosed to third parties, it cannot be asserted

[94] *Buttes Gas and Oil Co v Hammer (No 3)* [1981] QB 223 (CA).

[95] J Sexton 'A Post Upjohn Consideration of the Corporate Attorney Client Privilege' (1982) 57 *NYU Law Review* 443, 509.

[96] *Lee v South West Thames Regional Health Authority* [1985] 1 WLR 845.

in disputes *between* the parties.[97] The possibility of corporations relying on confidential communications by their employees in legal disputes with those very employees again highlights the fact that a corporate privilege is likely to have a limited, if not negligible role, in encouraging candour on the part of the employee where a conflict of interest exists.

A related problem is that individual corporate agents often have little influence in determining whether a communication qualifies for privilege in the first place. For a communication to qualify for privilege it must be made for the dominant purpose of obtaining advice. In the case of a company, it is the corporate client's purpose that is determinative. But given more than one agent can be involved in the client lawyer consultation process, the law must decide which agents' purpose is relevant to deciding the corporate client's purpose. One agent can have the authority to obtain legal assistance and order an employee to communicate with company counsel, while another can hold the information which the lawyer needs to provide assistance, and be the agent who communicates the information or prepares a document for that purpose. If the privilege belongs to the entity, then there is a good case of saying the purpose that counts is the purpose of those who control the company, and are responsible for taking advice on behalf of the company and deciding whether to implement it. But if this is correct, then an employee who holds information can be ordered to co-operate with corporate counsel without any guarantee that her statement is privileged. It may be that

[97] *Re Konigsberg* [1989] 1 WLR 1257 (Ch) 1266*; Cia Barca de Panama SA v George Wimpey & Co* [1980] 1 Lloyd's Rep 598 (CA) 614.

the dominant purpose of her superiors in ordering her to communicate with corporate was ultimately a business purpose rather than a legal one.

For these reasons, responsible corporate counsel should warn employees that any privilege over their communications belongs to the company, not them, and that any claim by privilege may not be upheld, whenever there is a conflict of interest between company or the agent or the individual agent is concerned about their own legal position. Alexander's 1989 study found that warnings about the possibility that the privilege claim may not be upheld, and that the privilege belongs to the entity, was already a common practice.[98]

One reason why US Attorneys advise corporate agents that a corporate privilege may not be upheld is that there is no clear definition of the corporate client. Consequently, neither the lawyer nor the corporate agent can be sure that their communications will qualify for privilege. The position in England is either more uncertain, for in England there is no definition of the corporate client at all. We will now turn to consider this controversial question.

5.2.4 Which agents represent the corporate client?

The above discussion on the effect of the privilege on corporate agents has been predicated on the basic assumption that at the very least we know the scope of a

[98] Alexander (n 36) 252, 266.

corporate privilege: we know who speaks for the corporate client, and when their communications will qualify for privilege. Amazingly, even this basic assumption is unfounded.

In the case of corporations the client is an artificial entity so the courts have to decide which agents of the company are to be considered part of the company for the purpose of the privilege.

The reality is that English law does not have a clear definition of the corporate client or even any guidelines to help courts determine which agents represent the corporate client.

This gaping hole in the law of privilege should ring alarm bells for anyone interested in ensuring the boundaries of advice privilege are properly policed, for it ought to be recalled that advice privilege only protects between lawyer and *client* and preparatory materials thereto. Equally, the lack of a clear definition ought to ring alarm bells for advocates of corporate privilege. If the privilege does play a role in inducing candour on the part of corporate agents, this candour promoting function must be critically if not fatally undermined by the fact that agents simply do not know whether their communications will be kept confidential because there is substantial doubt about whether they will be deemed to be part of the corporate client. There is some evidence that companies, and especially their lawyers, are seriously concerned about this problem, certainly if the Law Society's and the Bar Council's intervention in the Three Rivers Litigation are any guide. On the other hand, the fact that the Three Rivers

decision was handed down some 8 years ago, and there is no evidence that corporate Britain's relationship with lawyers has been seriously chilled by the decision, may lend further support to the argument that the value of privilege to corporations is greatly overstated.

It is also important to note that the client question can also arise when individuals seek legal advice through agents. Individuals use agents for a variety of reasons and functions including to conduct their legal affairs and represent their interests. The courts must decide when communications passing between an individual client and their agents, or their agents and the client's lawyer will qualify for privilege if the purpose of the communication is to obtain legal advice.

English law seemingly settled the independent agent question in the late 19th century in Wheeler v Le Merchant.[99] In that case the court held that communications via independent agents could not qualify as lawyer-client communications, protected by privilege, unless the agents were acting strictly as intermediaries between the client and the lawyer. If the agent was generating their own communication then no privilege would apply. This rule accords with the rationale of the privilege for if the agent is generating their own document they are in effect being used by the client to obtain information, and there is no good reason, and considerable cost, in protecting knowledge of underlying facts from disclosure as opposed to communications.[100]

[99] *Wheeler v Le Merchant* (1881) 17 Ch D 675.

[100] cf *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357 (Federal Court Of Australia - Full Court) The court held that communications with independent agents could attract advice privilege provided they were made for the dominant purpose of obtaining advice.

But the English courts never addressed the question of who speaks for the 'corporate client' until the Three Rivers litigation. Even then it is not clear that the parties intended to litigate the issue. The argument in the Court of Appeal in Three Rivers No 5 appears to have taken a different turn from the arguments raised before Tomlinson J, the judge at first instance. It should be recalled that the litigation concerned the Bank of England's role in the collapse of the BCCI. The plaintiff creditors had challenged the Bank's claim to privilege over documents by Bank employees prepared for the purposes of helping the Bank respond to the Bingham Inquiry, which was a private inquiry set up with the support of the government to investigate the matter. The Bank had set up a special unit, known as the Bingham Inquiry Unit (BIU), to liaise with the Bank's lawyers, Freshfields, in relation to the Inquiry. The documents which were the subject of the privilege challenge were not sent to Freshfields, but instead constituted the 'raw material' on which the Bingham Inquiry Unit sought advice. Tomlinson J described the question he had to decide as 'whether the subject matter of legal advice privilege is restricted to *communications between solicitor and client*, … or whether it embraces also material brought into existence for the dominant purpose of obtaining legal advice, even though that material is not in itself a *communication between solicitor and client*.'[101]

[101] *Three Rivers Council and Others v Bank of England* [2002] EWHC 2730 [3].

Yet this formulation, indeed the phrase ‘communication between solicitor and client’, raises two distinct issues. First, must the material be communicated to the lawyer to attract privilege, and secondly who is the client?

Tomlinson J focused on the nature of the ‘communication’, not the definition of a client in his decision. In upholding the Bank’s claim to privilege he stated:

> I would suggest that it is the confidentiality of the process of communication which is preserved [by LPP], rather than simply the confidentiality of distinct communications within that process… Once that wider principle is borne in mind…it **becomes clear that actual communication of the relevant document or information - and I prefer the broader description 'material' - is not in fact the touchstone.** Rather the touchstone is the purpose for which the document was brought into existence.[102]

Tomlinson J is surely right that it should not matter whether the client actually sends a document to the solicitor, provided it was created for the requisite legal purpose. Yet on appeal, the Court seems to switch its inquiry from whether the document must have been communicated to the Bank’s lawyers, to whether the employee who prepared the document is part of the corporate client. Counsel for the Bank put to the Court the hypothetical example of the Governor noting down what he remembered in relation to the supervision of BCCI with the intention of giving it to the BIU for transmission to Freshfields. In response, the Court endorsed counsel for the plaintiff’s submission that on the evidence before the court, the Bingham Inquiry Unit, which the bank set up to deal with the inquiry and liaise with Freshfields, was for the purpose of the application

[102] Ibid [4].

the client rather than any single officer however eminent he or she may be. Therefore even if the Governor had prepared such a document, it would not attract privilege.[103]

We can infer from the court's judgment that not all employees of the company will necessarily be part of the corporate client. Yet saying who is not the client just begs the question. And the court didn't give an answer. The Court decided the case on the facts before it, without giving an authoritative definition of the corporate client, or identifying any criteria to help courts, and more importantly lawyers and their clients, work out who is the client in any particular case. While this is regrettable, the court is not alone in failing to define the corporate client. The US Supreme Court in Upjohn ruled that the corporate client was not confined to members of the control group of a company (as the federal courts had previously held) but it also expressly declined to lay down any clear guidelines as to which agents of the company was the client for the purpose of the privilege.[104]

The Court of Appeal's judgment remains good law, although the law it created casts more confusion than light on the definition of the corporate client. The House of Lords declined leave to appeal, and refused to consider the issue in Three Rivers No 6, noting that the appeal was not concerned with that issue.[105]

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[103] *Three Rivers No 5* (CA) (n 2) [30]-[31].

[104] *Upjohn Co v US* 449 US 383 (1981) 396-7.

[105] *Three Rivers No 6* (n 14) [46] – [48] Lord Scott, [49] Lord Rodger, [63] Baroness Hale, [118] Lord Carswell.

In the next chapter we look at ways of defining the corporate in an effort to identify the optimal scope of a corporate privilege. Before turning to reform however we need to consider one other very important issue about the scope of corporate privilege and its effects on agent behaviour: how it applies in intra-corporate disputes.

5.2.5 Intra – corporate disputes

The current rules on LPP in intra-corporate disputes confirm the priority to the interests of the entity, over individual corporate agents, in the control of lawyer-client communications made by agents acting on behalf of the company. The current rule was outlined by Blackburne J in Arrow Trading & Investments v Edwardian Group:

A shareholder in the company is entitled to disclosure of all documents obtained by the company in the course of the company's administration, including advice by solicitors to the company about its affairs, but not where the advice relates to hostile proceedings between the company and its shareholders.[106]

[106] *Arrow Trading Investments v Edwardian Group* [2005] 1 BCLC 696 [24].

This rule provides further evidence that the corporate privilege provides very limited protection for individual agents who communicate with corporate counsel, which in turn can only limit the candour inducing role played by the privilege. On the other hand there are very sound reasons for adopting such a rule in intra-corporate disputes.

