Boey Chun Hian (by his guardian and next friend, Boey Ghim Huat) *v* Singapore Sports Council (Neo Meng Yong, third party)
[2013] SGHCR 15

Case Number : Suit No 408 of 2012 (Summons No of 983 of 2013)

Decision Date : 22 May 2013

Tribunal/Court : High Court

Coram : Amy Tung

Counsel Name(s) : Mr Dominic Chan (Characterist LLC) for the plaintiff; Mr K Anparasan and Ms Grace Tan (KhattarWong LLP) for the defendants.

Parties : Boey Chun Hian (by his guardian and next friend, Boey Ghim Huat) — Singapore Sports Council (Neo Meng Yong, third party)

Civil Procedure – Legal Professional Privilege

22 May 2013 Judgment reserved.

AR Amy Tung:

1 This is a case involving a boy (aged 15 then) ("the child") who had a near drowning incident at Hougang Swimming Complex on 20 June 2009. The ironic tragedy of this case was that the child himself was participating in a lifesaving course at the time of the incident. As a result of the incident, the child suffered severe personal injuries, and is currently bedridden. He is unable to eat or speak and requires round the clock nursing care and feeding through a tube.

2 His father brought an action as his guardian and next friend against the defendants, the Singapore Sports Council which owns and operates the Hougang Swimming Complex. He pleaded negligence on the part of the defendants and their lifeguards on duty on the day of the incident. He alleged, *inter alia*, that the lifeguards had failed to observe his son in distress and/or failed to render timely and effective rescue, thereby causing or contributing to his injuries. In particular, he alleged that the lifeguards had refused to lend the Automated External Defibrillator ("AED") at the critical moment, and caused further delay in the administration of Cardio–Pulmonary Resuscitation ("CPR") on his son. The father also alleged that the defendants had failed to put in place effective safety rules or a safe system for the conduct of lifesaving courses, and had further failed to put in place an effective medical emergency response system or protocols to provide emergency assistance to users or patrons of their swimming complex.

3 The defendants denied that they were negligent or in breach of their duty of care to the child. They pleaded contributory negligence on the part of the child and further added his lifesaving instructor, one Mr Neo Meng Yong as third party to the action (the "Third Party"). It was pleaded in the defence that one of their lifeguards, Mr Albert Law was by the child's side at about the same time that he was being pulled out of the water by the Third Party and immediately commenced emergency lifesaving procedures on him. The other lifeguard on duty, Mr Ong Kian Hua brought the softpack containing the AED and resuscitator to the child's side.

The present application

4 The application before me was one for specific discovery of documents. The plaintiff sought the

discovery of the following:-

(a) All documents including all statements, correspondences, SMSes, emails, faxes, police statements, and/or documents taken or recorded or received by the defendants from, or exchanged with, the witnesses of the near-drowning incident, and all parties who spoke with or interviewed such witnesses, including but not limited to the following parties –

(i) Neo Meng Yong;

(ii) Koh Jia Wei;

(iii) Benjamin Tan Jun Jie;

(iv) Albert Law;

(v) Ong Kian Hua;

(vi) All other students and bystanders who witnessed the incident;

(vii) Angel Lifesaver School;

(viii) Moe Aripe; and

(ix) The Singapore Lifesaving Society ("SLSS").

(b) The Committee of Inquiry Report dated 20 June 2009 ("the COI Report") and its enclosures referred to at s/n 1 of Part 2 of the Defendants' List of Documents filed on 11 December 2012.

5 Mr Koh Jia Wei and Mr Benjamin Tan Jun Jie were instructors from the same lifesaving school, i.e. Angel Lifesaver School, as the Third Party. Mr Albert Law and Mr Ong Kian Hua were the lifeguards employed by the defendants. All were present at or near the swimming pool where the child was first spotted motionless and submerged in the water.

6 Apart from these "eye-witnesses", the plaintiff also sought the communications flowing to and from the defendants in respect of Mr Moe Aripe and the SLSS. According to the plaintiff, Mr Moe Aripe who was from the SLSS had spoken with him to express sympathy and concern at or around the time

of the incident. It appeared to him that Mr Moe Aripe was informed by the lifesaving instructors that the lifeguards had refused to lend the AED, before finally relenting on its use. The plaintiff understood that this had delayed the rescue or hampered the effectiveness of the CPR performed on the child.

