Legal advice privilege

36. It is convenient to consider first what is usually called "legal advice" privilege, that is, the privilege that attaches to confidential communications between lawyer and client for the purposes of obtaining legal advice. This ground of privilege has recently been considered by the Court of Appeal in Three Rivers District Council v Bank of England (No. 5) [2003] EWCA Civ 474; [2003] 3 W.L.R. 667. The question for the court in that case was whether privilege attached to certain documents brought into being by the Bank of England in connection with the Bingham Inquiry into the collapse of BCCI. Four classes of documents arose for consideration: documents prepared by Bank employees with the intention that they should be sent to the Bank's solicitors and which had been sent to them; documents that were said to have been prepared with the dominant purpose of obtaining legal advice, but which had not been sent to the solicitors; documents prepared otherwise than for the dominant purpose of obtaining legal advice but which had been sent to the solicitors; and documents in all those categories that had been prepared by Bank employees who were no longer employed by the Bank. Having considered the authorities, the Court of Appeal held that legal advice privilege is restricted to communications passing between the client and his legal adviser for the purpose of requesting and communicating legal advice, to documents evidencing such communications and documents intended to be such communications. Accordingly, none of the categories of documents with which the court was concerned was privileged.

37. The precise ambit of what constitutes legal advice for these purposes was considered by Tomlinson J. in a further application for disclosure in Three Rivers District Council v Bank of England [2003] EWHC 2565 (Coram). In the light of the Court of Appeal's judgment in relation to the previous application the claimants sought disclosure of documents passing between the Bank and the solicitors advising it in connection with the Bingham Inquiry which, as can be seen from paragraphs 4 and 29 of that judgment, they had previously accepted were privileged. The application was made on the basis that many of those communications were concerned not with seeking or giving legal advice but with the manner in which the Bank's evidence should be presented to the Inquiry. Having considered paragraphs 32-37 of the judgment in which the Court of Appeal considered the purpose for which the documents in question had been prepared, Tomlinson J. concluded that communications between client and solicitor are privileged only if they were made for the dominant purpose of obtaining and communicating legal advice in the narrow sense of advice about the client's rights and obligations. I respectfully agree with that conclusion.

38. In my view it follows from these decisions that before legal advice privilege can be claimed in respect of any communication three conditions must be satisfied: (i) the communication must pass between the lawyer and his client; (ii) it must be confidential; and (iii) it must be for the dominant purpose of obtaining or giving legal advice, that is, advice about the client's rights and obligations. Moreover, the Court of Appeal has made it clear that the solicitor's own assertion that the dominant purpose of a particular communication was the obtaining of legal advice is not conclusive; it is a matter for the court to determine on the basis of the whole of the evidence before it: see per Longmore L.J. at page 691 (para. 35). Miss Dohmann reminded me of the observation made by Taylor L.J. in Balabel v Air India [1988] Ch. 317, 330 about the "continuum of communications" (to which the Court of Appeal itself referred in the Three Rivers case) in support of her submission that the privilege should not be unduly restricted. I would accept that nothing said by the Court of Appeal in the Three Rivers case can be read as detracting from what was said in Balabel v Air India and that the court should be careful not to allow incursions into what should properly be viewed as a continuous sequence of communications made.
for the dominant purpose of obtaining legal advice. However, in my view the decisions in the Three Rivers case do highlight the fact that it is necessary to approach a claim of legal advice privilege in a rather more critical manner than has perhaps been the case in the past.

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Referring Principles:

XII.6 - Attorney-client privilege