In England, the common law is still reluctant to recognize directors' general duties as being owed to shareholders individually. The main vehicle by which shareholders can sue directors for breach of their duties is a derivative claim on behalf of the company. Derivative claims under Part 11 of the Companies Act 2006 can only be continued with permission of the court, and the court will grant such permission only if it is satisfied that the litigation is in the interests of the company. If an action is 'in the interests of the company' it stands to reason that the shareholders bringing it ought to have access to any relevant legal advice the directors or senior managers obtained on the company's behalf.

However in jurisdictions where direct shareholder actions are more common, such as the US, far more attention needs to be paid to the issue of when shareholders suing the company are entitled to access the company's legal advice. The most significant US decision on the operation of the privilege is from the 5th circuit in *Garner v Wolfinbarger*.[107] The case arose out of alleged fraud and violations of securities laws by the officers and directors of a life insurance company in the registration and sale of

[107] 430 F2d 1093 (5th Cir 1970).

the company's stock. The shareholders brought a class action seeking damages individually, and asserted a derivative claim on behalf of the corporation. The company refused to disclose communications between it and counsel made contemporaneously with the relevant transactions. The district court relied on English authority that the privilege was totally unavailable in suits between a corporation and its shareholders. On appeal, the 5th circuit rejected the need to find either no privilege, or full privilege for the company. Instead of an absolute approach, it adopted a middle ground position, holding that the privilege for communications between management and the corporation's counsel is 'subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.'[108] The indicia of good cause include: the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources, and the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

These controlling devices are necessary if the law allows individual shareholders to pursue litigation against the company that is principally for their own benefit, or part of a shareholder activism strategy, rather than litigation which is in the interests of the shareholders as a group. This issue may receive more attention in England in the future, given that section 90 of the Financial Services and Markets Act 2000 provides that an

[108] Ibid 1103-1104.

acquirer of securities who suffers loss as a result of a false or misleading statement, or an omission of required information, in any prospectus or listing particulars may recover damages from any person responsible, including both the issuing company and its directors.

Conclusion

This chapter argued that the most convincing rationale for legal advice privilege is what Zuckerman has termed the ‘rule of law’ rationale. The rationale is derived from the basic right to know the law. The privilege facilitates this right by allowing clients to obtain legal advice in confidence, without fear that their communications will be disclosed without their consent. As such the rule of law rationale assumes that without a privilege, clients would be less willing to consult a lawyer and talk candidly to them about their affairs. While this assumption is a sound one in the context of litigation, it has less force when clients are seeking legal advice unconnected with litigation. Clients seeking purely legal advice already have a strong incentive to provide their lawyers with all the relevant facts because their aim is to get accurate legal advice on which they can rely. The circumstances in which the reduced candor assumption might hold true in advice contexts mostly relate to the needs and behaviour of individuals. Even if the privilege only makes a difference for some people in some situations, because of the

importance of the underlying right at the stake and the role the privilege plays in maintaining a proper relationship between the state and individual, a privilege can be justified for natural persons.

On the other hand, the rule of law rationale for privilege has little relevance to corporations, especially large and public corporations. The best rationale for a corporate privilege is that it promotes voluntary compliance. However a privilege which belongs to the entity is often unnecessary to achieve compliance, or does not assist efforts to achieve compliance, because it influences the behavior of corporate agents in different ways. The effects of privilege on corporate bebaviour can be summarized as follows: first, the privilege is virtually redundant as a means of encouraging directors (and senior managers) of large and publicly listed companies to obtain advice and provide full and frank instructions to their lawyers, given the incentives these agents have to get accurate and relevant advice; secondly, the privilege may play a useful role in encouraging directors of small companies to take advice regarding the company's affairs; thirdly, any individual corporate agent who is concerned about their own legal position as a consequence of their acts or omissions in the course of their employment (or office) may need an assurance that communicating with corporate counsel will not undermine their own legal position, but the privilege in its current form does not provide this assurance; and fourthly, employees who have no personal interest in a legal matter connected with their employment need no more incentive to co-operate with corporate counsel than an order from their superiors.

In light of these conclusions one has to seriously question whether a corporate privilege is fit for purpose. In most cases it is either not needed, or it does not work.

Some corporate agents may be genuinely concerned about the disclosure of their communications with corporate counsel. If they raise such concerns, the prudent corporate lawyer, acting both fairly to her client and the individual agent, is likely to give advice along the following lines:

> *Before you tell me what you know, you should be aware that what you say might be privileged, and be kept confidential, but I cannot give you a guarantee.*
>
> *The privilege protects communications between a client and a lawyer and in this case the client is the company. We cannot be sure whether a court would find you were part of the corporate client, even though you work for the company.*
>
> *If what you tell me is in furtherance of an improper purpose it will not be privileged. The relevant purpose is the company's, not yours personally.*
>
> *If the communication is made public by anyone even through no fault of your own or the company it might be used in evidence against you or the company.*

> *Ultimately the decision as to whether to assert the privilege, if it applies, rests with the company, not you. They can waive it without your consent. That is unlikely, but possible. In practice the people who make this decision are your superiors, or your successors, or administrators if the company goes insolvent. In intra-corporate disputes the company's shareholders may have a right to access your communications.*
>
> *So if you have some personal involvement in this matter and you are worried about your own position you should consider getting independent advice before speaking to me. I can't give you that advice because I act for the company, not you.*

It is hard to imagine that such a warning is likely to encourage much candour on the part of the agent. Not every part of this warning would be relevant in every instance, but in many cases much of it will be. Such a disclaimer (which does no more than. accurately state the law) bears almost no resemblance to the judicial rhetoric that the privilege is an absolute right that a person's communications with their lawyer will not be disclosed without their consent.

Should corporate counsel provide such a warning, agents who are concerned about their own legal position face an invidious choice: co-operate with counsel knowing that their communications could be disclosed without their consent, or refuse

to co-operate and risk dismissal from the company or other disciplinary action. Some employees will no doubt give the appearance of co-operating with counsel, but hold back half the truth. In turn this is likely to make management's task of achieving compliance more difficult, which is the raison d'etre of the corporate privilege. This highlights a basic problem with the corporate privilege: there is a conflict of interest between the actors who are needed to make it work.

A corporate privilege is designed to protect the entity, rather than individual agents, but the entity can only obtain the legal advice or assistance it needs if its human agents are willing to talk fully and frankly to the company lawyer about the entity's affairs. Thus if the corporate privilege is to function as intended it must give some protection to individual agents. Giving the entity a right to resist disclosure provides only conditional protection for individual agents because the entity may waive the privilege without the agent's consent. If agents were given greater rights over the fate of their communications with corporate counsel it would undermine the capacity of companies to use the information contained in lawyer-client communications as they see fit.

In Chapter 6 we try to identify the optimal scope of a corporate privilege in light of these conclusions.

Chapter 6 – The optimal scope of legal advice privilege

This chapter seeks to identify the optimal scope of legal advice privilege. Fortunately setting the boundaries of advice privilege involves fewer issues than is the case for litigation privilege. Once it is acknowledged that advice privilege should be confined to communications between lawyer and client, and preparatory materials thereto, the main questions as to when material will qualify for privilege are:

I. Who is the client, especially in the case of artificial entities? This is undoubtedly the most pressing question in setting the scope of a corporate advice privilege. A clear definition of the corporate client is needed to make the privilege function as intended, and ensure that the scope of privilege is kept within sensible limits. This chapter proposes a definition which seeks to meet these two objectives.

II. What is the requisite legal purpose for a communication or document to qualify for privilege? The purpose test was discussed in chapter 4. It recommended that the sole purpose test should be adopted in preference to the dominant purpose test, subject to the need to avoid chilling the communications between ordinary employees and corporate counsel than is already the case. Accordingly this chapter looks at ways in which a privilege could be reformed to give better protection for employees without increasing the costs of a privilege.

III. What constitutes legal advice for the purpose of the privilege? The House of Lords addressed this issue in *Three Rivers No 6*, where it held that legal advice

includes not only advice about the law, and a person's rights and obligations, but also advice as to what should prudently and sensibly be done in a relevant legal context. The court's decision is sound but applying it in practice can be difficult, and this chapter tries to give guidelines as to what counts as a relevant legal context.

While all these questions about the scope of advice privilege are important, there remains the fundamental issue of whether corporations should be entitled to claim the privilege at all and, if so, what type of protection should an advice privilege confer? Before addressing this question we can briefly deal with the type of protection that an advice privilege should provide individual clients.

In the previous chapter we saw that an individual's entitlement to advice privilege was based on rule of law considerations, and an acknowledgement that some individuals in some circumstances may need a promise of confidentiality before consulting a lawyer or talking candidly to them. Consistently with this rationale, there is a good argument for giving individual clients a right to resist disclosure and an immunity against use of any statements they make to a lawyer. This dual protection would give substance to the promise of confidentiality which underpins the rationale for LPP. The need for a use immunity may not be as strong in advice contexts as it is for individuals preparing for litigation. The use of statements to counsel in legal proceedings regarding the very subject matter of those proceedings could seriously undermine an individual's legal position. By contrast, in situations where an individual may need a promise of confidentiality to obtain advice unconnected with litigation, such statements may be inadmissible in any subsequent litigation: for example, communications about the motivations for

drawing up a will may be irrelevant in a dispute where the will is contested. On the other hand, it ought to be remembered that the costs of recognising a privilege for individuals are small because individuals have a limited capacity to suppress evidence and, in any event, individuals are unlikely to reveal information to their lawyers if they are concerned about its disclosure and use. Accordingly, it is submitted that LPP should be a rule of (non)compellability and (in)admissibility for individuals whether the individual is preparing for litigation or obtaining legal advice unconnected with litigation.

Turning to corporations, the best case for a corporate advice privilege is that it helps to promote voluntary compliance by encouraging companies to get prudent and relevant legal advice. To achieve this aim, it is necessary for corporate agents to be willing to consult lawyers and talk candidly to them about their company's affairs. In chapter 5 we identified two categories of agents who might need an incentive in the form of a privilege before they would take advice and/or talk candidly to a lawyer: directors of small companies and agents of any company who are concerned about their own legal liability for acts or omissions in the course of their employment/office. If a corporate privilege is recognised, it should be designed specifically to provide protection to these agents when they communicate with lawyers. Unfortunately, we do not have the luxury of setting the boundaries of a corporate privilege based solely on the interests of these two groups.