7 The plaintiff gave evidence on affidavit that after the incident, he resolved to find out what indeed had happened to his child, to seek justice for him and to ensure that nothing similar would ever happen to someone else's child. He asked "how can it be that a fit, healthy 15 year-old, a strong swimmer, with no adverse medical history whatsoever, could go for lifesaving lessons one day, under the watch or within the vicinity of up to 5 lifesaving instructors and lifeguards, and yet return with severe and permanent disabilities within the very same evening?" [note: 1]

8 When the defendants forwarded a Detailed Major Accident Report to him about a year later, he claimed that he was sorely disappointed as the "skimpy 1.5-page report" [note: 2] painted a rosy and incomplete picture of the incident. The plaintiff did not know of the existence of the COI Report and its enclosures until the defendants disclosed them in their List of Documents filed on 11 December 2012. Understandably, the plaintiff then sought production of these documents. When his request was refused by the defendants, he applied for specific discovery of these documents.

9 The defendants filed an affidavit through their Director for Sports Safety, Mr Fong Hung Ying to resist the application. The defendants informed in that affidavit that shortly after the incident, there were interviews with various witnesses and their contemporaneous statements were recorded. In addition to the five witnesses listed by the plaintiff in his specific discovery application, there were contemporaneous statements recorded from 7 other persons, including Mr Tan Yew Lee, a senior lifeguard employed by the defendants and Mr Neo Sock Hong, the defendants' customer service officer who called the ambulance at the time of the incident. [note: 3] These contemporaneous statements shall be referred collectively as "witnesses' statements" in the rest of my judgment.

10 Apart from these witnesses' statements and the COI Report, the defendants claimed that there are no other documents in respect of Mr Moe Aripe, Angel Lifesaver School or the SLSS which are in their possession, custody or power. Neither are they in possession, custody or power of any police statements. They also did not obtain any written statements from any other bystanders who might have witnessed the incident as they had no knowledge of their identities. [note: 4]

11 The defendants did not dispute that the witnesses' statements and the COI Report are relevant documents but claimed that they are privileged documents. More specifically, they asserted that the witnesses' statements are protected from disclosure by virtue of litigation privilege while the COI Report is covered by legal advice privilege. As such, the entire hearing before me proceeded on the narrow but interesting issues as to whether the witnesses' statements and the COI Report are protected by litigation privilege and legal advice privilege respectively. The Third Party did not participate at the hearing as the application was essentially between the plaintiff and the defendants.

Litigation privilege and Legal Advice privilege – The distinction in brief

12 Litigation privilege and legal advice privilege are the two principal forms of legal professional privilege, which has existed within the common law system of justice for hundreds of years. In Singapore, both litigation privilege (to an extent) and legal advice privilege find their expressions in sections 128 and 131 of the Evidence Act (Cap 97, 1997 Rev Ed). They provide as follows:-

> **Professional communications**

128. – (1) No advocate or solicitor shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate or solicitor by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.

(2) Nothing in this section shall protect from disclosure –

(a) any such communication made in furtherance of any illegal purpose

(b) any fact observed by any advocate or solicitor in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

(3) It is immaterial whether the attention of such advocate or solicitor was or was not directed to such fact by or on behalf of his client.

Explanation. – The obligation stated in this section continues after the employment has ceased.

…..

Confidential communications with legal advisers

131. No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

13 The leading authority on legal professional privilege in Singapore is the case of *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] SGCA 9 ("*Skandinaviska")* where the Court of Appeal discussed the rationale underlying legal professional privilege and considered the relationship between litigation privilege and legal advice privilege. There is an overlap between these two forms of privilege, though they are conceptually distinct: see *Skandinaviska* at [23] and [45]. As a result of the functional difference between litigation privilege and legal advice privilege, they operate in different ways: see *Skandinaviska* at [43] to [46]. The Court of Appeal highlighted two main operational differences. First, legal advice privilege will apply to a confidential communication between a lawyer and his client made for the purpose of seeking legal advice, regardless of whether or not litigation is contemplated. Secondly, once a communication is indeed for the purpose of litigation, litigation privilege will attach even if the communication is not between a lawyer and his client, but arises from some other third party.

14 The Court of Appeal also clarified that the statutory provisions in our Evidence Act (i.e. sections 128 and 131) do not affect the applicability of English law principles, which can continue to guide our courts, so long as they are not inconsistent with the written law: see *Skandinaviska* at [31].

15 Regardless of the differences between these two forms of privilege, it is trite that it is for the party asserting privilege and refusing disclosure to prove that he is entitled to the privilege (*Brink's Inc v Singapore Airlines Ltd* [1998] SGCA 33 applying *Waugh v British Railways Board* [1980] AC 521

("*Waugh*")).

16 I now turn to the issues.

Whether the witnesses' statements are protected by litigation privilege

17 For litigation privilege to apply, two elements must be satisfied. First, it must be shown that there is a reasonable prospect of litigation and secondly, the dominant purpose of the document over which privilege is claimed must have come into existence for the purpose of the pending or contemplated litigation.