The main problem with the corporate privilege is that there is an intractable conflict at its core. The difficulty lies in balancing the conflicting interests of all parties with a legitimate interest in the control, access and use of information

contained in lawyer-corporate client communications. It is in everyone's interest that companies are encouraged to access legal advice so that they can conduct their affairs in a lawful manner. Corporations should also be free to use their legal advice, and the information their agents communicate to corporate counsel, as they see fit. The interests of the individuals working for or managing corporations, who can be personally liable for their conduct as corporate agents, also require protection. An individual may damn themselves out of their own mouths simply by fulfilling their duty to the company, which is to communicate with corporate counsel about matters connected with their employment or office. This undermines the ability of companies to obtain advice and achieve compliance, but it also raises basic fairness considerations. The interests of third parties and the community at large must also be taken into account. Law enforcement agencies and third parties need access to relevant evidence to ensure that corporations, often wielding extensive economic and social power, comply with their legal obligations.

However, the privilege rule is formulated, it will have significant costs for one or more parties interested in the content of lawyer-corporate client communications: the individual employees who provided the information, the entity that has a right to the information, and law enforcement agencies and other third parties, who may have a legitimate need for the information. In that vein, this chapter argues that the least worst solution is to split the corporate privilege into one rule as it applies to the entity and another for the individual agents of the company.

This chapter argues that there are sound reasons for abolishing a corporate privilege, at least for publicly listed and large private companies. Not only have

recent developments in corporate law and governance reduced the *need* for a privilege for such companies, there are good reasons for arguing that they should not have a privilege as a matter of policy. The benefits of the privilege are limited because its role in encouraging companies to obtain advice has been superseded by other corporate law and governance rules aimed at promoting compliance and good governance. On the other side of the ledger, the costs of a corporate privilege remain substantial. Accordingly, legal advice privilege for corporations ought to be abolished, at least for large private and publicly listed companies. This chapter considers whether a privilege could be recognised for small companies, and, if so, what might classify as small for this purpose.

In relation to individual corporate agents, this chapter argues that LPP could still provide individual corporate agents with meaningful protection, even if the entity no longer has a right to resist disclosure. Making the communications between every corporate agent and corporate counsel subject to compulsory disclosure is likely to reduce candour on the part of some corporate agents in some circumstances. The best way of minimising this risk, without substantially increasing the costs of a privilege, is to provide agents with a use immunity which prevents their statements to corporate counsel from being used in evidence to prove their personal liability or culpability. This will give agents a guarantee that the information they provide to corporate counsel about matters connected with their employment or office cannot be used to prejudice their own legal position, regardless of what the entity does with their communications. It argues that this use immunity should apply whether the company is obtaining legal advice or preparing for litigation.

Before we examine how this reformulated privilege would work in practice, we first need to resolve the basic question that the courts have failed to address. We need to identify which corporate agents are the 'client' for the purposes of the privilege.

6.1 Who is the corporate client?

The reasons why English law does not have a definition of the corporate client were discussed in the previous chapter and need not be repeated here. Lord Scott declined to consider the issue in *Three Rivers No 6* for two reasons: 'First, the issue is a difficult one, with different views, leading to diametrically opposed conclusions, being eminently arguable. Second, there is a dearth of domestic authority.'[1] Lord Scott is undoubtedly right on both points, which serve only to highlight the fact that a clear definition of the corporate client is sorely needed.

For the privilege to serve its intended purpose – allowing a client to consult a lawyer without fear that what he tells the lawyer will be disclosed to his prejudice – the client must know with reasonable certainty, at the time they are making the communication, whether it will be privileged. At present the uncertainty created by the absence of a definition of the client applies only to advice privilege because it protects only lawyer-client communications. However, the issue may also become important in a litigation context. Privilege for third party communications has come in for fierce judicial criticism in recent years, and for some types of proceedings it has already been removed. If privilege for such communications were to be

[1] *Three Rivers DC v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610 [47] (Lord Scott).

abolished as this thesis suggests, defining the client would become just as critical in a litigation context.

As a matter of legal principle the corporate client must be the entity. However, a corporation can act only through its agents, so this basic statement does not take us very far. For every area of substantive law, the law develops 'rules of attribution' to determine what acts and knowledge of the companies' agents can be attributed to the company. In the case of privilege we need a 'rule of identification' to determine which agents are deemed to be the corporation for the purposes of the rule.

Case law and scholarship on the corporate client emanates almost exclusively from the United States, where the concept has historically been used as the primary controlling device on the scope of a corporate privilege. The US courts' concern to define the corporate client reflects not only a practical desire to keep the privilege within sensible limits, but also principled concerns as to whether information held by an entity with many thousands of employees and many more shareholders, can legitimately be described as confidential information.[2]

In the second half of the 20th century there were two principal tests used by US courts to define the corporate client: the control group test and the broad agency test. The control group test confines the privilege to communications between corporate agents and their attorney, where the corporate agent has some control or significant participation in the decision on which the corporation seeks legal advice.

[2]*Radiant Burners Inc American Gas Association* 207 F Supp 771 (ND Ill, 1963) (Illinois District Court) 703.

The exact title of the agent is not significant, although as a practical matter the control group is usually senior management, which has the authority to obtain advice and order that it be followed. Ordinary employees are normally excluded. In many cases employees have knowledge of the subject on which advice is sought only as witnesses to the events or transactions in question: the only connection to the corporation is that they were working for the corporation at the time.

The control group test for the corporate privilege is the most narrow and sensitive to the need for disclosure. Until the early 1980s the control group test was the prevailing definition of the corporate client amongst federal courts.[3] However, the US Supreme Court rejected the test in *Upjohn v the United States* on the grounds it may deter senior management or corporate counsel from collecting information from ordinary employees about potential legal breaches. On the other hand, it is doubtful whether members of the control group need a privilege in light of all the other incentives senior corporate agents have to obtain accurate legal advice. The result is that the control group test provides protection where it is not needed and none where it is.

The broadest definition of the corporate client is the appropriately named broad agency test.[4] This doctrine holds that, whenever the corporate agent is acting within the course or scope of his or her employment in communicating with the lawyer, then the communication is covered by privilege, irrespective of the capacity

[3] E Imwinkelreid, *The New Wigmore: A Treatise on Evidence* (Aspen Law & Business, New York 2002)745; C Wright and K Graham (eds), *Federal Practice and Procedure* (vol 24, 2nd edn West Publishing, St Paul 2007) 289.

[4] Also known as the United Shoe test after the case that endorsed it: *United States v United States Shoe Machinery Corp* 89 F Supp 357 (D Mass 1950).

in which the employee acquired the information: personally, as mere witness, or in the course of her employment. Provided the employee is authorised to relay information to the attorney, then it is covered by privilege. This test is supported by Thanki, who was counsel for the Bank of England in the Three Rivers litigation.[5] It is perhaps the easiest test to apply but also extends the blanket of secrecy of a company's operations the furthest, and cover many instances where no privilege is needed to encourage corporate agents to consult or speak candidly with a lawyer.

Two more nuanced definitions of the corporate client are also worth noting. In Upjohn, Burger CJ wrote a concurring opinion in which he stated it was essential that the court gave clear guidance on the circumstances in which employee communications with corporate counsel would attract privilege. He proposed a test where privilege will attach to communications which are authorised by management between employee and an attorney, regarding conduct or proposed conduct within the scope of employment, for any of the purposes of: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct, i.e. responding to investigations or litigation.[6]

After the Supreme Court's decision in Upjohn, the Arizona Supreme Court in *Samaritan Foundation v. Goodfarb* held that the corporate client included the control group and employees who had a direct personal interest in the subject of the

[5] B Thanki (ed), *The Law of Privilege* (OUP, Oxford 2006) [2.38], 52.

[6] *Upjohn Co v United States* 449 US 383, 101 S Ct 677 (1981) 402-403.

advice, i.e. some potential liability.[7] The case was a medical negligence suit arising out of an operation during which the patient, a child, suffered a cardiac arrest. A lawyer for the Good Samaritan hospital investigated the incident and directed a paralegal to interview three nurses and a scrub technician who were present during the surgery. The paralegal summarised the interviews in memoranda that she then submitted to corporate counsel. By the time the case came to trial the witnesses had forgotten much of the detail of the incident, and the claimant sought production of the memoranda. The court ordered their production on the basis the nurses were merely witnesses and therefore not part of the corporate client.

These alternative definitions are similar in their aims and their reach, but Burger CJ's formulation is probably the better option. The test used by the Arizona Supreme Court closely tracks the categories of employees who actually need an assurance of confidentiality before talking to corporate counsel. However, applying it in practice requires a legal assessment of the likelihood of corporate agents being personally liable for acts or omissions in the course of their employment, without full knowledge of the facts and the benefit of legal advice. In contrast, Burger CJ's test focuses on the conduct of the company's agents and the circumstances in which they spoke to corporate counsel. If the agent was involved in the incident or transactions, or was partly responsible for what happened, then provided she is authorised to speak to corporate counsel, she is deemed to speak for the corporate client when talking to the company lawyer. This test would still exclude company employees who were merely witnesses to an incident. It would also exclude former employees who would be communicating with corporate counsel voluntarily as

[7] *Samaritan Foundation v Goodfarb* 176 Ariz 497, 862 P2d 870 (1993).

witnesses, rather than fulfilling an employment obligation to cooperate with management. Most importantly, it would be easier for corporate agents to follow in practice because it is linked to the activities and responsibilities of agents within the corporate hierarchy as opposed to judgments about the legality of those activities.

While Burger CJ's test has a lot to commend it, it is silent on some issues that require clarification. First, Burger CJ's formulation was directed towards the issue before the Court: whether the privilege covered communications with ordinary employees. For the avoidance of doubt, the corporate client should also include any corporate agent who possesses decision making responsibility regarding the matter about which legal help is sought, i.e. the control group. Second, it should be noted that an employee's conduct includes not only her positive actions but also omissions for which she is responsible by virtue of her position in the corporate hierarchy. Thus any employee who is implicated in a matter affecting the company will also be part of the corporate client. Third, it is important that the rule in *Wheeler v Le Merchant* – that advice privilege will attach to communications from the client's agents to the client's lawyer only if they were acting as intermediaries – is not applied in a way that would prevent corporate managers delegating the task of communicating with corporate counsel. The capacity to delegate tasks to other agents subject to supervision is a necessity for large companies. If legal advice privilege was confined to agents acting as intermediaries, then it would exclude personal assistants or lower level employees who are asked to collect information or prepare draft instructions for the purpose of requesting advice. Such agents should be included within the corporate client when they are authorised by a member of the control group to prepare or collect material for the purpose of laying it before a

lawyer. Like intermediaries, these agents are merely providing their labour to management to assist them obtain advice. Finally, Burger CJ's definition refers to employees *communicating* with corporate counsel. As already indicated, it is not necessary for an agent's document to be sent to a lawyer, or for them to communicate with a lawyer, provided the document or communication was made for the requisite purpose of obtaining advice.