First element – Reasonable prospect of litigation

18 Before me, the issue of whether there was a reasonable prospect of litigation did not arise at all. It was deposed in the defendants' affidavit that "it is reasonably anticipated that where a fatal or near fatal accident occurs while a user is using facilities provided by the defendants, a claim for compensation is likely to be made ... and legal proceedings will ensue". [note: 5] Counsel for the plaintiff appeared to have accepted this statement and made no submissions on this issue.

19 Even though this was not a disputed issue at the hearing, I will briefly state my views. The fact that parties are already in the midst of litigation does not always necessarily answer the question whether there is a reasonable prospect of litigation in the affirmative. The relevant time at which the courts must consider the criterion is the point in time when the documents came into existence. Although there is no requirement that litigation must be certain, it is not sufficient for litigation privilege to attach if at the time the documents were created, litigation is merely possible: see *United States of America v Philip Morris Inc* [2004] EWCA Civ 220. In this case, the documents in question were the witnesses' statements recorded quite shortly after the incident. Given that the personal injuries which ensued were very severe, resulting in permanent disabilities, I accepted that on the facts of this case, there was a reasonable prospect of litigation at the time the witnesses' statements were recorded. This was notwithstanding the fact that the plaintiff only commenced proceedings in May 2012, nearly three years after the incident.

Second element – Dominant purpose for litigation

20 Throughout the hearing, counsel for the plaintiff reiterated many times his submission that the Detailed Major Accident Report (and the witnesses' statements which were used to prepare it) and the COI Report were all routine documents, to which privilege should not attach. In particular, counsel for the plaintiff referred to paragraph 4 of the defendants' affidavit and argued that the account of the process or workflow showed that the preparation of an incident report was routinely done following an accident. He sought a clarification from the counsel for the defendants as to whether the 'incident report' referred to in that paragraph was the Detailed Major Accident Report. The relevant paragraph reads:-

> When an accident occurs on the Defendants' premises, the Defendants' employees or servants of the relevant Sports Recreation Centre ("SRC") would alert their supervisor and the Defendants' Sports Safety Division ("SSY") for their necessary action. The said employees or servants will then submit ***an incident report*** to the SRC Management, SSY, and other relevant departments. Thereafter, SSY will then determine whether it is necessary to recommend to the Defendants' Chief Executive Officer ("CEO") that a Committee of Inquiry ("COI") be convened.

21 In contrast, it was argued by the counsel for the defendants that the Detailed Major Accident

Report was not a routine report and would also have been a privileged document, if not for the fact that the defendants had chosen to voluntarily disclose it upon receiving letters from the plaintiff's Member of Parliament. According to him, the 'incident report' in paragraph 4 of the defendants' affidavit did not refer to the Detailed Major Accident Report but a routine report. The Detailed Major Accident Report was prepared specially for this case, where the injuries which ensued were so severe as to cause permanent disabilities and where there was also police involvement. The Detailed Major Accident Report was intended by the defendants to be and was submitted to their in-house counsel for advice on their potential legal liability arising out of the incident.

22 It was further argued by counsel for the defendants that the recording of contemporaneous witnesses' statements was not an established practice of the defendants. Again, it was stated that this was specially done in this case and that it was abundantly clear that the witnesses' statements were created for the dominant purpose of obtaining legal advice in anticipation of proceedings against the defendants.

23 In my opinion, it was not entirely clear from the defendants' affidavit that the 'incident report' was not the same as the Detailed Major Accident Report, especially since paragraph 4 showed that the incident report was to be submitted to the Sports Recreation Centre Management and on the face of the Detailed Major Accident Report, it was meant "for senior management reporting". The clarification from counsel for the defendants appeared to be evidence from the bar. I can understand, however, why the counsel for defendants was anxious to show that neither the witnesses' statements nor the Detailed Major Accident Report were 'routine' documents. The authorities placed before me (at least those which similarly involved reports) show that the courts, in refusing the claim for privilege, appeared to be influenced by the fact that the reports in question were 'routine' documents.

24 In *Grant v Downs* (1976) 135 CLR 674, the deceased was admitted as a patient to a government mental hospital. He was left on his own in a single room and was found the next morning dead on the hospital grounds. Various reports were made following his death. His wife sued the hospital for negligence and sought production of those reports. The claim to privilege was upheld at first instance and on appeal. When the application for leave to appeal was refused by the Court of Appeal, the wife appealed to the Australian High Court against the refusal to grant leave. Jacobs J (at [5]) agreed with the description of the reports by the lower court Judge, which was as such:

> The reports appear to me to be routine reports such as subordinates would make to superiors to keep them informed in relation to serious accidents in mental institutions. They are reports that the superiors would require in order to determine what action, if any, they would take. There is nothing in the reports to suggest that legal advice was contemplated. The whole structure and apparent purpose of the reports is administrative. I appreciate that when a death occurs in a mental institution, minds turn to possible legal proceedings, but I do not think that this circumstance can attach privilege to reports that then come into existence because of the administrative procedures of the institution and of the authorities to whom it is responsible. The emphasis, in my view, is on administration, and of course, as a related matter, discipline.