To summarise, Burger CJ's definition of the corporate client should serve as a framework for English law. Specifically, the corporate client should include: (1) agents who have the authority to obtain advice on behalf of the company and order that it be followed, i.e. the control group; and (2) agents who were involved in or implicated in the matter on which the company is seeking advice. Privilege will only attach to the communications or documents of such agents if they were created for the sole purpose of: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct, i.e. responding to investigations or litigation.

This proposed definition is more complex than a bare control group or broad agency test, and thus there is a possibility that it could lead to satellite litigation. Nonetheless, the alternative is to have a neater definition of the corporate client which provides either too much or too little protection from disclosure.

6.2 Should corporations be entitled to legal advice privilege?

It is worth recalling the basic principles which should guide us in deciding whether to recognise a privilege, as set out by Wigmore: the benefits of a privilege must outweigh its costs, and the scope of the rule must be kept strictly within the logic of its principle.[8] While the latter principle relates more to the boundaries of privilege, it is relevant to the case for a privilege in one crucial respect. If the scope of a corporate privilege cannot be kept within sensible limits, then it is harder to argue that its benefits outweigh its costs.

As we have seen from our discussion in chapters 1, 2 and 5, the costs of a corporate privilege are substantial and its benefits are very speculative. For practical and some doctrinal reasons, corporations have greater scope to conceal sensitive information under the privilege cloak either through legitimate privilege claims or unmeritorious privilege claims that go undetected. LPP can hinder the law enforcement process and may even lower the standards of behaviour by corporate agents and corporate counsel. In turn, this can undermine public confidence in the rule of law. There also remains great uncertainty about the scope of privilege because of the lack of any definition of the corporate privilege. This can only increase the amount of evidence lost to the privilege, or undermine its benefits. Accordingly, there is real doubt about whether the arguments in favour of a corporate privilege are powerful enough to outweigh its costs.

[8] J Wigmore, *On Evidence* (vol 8, 4th edn McNaughton Revision, Little Brown & Co, Boston 1961) 527, 544.

Sexton argues that our views of corporate privilege are heavily influenced by our views of corporate behaviour. If we believe most managers want the company to conduct its operations in a responsible and lawful manner, then a privilege over lawyer-client communications can play a useful role in promoting legal compliance (a voluntary compliance model). However if we believe managers flex their corporate power and push regulatory boundaries or the rights of third parties in order to maximise corporate profits, there is a strong case for giving law enforcement agencies strong investigative powers, including the right to inspect the corporation's books and legal advice, in order to ensure compliance with the law (a regulatory model).[9] This is a difficult empirical question. Many corporations could fairly claim to fit the compliance model, while others could fairly be placed in the regulatory model, and some fit both from time to time depending on the circumstances and the laws in question.

What we can comment on with greater confidence is the value of the privilege in promoting a compliance model. Following on from the discussion in the previous chapter, it is clear that the corporate privilege is not fit for purpose in its current form, at least in the case of large private and publicly listed companies.

The rationale for LPP rests on the empirical assumption that a promise of confidentiality is necessary to encourage people to consult a lawyer and provide full and frank disclosure when communicating with a lawyer. In the case of corporate clients the people who may require such an assurance are the corporation's agents. To provide individual corporate agents with a guarantee of confidentiality, a

[9] J Sexton, 'A Post Upjohn Consideration of the Corporate Attorney-Client Privilege' (1982) 57 NYU L Rev 443, 469-470.

corporate privilege would need to achieve three things. First, employees would need to control the fate of the information they communicate to corporate counsel, which means that the company could not disclose it without their consent. Second, employees concerned about their legal position would need to come within the definition of the corporate client so that their communications qualify as lawyer-client communications for the purposes of advice privilege. And third, where an employee communicates with counsel about their conduct at the direction of management, the communication would need protection regardless of whether management's decision to order the employee to talk was motivated predominately by a legal or by a business purpose.

As discussed in the previous chapter, all three propositions are either directly inconsistent with the current law, or the law is unsettled. Giving employees control over their communications would compromise the value of the privilege to the company, undermining its ability to use its 'corporate knowledge' as it sees fit. Making an individual agent's purpose determinative of a privilege claim, as opposed to the corporation's purpose, would dramatically expand the scope of the privilege and managers' ability to conceal sensitive information under the privilege cloak. The net result is that while the benefits of the privilege might be greater, this would be more than offset by an increase in its costs.

A second comment that can be made about Sexton's distinction between a regulatory or a compliance model is that it helpfully situates the case for the privilege in its broader context: the need to promote legal compliance as part of an effective system of regulating corporations.

Perhaps more significantly, the world has changed since Sexton wrote his article in 1982. Arguably, the developments in corporate law and governance described in chapter 5 have reshaped the choice between a voluntary compliance or a regulatory model, at least in regard to the need for directors to obtain advice about the company's affairs. The value of these changes is that they retain many of the benefits of the voluntary compliance model, but also show that it may be possible to achieve these benefits *without* a privilege which allows companies to keep sensitive information beyond the reach of law enforcement agencies and the courts.

Provided there are sufficient incentives for corporate mangers to obtain advice, and clear guidelines about when to get advice, corporate managers who want their companies to act responsibly and lawfully will not hesitate to seek accurate legal advice or assistance when necessary. For managers who are inclined to push the regulatory envelope, Sexton is surely right that a regulatory model is needed to ensure that their companies comply with the law. And disclosure is a valuable tool in an effective regulatory regime: so that law enforcement agencies can verify compliance or take enforcement proceedings, and third parties can enforce their legal rights.

An effective system of regulation will normally have a combination of rules designed to promote voluntary compliance and rules to help law enforcement agencies verify compliance, and to bring enforcement proceedings when necessary. The best case for a privilege is that it functions as a useful 'carrot' in encouraging companies to achieve compliance voluntarily. Defenders of corporate privilege

might suggest that it is sensible to rely on both the regulation stick and the privilege carrot to encourage legal compliance. This would be true if the privilege were cost free, so that any role it played in encouraging corporate agents to take advice and talk candidly to their lawyers could only increase the chances of achieving greater legal compliance. Unfortunately, however, because the privilege acts as a check on disclosure it has the effect of undermining rather than supplementing a regulatory approach to legal compliance.

Stopping public and large private companies from concealing the information that they provide their lawyers and the legal advice that they receive under a cloak of secrecy may be required by, or is at least compatible with, policies designed to promote greater legal compliance. It would certainly reduce the amount of evidence lost to the privilege, and thus make it easier for regulators and third parties to enforce the law and their legal rights respectively. It is also not unreasonable to assume that removing the privilege for larger corporations might have the effect of making their agents even more diligent in ensuring that the companies' affairs are organised lawfully, and that the company acts prudently in relation to matters that could have legal ramifications.

This cost benefit analysis about the value of the privilege is not simply an empirical assessment about the effect of privilege on corporations and their agents. Normatively as a society we must also consider the standards of conduct, transparency and accountability we should require of corporations and their agents. Transparency is a cornerstone of a sound system of corporate governance. As Davies states: 'The legislature has always made it an essential condition of the recognition

of corporate personality with limited liability that it should be accompanied by wide publicity.'[10] Third parties are entitled to see who a company's members are, what shares they hold and, in the case of a listed company, the beneficial interests in those shares if substantial. They are also entitled to see who its officers are, what its constitution is, and what its capital is and how it has been obtained. The main point of these disclosure obligations is that third parties and potential investors can know whether to trust the company, to do business with it, and invest in it.

Most publicity requirements relate to a company's governance and financial health. In the past little attention has been paid as to how a company's legal affairs typically bear on its financial affairs or governance. However the policy work that went into the Combine Code on Corporate Governance, and in particular the Turnbull Guidance on Internal Control, demonstrate that the issue of legal compliance cannot be separated from a company's risk management systems, which in turn are vital to protecting the company's assets and performance. A company's affairs, its attitude to compliance, its record of compliance, and the litigation it is engaged in or preparing to engage in, can reflect its approach to corporate governance, and materially affect its financial performance.

A central argument of this thesis is that the rules on legal professional privilege for corporations ought to take account of, and be consistent with, the rules on corporate governance more generally. In particular, the law of privilege must take account of the standards of behaviour that corporate governance rules and principles require or seek to promote. If the debate on privilege is considered from this standpoint, then

[10]P Davies, *Gower & Davies' Principles of Company Law* (7th edn Sweet & Maxwell, London 2003) 180.

there must be considerable doubt about the value of providing corporations with a right to resist compulsory disclosure of communications with their lawyers. Moreover, when the law of privilege is viewed from this standpoint, it is also possible that it can make a positive contribution to the broader debate on how to promote good corporate governance. While this broader debate on good corporate governance is far beyond the scope of this paper, it may be useful to give one example of how the rules on privilege could contribute to the debate.

A common criticism of English company law is that it unduly favours the interests of shareholders over those of voluntary and involuntary creditors and the community at large. Not surprisingly, the debate about the priorities of company law and the responsibilities of corporations in society played a part in the policy process leading to the enactment of the New Companies Act.[11] The outcome of that debate can be seen in section 172, the directors' duty to promote the success of the company. Section 172 codifies the old duty of loyalty to the company as a duty to promote the success of the company in good faith based on a philosophy of enlightened shareholder value.[12] In promoting the success of the company for the benefit of its members as a whole, a director must have regard to a list of non-exhaustive factors, including the interests of the company's employees, the need to foster the company's business relationships with suppliers, customers and others, and the impact of the company's operations on the community and the environment.

[11] Specifically the Company Law Review Steering Group, the body established by the DTI to oversee the reform process. It published its final report *Company Law for a Competitive Economy* in July 2001.

[12] P Davies (n 10) [16-24] 508.

One of the dangers of requiring directors to take account of, or to act in the interests of, persons other than the company's members is that it creates a multiple master problem. Such a criticism cannot be levelled at s172. The section clearly rejects a pluralist approach to directors' duties, under which the interests of a range of stakeholders are given equal status with the shareholders as groups whose interests are to be promoted when the directors exercise their discretion. Instead, the factors to which directors must have regard are tied directly to their duty to promote the company's success. For example, directors would not be required to take account of their suppliers' interests when negotiating supply contracts if this would hinder rather than help the success of the company.

Amending the rules on LPP may be one way of partly addressing the longstanding dilemma in corporate law between 'shareholder' and 'stakeholder' approaches to governance Abolishing the privilege for corporations (as part of a robust system of disclosure) and the additional accountability and possibility of enforcement (formal or informal) that go with it, is one way of protecting the public interest and the rights of third parties without undermining the strength of the principal-agent relationship. By guaranteeing law enforcement agencies and third parties access to relevant information held by the company, it will make it easier to hold the company legally accountable for its activities. In such a system the primary question becomes: how would directors respond to the greater likelihood of disclosure? Arguably the reasonable director would respond, and only need to respond, by increasing the company's efforts to achieve compliance. This would have the effect of internalising to the company the risk of breaching the law. The unreasonable director may not respond with the same diligence – they may care little

about compliance – but if that is the case, relying on such directors to take account of the interests of third parties is likely to be futile. Where companies are managed by directors acting unreasonably, there is a strong case for ensuring law enforcement agencies and third parties have access to evidence held by such companies - in order to force them to comply with their obligations.

It may be unreasonable or unrealistic to expect directors to take account of the (undefined) interests of third parties when making decisions about the company's affairs, beyond what the law requires or prohibits them from doing. Quite simply it might mean directors are sometimes at a loss to know what they ought to do, and their decisions will either fail to promote shareholders' interests or those of outsiders, and in some cases may not promote anyone's interests. The result is inefficiency and the potential to chill desirable risk taking. As the Government acknowledged in its March 2005 White Paper, companies work best where the respective roles and responsibilities of directors and shareholders are clearly understood.[13]

Requiring directors to act in the interests of third parties is also unlikely to be an effective means of protecting the interests of third parties because of the inherent biases and vested interests of the director. Arguably, the people who can best protect the interests of third parties and the public interest, are third parties and the public (and their representatives). To ensure that third parties can protect their own interests, and that public officials can protect the public interest, it is necessary to

[13] Company Law Reform (Cm 6456) at 16.

provide an effective law enforcement process which provides facilities for collecting relevant evidence in investigations and legal proceedings.

Not only would this disclosure model help protect third parties and the public at large (and the environment), it would have the distinct advantage of preserving the ability of directors to pursue the interests of the company (its shareholders) with single minded vigour *within* the bounds of the law. This level of dedication is what most principals would want from their agents.

The downside of this basic 'disclosure model' is that it only requires a company to do what it is already legally obliged to do. Many advocates of corporate social responsibility would argue that companies should do more: they should pursue the interests of all relevant stakeholders even if they are formally accountable only to shareholders.[14] However, it ought to be remembered that the function of substantive law is also to mediate the competing interests of corporations and others, by defining what each of these parties must, can and cannot do. And there is the capacity for those interests to be represented, and any arguments they wish to put, to be fully ventilated in the law making process, especially in Parliament.

To some extent, the approach outlined here is influenced by the corporate governance philosophy underpinning English law, which views directors as professional managers acting as agents for the owners of the company. Obviously there are alternative approaches to managing companies. In Germany, for example, there is a separate supervisory board comprised of representatives of shareholders

[14] R Smerdon, *A Practical Guide to Corporate Governance* (3rd edn Sweet & Maxwell, London 2007) 435-436.

and employees which oversees the management board.[15] Not surprisingly, the interests of these stakeholder groups are partly mediated through the decision making processes of a corporation's boardroom/s. An important point to make about this approach is that it does not constrain the decisions which directors can make, but rather who it is who makes the decisions. As such it is not amenable to the same charges of uncertainty that requiring directors to take account of, or act in the interests of, third parties can be. How effective it is in balancing those interests, and what impact it has on corporate governance, is a matter of considerable debate.[16]

The claim being made here is a modest one. Disclosure is not a solution for balancing the interests of companies against all those with a legitimate interest in their activities. A system of disclosure neither creates nor defines the interests that need to be balanced, nor gives any insight into where the balance ought to be struck. What is being claimed is that robust disclosure can provide directors with additional incentives to ensure companies comply with their legal obligations whilst protecting the strength of principal-agency relationship between directors and the company (and its members). It is also worth noting that disclosure is a necessary, though insufficient[17], requirement of most approaches to company regulation, including formal legal enforcement by public agencies or private parties, or market based approaches including the possibility of hostile takeovers or removal of directors of underperforming firms.

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[15] Designed as a consensus oriented egalitarian approach, often called Rhineland capitalism: M Goergen et al, 'Corporate Governance in Germany' in K Keasey (ed) *Corporate Governance: Accountability, Enterprise and International Comparisons* (John Wiley & Sons, Chicester 2005) 285.

[16] Ibid 303.

[17] Armour and McCahery note that a puzzling feature of the Enron collapse was that there were plenty of public warning signs that Enron's accounts were artificially inflated: J Armour and J.A. McCahery (eds), *After Enron: Reforming Corporate Governance and Capital Markets in Europe and the US* (Hart Publishing, Oxford 2006) 5.

The above discussion as to how LPP might positively contribute to good corporate governance, assumes that abrogating the privilege may play a positive role in improving the level of voluntary compliance by directors. However a case for abrogating a privilege can also be made solely on the grounds that it provides a more effective law enforcement process in which law enforcement agencies and third parties can force (or pressure) companies to comply with their legal obligations.

Whether we take the view that a system of disclosure would provide incentives for companies to comply with their legal obligations voluntarily, or whether it would increase compliance secured by enforcement measures, what lends both arguments greater weight is that abolishing the privilege would not have the feared chilling effect on lawyer-client communications that defenders of the privilege have long claimed. This is because corporations already have sufficient incentives to obtain accurate legal advice, in part because corporate governance rules effectively require directors to obtain advice on important matters affecting the company.

Defenders of corporate privilege might point to the costs of *forcing* companies to obtain advice, and argue these costs are just as great, or greater, than the costs of a corporate privilege. Rules and policies designed to ensure corporate managers take advice more often could create unnecessary compliance costs. While it is likely that there will be additional costs associated with these rules, they are unlikely to exceed the costs of the privilege. Furthermore, if companies establish

appropriate risk and audit systems the rules may even generate efficiencies over time.

The duties in s174 do not provide blanket prescriptions that all directors must follow, regardless of the circumstances or the size or nature of the company. They are more flexible and targeted than that. The case law on directors' duties and the combined code on corporate governance lay down practical guidelines on when directors should seek advice. The privilege is also intended to encourage corporate agents to take advice. The difference between the two approaches is that relying exclusively on the privilege leaves the decision about when to take advice entirely to the discretion of the corporate agent. By contrast the guidelines created by the jurisprudence on directors' duties signpost the situations where directors should seek advice. In the case of directors' duties the guides represent a judicial assessment of the minimum standard of competence required of directors. In the case of the combined code on corporate governance the guides represent recommended or 'best practices'.

Creating general guidelines can lead to a reduction in decision making tailored specifically to the circumstances of individual companies. But it ought to be remembered that directors need to get advice only where an important issue facing the company has a significant legal dimension. Likewise public corporations need to establish internal risk management systems that reflect the risks actually faced by the company, rather than hypothetical or fanciful possibilities. Therefore it is unlikely that corporate agents will need to be permanently on the phone, and writing cheques, to the company lawyer.

In addition, the relevant corporate law and governance rules are sensitive to the transaction costs of forcing company directors to take advice, as we saw on our discussion on small companies. The circumstances in which such directors can be expected to get advice about the company may be more limited than directors of publicly listed and private companies. This suggests that the privilege may still be a useful tool in promoting voluntary compliance on the part of small companies. We will return to this issue shortly.

First however we need to address a more fundamental criticism of direct regulation of corporate agent behaviour: that too much regulation can reduce socially desirable risk taking or 'be detrimental to the development of enterprise performance'.[18] There is little likelihood of reducing desirable risk taking in the present context. The corporate law and governance rules relevant to LPP are a classic example of what Issacharoff calls 'process regulation'.[19] They are not designed to limit the range of available choices to corporate agents. Instead, they seek to regulate the process by which those choices are made. In particular, major decisions affecting the company which have a legal dimension should not be made by corporate agents before first getting advice from trained legal advisers as to the applicable law. Similarly, where compliance issues have already arisen, corporate agents should not make decisions about what to do before first obtaining the input of

[18] K Keasey et al, 'The Development of Corporate Governance Codes in the UK' in K Keasey (ed) *Corporate Governance: Accountability, Enterprise and International Comparisons* (John Wiley, Chichester 2005) 21, 42.

[19] S Issacharroff, 'Legal Responses to Conflicts of Interest' in D Moore et al (eds) *Conflicts of Interest* (CUP Cambridge 2005) 200-1.

lawyers who can investigate whether there has been a breach of the law and, if so, what the company can and should do about it.

One must acknowledge that if this ‘process regulation’ were to be accompanied by the abrogation of the privilege, it could have the effect of forcing corporate managers to follow the advice they receive, thus limiting their discretion in practice. The adverse consequences for corporations in not acting on their legal advice, which could be compelled by regulators or opponents in litigation and used in evidence against the corporation, are simply too great for them do anything other than implement their legal advice to the letter. This proposition has real force, but one must ask whether corporations acting on their legal advice should be classified as a cost? The advice lawyers give to their clients is in most, if not all, cases advice on how they can arrange their affairs in an orderly and lawful manner. In other words how to achieve legal compliance. Greater legal compliance can only be described as a cost if the cost of the compliance is too high, or the law itself prohibits socially desirable behaviour. And if compliance with the law is too difficult, or the law is undesirable, the most efficient and fairest way of remedying this problem is to reform the substantive law. The justification for the privilege surely cannot be that it encourages corporations to push the boundaries of inefficient and/or undesirable laws. If support for that statement is needed one need look no further than the rule that privilege does not attach to legal advice obtained in furtherance of unlawful or ‘iniquitous’ purposes.

Clients are entitled to challenge laws, and to question their legitimacy and their scope in legal proceedings. Indeed lawyers have a duty to mount every tenable

legal argument that would advance their client's cause, as part of their duty 'to promote and protect fearlessly by all proper and lawful means the client's best interests'.[20] But where lawyers are asked to give advice on matters as to what the client is proposing to do, or is already doing, the lawyer's obligation is very different: in the words of Baroness Hale, the lawyer's role is to give advice that is correct as to the law and sensible as to one's conduct.[21]

If Bentham is right that the more closely we are watched the better we behave, lawyers are likely to make doubly sure that their advice is accurate and prudent if it is open to inspection. If the net effect of lawyers giving such advice, and corporations routinely following it, is a reduction in socially desirable risk taking, then what is needed is a change in the substantive law.

To sum up, the value of an advice privilege to large private and publicly listed companies and those who manage them is very limited, and the benefits of privilege do not outweigh its costs. What benefits there are can be achieved by other, less costly, means. Accordingly serious consideration should be given to abolishing the privilege altogether.

6.2.1 What to do about small companies?

In contrast to the position of large private and publicly listed companies, there is a better case for continuing to recognise a privilege for small companies. As discussed in the previous chapter, small companies have fewer incentives to obtain legal

[20] Code of Conduct of the Bar in England & Wales 8th edn 2004, rule 303.

[21] *Three Rivers No 6* (n 1) [62].

advice than large companies, and there is a risk of reducing candour in communications between small companies and lawyers if such companies could not claim the privilege. If this conclusion is accepted the debate on corporate privilege can be taken in several directions. Lawyers associations argue that because the privilege has value for small corporations it must be extended to all corporations. It would be undesirable, if not impossible, to decide which companies should or should not have the privilege, and whatever division is ultimately drawn would be arbitrary.[22] Alternatively, it could be argued that small businesses that elect to incorporate, and enjoy the benefits of separate legal personality and limited liability that go with it, can also reasonably expect to comply with extra transparency and disclosure obligations. The absence of a privilege is not too great a price to pay for the prize of limited liability. On balance I think the latter view is the better one, for the need to regulate effectively large corporations that wield extensive economic power, which is inhibited by a broad corporate privilege, is a higher priority than affording small corporations the right to obtain legal advice in confidence.

But the choice for law makers may not be an either/or option. Another possible solution is to adopt different privilege rules for small and large corporations. There are areas of substantive law where it would seem highly unusual, and potentially a moral hazard, to adopt different legal standards based on the size of a company. Corporate criminal liability may be one example. On the other hand, there are some areas of law where differential treatment for companies based on their size and type is common. This is especially so in the case of corporate

[22] The Law Society of Australia advanced this argument in its submission to the Australian Law Reform Commission's review of Client Legal Privilege and Federal Investigatory Bodies, 4 June 2007 [44]-[45].

governance, where it would be reasonable to state that differential treatment is almost a guiding principle.

Given that the overwhelming majority of companies are small private companies, and given their importance to the economy, the steering committee to the Company Law Review stated that law governing small private companies should 'provide an optimal framework for the establishment, efficient operation and development and growth of these companies'.[23] The need for different treatment for small companies is given effect to in the 2006 Companies Act. The Act is divided into rules applying to private and to public companies, and adopts further distinctions based on the size of the company with special rules for small and medium sized companies. These classifications also differ depending upon the relevant legal requirements. For reporting purposes the criterion is the size of a company. Under section 383 a company is classified as small if it meets two of the following criteria: i) its annual turnover does not exceed £6.5 million; ii) its balance sheet total, i.e. assets, does not exceed £93.26 million; and iii) it has not more than 50 employees. S 383 also has buffer rules to prevent companies constantly moving between different classifications, and corporate groups as a whole must meet the criteria to prevent them from artificially taking advantage of the less onerous rules.

One argument of this thesis is that the value of LPP for corporations is based on the extent to which it promotes or hinders compliance. If that argument is correct, LPP could sensibly be viewed as part of the many laws dealing with the governance

[23] Company Law Review Steering Group, *Company Law for a Competitive Economy: Final Report* (July 2001) [1.27].

of corporations and, like many such rules, adopt differential treatment for small companies.

It is also worth noting that proposals for differential treatment for small and large corporations are emerging in other areas of substantive law. For example the Law Commission report in 2005 into unfair contractual terms recommended that micro businesses enjoy the same protections against unfair contractual terms that are available to individuals, defining a micro businesses as businesses with nine or fewer employees.[24] The Law Commission made this recommendation on the ground that micro-businesses, like individuals, often lack sufficient bargaining power to individually negotiate contracts with large businesses.

If the law of privilege were to adopt differential rules for large and small companies, the success of such a distinction would hinge largely on where and how to draw the line. The examples above show that law makers can draw the line in very different places depending on the relevant rule and context, and on the need to give greater legal protection to small companies or reduce the amount of regulation imposed on them. In the context of the privilege, the policy question is whether and what type of small companies need a privilege; the strength of the case for greater transparency and accountability for small companies; and where and how the line can be drawn without creating demarcation problems or additional regulatory costs. Many of these questions can be resolved technically, but the basic question of where to draw the line is a classic legal policy choice which is traditionally the domain of Parliament. Given that this is an issue on which reasonable minds may readily differ,

[24] Law Commission, *Unfair Terms in Contracts* (Law Com No 292, 2005) [14] of the Executive Summary.

arguably it is a matter best dealt with by the legislature exercising its democratic mandate.

An alternative solution to adopting different rules for small and large companies is to address the source of the risk of reduced candour directly: a corporate agent's legitimate fear that communications with the corporation's lawyers could be disclosed to *his or her* prejudice. Abrogating the corporate privilege will leave some individual agents who communicate with corporate counsel even more vulnerable to the disclosure and use of their statements against them personally, than is currently the case. The risk of reduced candour could be minimised by adopting a use immunity rule that prevented any statements, made by a person in a privileged document or communication, from being used in evidence against the person who made it in order to prove their personal liability or culpability. That way whatever the fate of the material belonging to the corporation, the individual corporate agent can be assured that what they say under the cloak of the lawyer-client privilege cannot be used in evidence against them in their personal capacity. This idea is further explored in the next section on corporate agents, for at present all agents, from the CEO to those on the factory floor, live with the prospect that what they tell the company lawyer could be disclosed to their prejudice and without their consent. This is an unsatisfactory position that needs to be addressed irrespective of whether any other changes to the privilege are adopted.

6.3 The case for a privilege for individual corporate agents

As we have already seen, the corporate privilege offers only limited protection for individual employees. Yet abrogating the privilege for the entity increases the chances that an employee's statements to corporate counsel will be disclosed to their prejudice. Employees concerned about their own legal position may be further deterred from being completely candid in communications with corporate counsel.

So is there another way of promoting candour in communications with corporate counsel, and protecting agents who do speak candidly with corporate counsel, from having their statements used against them in an unfair manner, without expanding the entity's privilege, or forcing the entity to share the privilege with its agents? This thesis has already argued that individuals seeking advice on their own behalf should be entitled to an immunity preventing their privileged statements from being used in evidence against them. The position of corporate agents could be strengthened by extending the 'use immunity' to any natural person communicating with a lawyer for the sole purpose of obtaining legal advice, whether they are seeking that advice on their own behalf, or for the benefit of someone else, including their corporate employer.

This suggested reform would have the effect of turning the current privilege rules for corporations on their head: giving protection to the individual agents within a company, as opposed to giving it to the entity.

The proposed use immunity as it applies to individuals acting on their own behalf would need to be modified for individuals acting as agents for a company. Because the corporate agent is acting on behalf of their employer/principal, any information an agent supplies to corporate counsel when acting in that capacity should still be admissible against the agent in disputes regarding their duties as *agents*. For example, a statement made by a director to corporate counsel regarding the company's affairs would still be admissible against the agent in an action alleging that the director had breached their duties to the company. The same would be true of a statement made by an employee to corporate counsel in an employment dispute with the company. Directors' duties and employment obligations derive from the very nature of the employer/employee and principal/agent relationship. Agents are subject to these duties by virtue of their appointment and actions as directors or employees.[25] The duties are owed to and enforceable by the company. The information supplied to corporate counsel by an agent acting as such, about matters in the course of their employment and/or their office, should still be available to the principal in order to ensure the company's agents comply with their duties to the company. Of course, all corporate agents have the right, as individuals, to obtain confidential legal advice as to whether they have complied with their duties to the company. But what agents say and do as part of their 'job' should be admissible in any dispute as to whether they have done their job properly.

Corporate agents can also acquire personal duties and liabilities to third parties, and personally breach laws or regulations, as a result of their conduct when carrying out functions on behalf of the company. This is where a 'use immunity'

[25] P Davies, *Gower & Davies' Principles of Company Law* (8th edn Sweet & Maxwell, London 2008) [16-5] 480.

belonging to the agent is both needed and justified. Because the company can be liable for their agents' acts and omissions (either directly or vicariously), for which the agent is also personally liable, the entity has an interest in monitoring the activities of its agents, and ordering them to do things or disclose things which may undermine the agent's own legal position. It is appropriate to give agents some assurance that fulfilling their duties as agents when cooperating with corporate counsel will not also have the effect of exposing themselves to the risk of criminal prosecution or civil litigation. In this respect, the idea that individuals seeking legal advice should not have to run the risk of damning themselves out of their own mouths applies with similar force to corporate agents.

Failing to give some protection to agents when communicating with corporate counsel is likely to make the role of agent less attractive, increase the costs of agents' services, and make pursuit of the principal's aims (in this case legal compliance) more difficult. Accordingly, there should be a rule that, when corporate agents provide information to corporate counsel for the sole purpose of enabling the company to obtain legal advice, the agent's statement could not be used in evidence to prove their personal liability or culpability. This immunity would belong to the agent, and only the agent could waive it. Furthermore, whether the information qualifies for this immunity would depend on the *agent's purpose* in cooperating with counsel, not that of the control group or any other person.

The key question in determining a corporate agent's claim to privilege (i.e. use immunity) would be: was the agent's sole purpose in communicating with corporate counsel to assist the company obtain legal advice? A use immunity will

give individual agents a guarantee that, no matter what the circumstances in which management orders them to communicate with corporate counsel, or what management does with the information they provided to corporate counsel, provided the agent had the requisite legal purpose they will be entitled to a privilege unless they choose to waive it.

A use immunity would provide individual agents with guaranteed protection in contrast to a corporate privilege. However in practice the protection enjoyed by individuals qua agents would not be as strong as that enjoyed by individuals acting on their own behalf. This is for the simple reason that it is the company, not the agent, that controls the information communicated to counsel, and the right to resist its disclosure.

In addition, if the privilege is abolished the chances of an agent's communications being disclosed would increase significantly. An agent's communications would provide a paper trail which law enforcement agencies could use as leads in their investigations.

Thus it cannot be denied that, even with a personal 'use immunity', some corporate agents may be reluctant to communicate with corporate counsel if they know their statements can be obtained directly from the company pursuant to compulsory process.

Three things should be said about this prospect. First, as argued in chapter 5, the corporation would continue to enjoy a qualified privilege over lawyer-client

communications made in connection with litigation that is reasonably anticipated. This will provide an added level of protection to the individual corporate agent who communicates with corporate counsel. Where individuals are fearful for their own legal position, it is usually because they were involved in a major incident that resulted in personal injury or property damage, or financial losses to the company, or because the employee has good reason to believe there has been a breach of the law. In many of these cases it is likely that litigation will follow, and an agent's communications (otherwise qualifying) will be eligible for privilege.

Second, corporate agents would have the right as individuals to obtain confidential legal advice as to whether they could be personally liable or culpable for anything done in the course of their employment or office. This right will not make it easier for the company to order its affairs lawfully, but it is an important protection for the agents concerned.

Third, even if the corporate privilege was abrogated in advice contexts, it is questionable whether this would make a difference to employees deciding whether to cooperate with the company lawyer. It would matter for employees who are fearful enough of their own legal position to be unwilling to cooperate fully with corporate counsel, even with a personal immunity, unless the company also has a right to resist disclosure. At the same time, they are not fearful enough, or they trust the company sufficiently, to be willing to talk to the company lawyer, even knowing their statements could be disclosed without their consent. Agents falling into this category may include directors or managers of small companies, who have the

power to assert privilege on behalf of the company, or who believe that those controlling the company would not betray their confidences.

As to how large this category of agents may be, one can only speculate. In the author's view it is doubtful whether it is sufficiently large, and the effect of compulsory disclosure on the company's efforts to achieve compliance is sufficiently grave, to justify retention of a privilege *for the company*. If this assessment is wrong, one way of protecting these agents, whilst minimising any increase in the costs of the privilege, is to recognise a qualified advice privilege for companies, in addition to a personal use immunity for individual agents. As with the qualified litigation privilege, companies could resist the right to produce privileged material, but the privilege would give way if the party seeking disclosure could demonstrate a substantial need for the material, and that its substantial equivalent could not be obtained by other means without undue hardship.

Recognising a qualified privilege for corporations could have collateral benefits if it was adopted in conjunction with some of the other recommendations in this thesis. If the corporate privilege was qualified in both litigation and advice contexts, the boundary between litigation privilege and legal advice privilege would become immaterial provided litigation privilege did not extend to third party communications. Furthermore if the sole purpose test was adopted in preference to the dominant purpose test, the amount of information that would qualify for the protection of privilege would be reduced, so the qualified privilege would have less work to do. In other words, the qualified privilege would be more likely to be a genuine safety valve rather than the primary means of balancing the need for

confidentiality in lawyer-client communications with the needs of the administration of justice which may require the disclosure of such communications.

Abolishing corporate advice privilege would also have important collateral benefits. The vexed issue of waiver by the company, or loss of privilege through inadvertent or unauthorised disclosure, would simply fall away for legal advice unconnected with litigation. Similarly the problem of whether the privilege applies to advice taken by the company in intra-corporate disputes would also fall away.

By a fine balance, I think that the possibility that some agents may be deterred from fully co-operating with corporate counsel if the communications are subject to compulsory disclosure is not sufficient to justify recognising a qualified privilege for the entity. While a qualified privilege is a useful safety valve to avoid injustices where evidence that may change the outcome of a case can only be found in privileged material, it could lead to costly satellite litigation. That cost can be justified if there is a good case for recognising a corporate privilege, which is true of litigation privilege, but the case for a corporate advice privilege is much weaker. If there are agents of large and public listed companies who are reluctant to obtain advice or give candid instructions about the company's affairs in the absence of a corporate privilege, even with the benefit of a personal use immunity, arguably a privilege is not the solution. Instead what is needed is a regulatory model that would provide law enforcement agencies with greater access to companies' books to verify compliance, or bring enforcement proceedings.

The overall effect of the reforms advocated here would be to reduce the costs of LPP substantially. Second, through a combination of independent incentives on companies to obtain advice, and a use immunity for individual agents when communicating with the company's lawyers, restricting a corporate privilege would not lead to a corresponding reduction in the benefits of the privilege. Corporate agents in some respects would be in an even better position than they are under the existing law because the protection of the privilege would no longer be conditional on the will of the entity. Furthermore, when one also takes into account that a corporation would still enjoy a qualified privilege in litigation, it is arguable that corporate agents would at least not be worse off than they are under the existing law. A reformulated privilege along these lines would provide real, though limited, protection. Equally importantly, the benefits would outweigh the costs of the privilege, thereby satisfying Wigmore's basic test for recognising a privilege.

6.4 When will documents or communications qualify for legal advice privilege? The meaning of legal advice

The main question in setting the boundaries of advice privilege was addressed by the House of Lords in *Three Rivers No 6*: what constitutes legal advice?

The Court of Appeal had ruled that, for the purposes of advice privilege, the advice must relate to legal rights and liabilities. As a consequence communications

between the Bank of England and its lawyers about how to present its position to the Bingham Inquiry into the collapse of BCCI did not constitute legal advice.[26]

The House of Lords unanimously rejected the Court of Appeal's interpretation of legal advice. Their Lordships all endorsed Lord Taylor's formulation in *Balabel v Air India* when he said that, for the purposes of the privilege, advice should be construed broadly and include advice as to what should prudently and sensibly be done in a relevant legal context.[27]

Lord Scott held that the case could have been decided on the narrow grounds that legal professional privilege applies to clients obtaining advice as to their public law rights and obligations. In situations where a client is seeking advice about how to deal with an inquiry, which is subject to judicial review, a court may more readily conclude that a client is seeking advice about their public law rights and obligations. A person may wish to be heard at the inquiry, or they may be unsure whether to appear at an inquiry if they are requested to appear, or they may want to know how best to conduct themselves at an inquiry, or what significance the inquiry has for them. If a person seeks advice in relation to any of these matters, they are almost certainly requesting advice about their public law rights and obligations.

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[26] *Three Rivers DC v Governor and Company of the Bank of England (No 6)* [2004] EWCA Civ 218, [2004] QB 916 [16], [28].

[27] *Balabel v Air India* [1988] Ch 317 (CA) 322.

Lord Rodger also noted that a person is entitled to take advice regarding the rights and obligations of others.[28] In so doing, a person is exercising their right to acquire knowledge about the law.

Whether legal advice should include advice to clients about what to do, even though it does not directly relate to what the law requires or prohibits someone from doing, is a more contentious issue. People can benefit greatly from the assistance of trained lawyers, even though the assistance does not call for advice on their legal rights and obligations. Rather the advice relates to what the client should or should not sensibly do. Lawyers giving conduct advice or 'wise counsel' to their clients can have significant social benefits as well. Again, to quote the words of Baroness Hale: '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.'[29]

The difficult question is whether such advice should be protected from disclosure if no one's legal rights or obligations are being advised on. The rule of law rationale for privilege does not support a right to confidential assistance from lawyers merely on the grounds that disclosure of the communications may prove embarrassing to the client. Virtually every communication in which a person requests advice from a trusted source could qualify for privilege on that ground. A better argument for protecting conduct advice from disclosure is that the advice is given in a 'relevant legal context'. But the meaning of legal context when it is detached from advice about the law or determination of one's rights and obligations requires some explanation.

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[28] *Three Rivers (No 6)* (n 1) [56].

[29] Ibid [61].

The notion of a ‘relevant legal context’ is best understood as an analogue to the issue of ‘reasonable anticipation’ of litigation. Just as preparing for litigation often includes investigating whether you have a claim and preparing to commence litigation or preparing to defend a claim where you have notice of a legal dispute; in some situations advice is needed for pre-emptive purposes. People often need to take advice as to how to protect their legal interests: to avoid the possibility of a breach of their rights, or being held liable or culpable for their acts or omissions.

Understood in this way, in practice there will be few situations where assistance or advice to protect one’s legal position will not involve advice regarding legal rights and obligations: i.e. what you should sensibly do to protect your legal rights or avoid legal liability. Whether a lawyer is giving advice for the purposes of protecting a person’s legal position, or general advice on business, political or personal matters, is a question of fact. It may require the court to make difficult judgments, and as Lord Scott observed, there will be borderline cases. Other controlling devices for privilege can make the court’s task easier. A communication would not pass the purpose test, and the relevant context could not be a legal one, if the client is not expressly seeking advice for the purpose of protecting their legal position. The court could also take into account the degree of proximity between the situation in which the advice or assistance is given, and the prospect that the client’s legal rights and obligations could be affected. The court could ask itself whether there is a sufficiently close connection between the situation in which the lawyer is rendering assistance and advice, and the possibility that the individual’s legal rights and obligations could be affected such that it can be described as a legal context.

Perhaps the most common situation where it would be prudent for someone to seek legal assistance, even though strictly speaking they are not requesting advice about the law, is when the person's conduct is under scrutiny in either a formal or informal investigation or inquiry. The Court of Appeal found this the most difficult question in Three Rivers No 6.[30] Assistance regarding investigations, inquiries, or inquests that perform a fact finding function constitute a relevant legal context because the findings made by the fact finder could provide an evidentiary foundation for law enforcement processes. Of course, assistance regarding investigations may also qualify for litigation privilege depending upon the nature and subject matter of the investigation, and assistance regarding public inquiries may also qualify for privilege on the basis that it relates to the client's public law rights.

Applying this test to the facts of Three Rivers No 6, there was a real possibility that the evidence heard by the Bingham inquiry, and any findings made by Lord Bingham which were unfavourable to the Bank of England, could be used as the evidential and legal foundation for claims by creditors of the BCCI in proceedings against the Bank. Accordingly, their Lordships were entitled to conclude that Freshfield's advice to the Bank on how it should deal with the Bingham inquiry and present its position to the inquiry constituted advice in a relevant legal context.

[30] *Three Rivers No 6* (CA) (n 28) [36].

Conclusion

This chapter has examined the optimal scope of legal advice privilege, with particular emphasis on corporations and their agents. In chapter 5 we saw that the empirical case for a corporate privilege was weak, at least for large and publicly listed companies. In setting the optimal scope of a corporate advice privilege our aim was to balance fairly the interests of all those with a legitimate interest in the disclosure and use of lawyer-corporate client communications.

As with chapter 4, it may be more helpful to recapitulate the recommendations made in this chapter as to the optimal scope of an advice privilege rather than to summarise the arguments in support.

I. English law should adopt the definition of the corporate client proposed by Chief Justice Burger in *Upjohn v United States,* with certain clarifications. The corporate client should encompass members of the control group of a company, and any employee who is personally implicated or involved in an activity that may legally bind the company.

II. Advice privilege for corporations should be abolished, although a sound case can be made for continuing to recognise an advice privilege for small companies. Whether small companies should be entitled to an advice privilege, and what counts as small for this purpose, should be decided by the legislature.

III. Corporate agents should be entitled to an immunity which prevents their statements to a lawyer from being used in evidence against them, provided that they communicated with the lawyer for the sole purpose of helping the company obtain advice or prepare for litigation. The information would still be admissible in any dispute as to whether the agent complied with their obligations *as an agent*, but it could not be used to establish their personal liability or culpability.

IV. For material to qualify for legal advice privilege, the documents or communications must have been made for the purpose of obtaining legal advice, or advice as to what should prudently and sensibly be done to protect one's legal position.

V. For individuals, legal advice privilege should confer a right to resist compulsory disclosure and an immunity preventing the use of privileged statements made by an individual from being used against them in evidence.

Conclusion

The principal argument of this thesis has been that the costs of a corporate privilege outweigh its benefits, and its scope (where it is clear) is out of alignment with its rationale. The jurisprudence on a corporate privilege is in need of urgent attention and is ripe for reform.

The costs of a corporate privilege are difficult to measure precisely but they are undoubtedly substantial. Corporations have great scope to conceal sensitive information under the cloak of privilege, thereby undermining the law enforcement process and public confidence in the rule of law. Furthermore, the secrecy conferred by the privilege may contribute to lowering the standards of behaviour expected from corporate agents and corporate counsel.

By contrast the benefits of a corporate privilege are limited and largely speculative. Part of the problem is that, like most rules of evidence of great antiquity, LPP was originally designed for individuals and the courts continue to discuss the rationale for privilege, and its scope, by reference to the needs and behaviour of individuals. Accordingly much of the jurisprudence on LPP has limited relevance to corporations.

The thesis has argued that the best rationale for litigation privilege is that every person has the right to prepare for litigation in a private and secure space, without the fear that their case preparation could be disclosed to their prejudice. This inviolable space, and the privilege which guarantees it, is necessary to protect a

person's dignity and the integrity of the legal process, and is integral to the right to fair trial under Art 6 of the ECHR. Nonetheless much of the material that is currently protected by litigation privilege is not confidential to the privilege holder and does not require protection in this private and secure sphere. Third party communications are the most notable example.

The rationale for corporate litigation privilege is not identical to the rationale for litigation privilege for individuals. Corporations do not possess dignity. However the integrity of the legal process requires that corporations, like individuals, are entitled to prepare for litigation in private, and not be judged on their case preparation. This right needs to be qualified in one important respect. A company's case preparation is really the preparation of its agents, who can number in the hundreds or thousands. It is important that any probative evidence held by a company's agents, past or present, is not permanently lost under the cloak of the privilege if those agents are not available to give their evidence in person. Using the US attorney work product doctrine as a model, a company's litigation privilege should be qualified so that its preparatory materials for litigation are protected from disclosure unless the substantial equivalent of the evidence is no longer available without undue hardship.

As an empirical matter there is doubt as to whether corporations need a privilege to obtain legal advice or assistance or to talk candidly to their lawyers. Nowhere is this more evident than in the case of legal advice privilege. The most convincing rationale for legal advice privilege is what Zuckerman has termed the 'rule of law' rationale. The rationale is derived from the basic right to know law. The

privilege facilitates this right by allowing clients to obtain legal advice in confidence, without fear that their communications will be disclosed without their consent. In most cases however, the client seeking purely legal advice already has a strong incentive to provide their lawyer with all the relevant facts because their aim is to get accurate legal advice on which they can rely. Nonetheless in some situations, individuals who want legal advice may genuinely fear disclosure of their communications with a lawyer and be deterred from getting advice or talking candidly to them.

By contrast there is a strong argument that corporations already have sufficient incentives to obtain accurate legal advice even without a privilege. Several developments in corporate law and governance in the UK have reduced the need for a corporate privilege. More stringent obligations have been imposed on directors to stay properly informed about the company's affairs as part of their duties of 'diligence' and 'skill and care'. These changes have now been codified in Section 174 of the Companies Act 2006, and the new derivative action under Part 11 of the Act will make it easier for individual shareholders to commence derivative actions for breaches of directors' duties. The voluntary but influential Combined Code on Corporate Governance for publicly listed companies also requires the adoption of internal risk management and audit systems. In practice these changes will require directors (and managers) to obtain more advice, including legal advice, about the company's affairs, and to actively monitor legal compliance by the company. Arguably there is a trend here: in many corporate contexts the privilege's role in encouraging corporate agents to comply with the law has been overtaken by laws

and policies designed to force corporate agents to do the very same thing, which is to achieve compliance.

Ultimately the case for corporate advice privilege rests on a belief that the best way to achieve legal compliance is to encourage corporations to comply voluntarily, and to remove obstacles that would undermine this goal. Increasingly however, law makers are no longer prepared to leave compliance to the judgment and competence of corporate managers and their advisers. Instead they are seeking ways of making companies 'perform better' through regulation of corporate agent behaviour, and more accountable through greater transparency. This shift in policy focus, putting less emphasis on voluntary compliance and more on regulation, has substantially reduced the need for a corporate privilege because corporations and their agents already have sufficient incentives to obtain accurate legal advice even without a privilege.

At the other end of the corporate ladder, employees who may have some personal liability arising out of suspected legal breaches – the quintessential scenario in which a privilege might induce greater candour in the lawyer-client relationship – are likely to be less willing to talk candidly to the company lawyer when informed that the privilege belongs to the entity, and can be waived without their permission. Employees who have no personal interest in a suspected breach, and are merely witnesses to it, arguably need no more incentive to talk to the lawyer than an order from their superiors.

For all these reasons it is fair to conclude that a corporate advice privilege has few benefits and is slowly being made redundant. Furthermore, given its costs are substantial there is a strong case for abrogating a corporate advice privilege, at least for public and large private companies.

On the other hand, there is a reasonable case for continuing to recognise a privilege for small private companies. One reason in favour of treating small private companies differently is that some rules regulating the behaviour of corporate agents, notably directors' duties, are sensitive to the different functions performed by agents and the different types of company for which they perform them. Therefore in practice these rules do not have the same effect on agents of large or public companies as on agents of small companies. In the case of the Combined Code it does not apply at all to private companies. Whether small private companies should continue to enjoy a privilege, and what counts as a small company for this purpose, is a matter that should be left to Parliament.

While much of the thesis indicates areas where LPP provides too much protection from disclosure, in two important respects it arguably provides too little protection. Currently, the privilege is a rule against compellability and not a rule of admissibility. This gives the client a private sphere, but not a secure one, in which to prepare for litigation or to obtain legal advice. The lack of a secure space creates significant problems in practice, particularly for clients who inadvertently disclose privileged material or have such material disclosed without their consent. If materials escape the private sphere, the privilege holder does not have an automatic right to their return, or an automatic right to prevent their use in legal proceedings.

To redress this shortcoming, the thesis has proposed that individuals are given a ‘use immunity’, which would prevent any statements they make in a privileged context from being used in evidence against them.

Individual agents within a company could and should also receive greater protection from LPP. A corporate privilege is designed to protect the entity, rather than individual agents, but the entity can only obtain the legal advice or assistance it needs if its human agents are willing to talk fully and frankly to the company lawyer about the entity’s affairs. Thus if the corporate privilege is to function as intended it must give some protection to individual agents. Giving the entity a right to resist disclosure provides only conditional protection for individual agents because the entity may waive the privilege without the agent’s consent. On the other hand, if agents were given greater rights over the fate of their communications with corporate counsel it would undermine the capacity of companies to use the information contained in lawyer-client communications as they see fit.

The fact that individual agents can be personally liable for the things they do as agents of the company also raises basic fairness considerations. An individual agent may damn themselves out of their own mouths simply by fulfilling their duty to the company: to communicate with corporate counsel about matters connected with their employment or office.

The interests of third parties and the community at large must also be taken into account. Law enforcement agencies and third parties need access to relevant

evidence to ensure that corporations, often wielding extensive economic and social power, comply with their legal obligations.

Taking into account the conflicting interests of everyone with a legitimate interest in the fate of lawyer-corporate client communications, this thesis has argued that the best solution in the Churchillian sense of the word – it is the worst except for all the others – is not to expand the corporate privilege but to provide a separate privilege for individual corporate agents. Corporate agents should be entitled to an immunity which prevents their statements to corporate counsel from being used against them in order to prove their personal liability or culpability, whether the company is preparing for litigation or obtaining legal advice unconnected with litigation. This will give employees a guarantee that the information they provide to corporate counsel about matters connected with their employment will not undermine their own legal position, regardless of what the entity does with their communications. Overall, these reforms are likely to strengthen, or at least not weaken, the position of corporate agents when compared with the current law.

Whether any of these reforms are adopted, at the very least it would be a welcome change if the next time the courts are confronted with a question about the proper scope of a corporate privilege, they take account of the legal, economic and social realities of corporate life, rather than resort to dubious analogies between testators drawing up a will and major public companies. The courts would then be in a much better position to engage with the difficult policy arguments about whether and how a corporate privilege can contribute to increasing corporate compliance. Recasting the debate on LPP on these lines will also have the additional benefit of

situating the corporate privilege debate within the broader debate on how best to regulate companies and promote good corporate governance.

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