25 Jacobs J held that "there is no indication that these documents would not have come into existence in the ordinary course of administration" and that the "test [for privilege] is clearly not satisfied" (at [6]). Stephen, Mason and Murphy JJ decided that it was not established that the reports existed for the sole purpose of being submitted to the legal advisers and went on to state (at [29]):-

> moreover, the documents have about them a flavor of routine reports such as would be made by

any institution or corporation relating to an occurrence of the kind that took place so as to inform itself of the circumstances in which the death of the patient occurred and with a view to disciplinary action and the reform of any procedures that might be found to be defective.

2 6 *Waugh* was similarly cited for the purpose of showing that routine documents should not be protected by litigation privilege. Counsel for the plaintiffs sought to rely on this authority while counsel for the defendants sought to distinguish it.

27 While I appreciated that a finding that a report was a routine document would generally mean that the document did not come into existence for the dominant purpose of litigation, I was not convinced that labeling documents as routine or otherwise is necessarily helpful in every case. In this regard, I much prefer the views of Barwick CJ in the case of *Grant v Downs* ([24] *supra*) that the "circumstance that the document is a 'routine document' will not be definitive" (at [3]). The fact that a document is a routine one will strongly suggest that it would normally have come into existence as a matter of course and therefore is not one produced for the dominant purpose of litigation. However, the question to be asked is still whether or not a document was made or came into existence for the dominant purpose of litigation. Routine documents may in particular circumstances be sufficiently clothed with the requisite purpose while on the other hand, non-routine documents may not be established as having been made with the dominant purpose of litigation, even when litigation is reasonably in sight or pending (as was the case in *Gallagher v Stanley* [1998] 2 I.R. 267).

28 As such, whether or not the Detailed Major Accident Report or the witnesses' statements were routine documents would not be determinative of the issue as to whether litigation privilege should attach. Even if I were to accept that the recording of witnesses' statements and the preparation of a Detailed Major Accident Report do not routinely occur, I would still have to examine the purpose for which they were recorded and prepared in this case.

29 By the defendants' own evidence, I was of the opinion that the witnesses' statements were not recorded for the dominant purpose of litigation. At paragraph 6 of the defendants' affidavits, it was stated:

> On 24 June 2009, the Defendants' Centre Manager and Assistant Centre Manager of Hougang SRC, i.e. Kelvin Woo and Ringo Ng respectively, and Senior Manager Eddie Foo and myself from SSY, commenced interviewing the relevant witnesses of the Incident and recorded their contemporaneous statements to assist in establishing the circumstances surrounding the Incident ("Contemporaneous Statements") and as materials upon which a report to be submitted to the Defendants' in-house counsel can be produced. These Contemporaneous Statements were also intended to be materials upon which the COI, if and when convened, for it to carry out its investigations.

30 From the affidavit evidence, I could distill at least three purposes for which the witnesses' statements were recorded:-

(a) to assist in establishing the circumstances surrounding the incident;

(b) to prepare a report for submission to the defendants' in-house counsel; and

(c) to be supplied to the COI, if and when convened, for it to carry out its investigations.

31 In my view, the defendants were only able to show that the use of the witnesses' statements for preparation of a report to be submitted to the defendants' in-house counsel was, at best, *only one of the purposes*.

32 Indeed, although the recording of witnesses' statements might not have been routinely done following an incident, there was a compelling reason (even from an objective perspective) for the witnesses' statements to be recorded in this case so as to establish what had exactly happened to the child, to account for the incident and to look into safety measures. In *Waugh*, Lord Edmund-Davies stated ([15] *supra* at 544):-

> Indeed, 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.

33 Moreover, to my mind, the intention to supply the witnesses' statements to the COI, if and when convened, reinforced their fact-finding use. This was especially since the formation of a COI had been clearly stated in the Singapore Sports Council Annual Report 2008/2009 (at page 18) to be for safety purposes.

34 In the circumstances, I found that the witnesses' statements were not recorded for the dominant purpose of litigation. As such, the defendants' claim to litigation privilege in respect of the witnesses' statements must fail.

Whether the COI Report is protected by legal advice privilege

The arguments of the parties

35 Counsel for the plaintiff argued that the dominant purpose test should apply to legal advice privilege i.e. that in order for a document to be covered by legal advice privilege, it must be created or produced for the dominant purpose of obtaining or giving legal advice. The mere conveyance of the COI Report to the defendant's in-house counsel for follow-up and legal advice was simply not sufficient to attract legal advice privilege. Since the COI Report must invariably have at least an equal purpose of preventing lapses and ensuring safety, the defendants' claim to legal advice privilege must thus fail.

36 Counsel for the defendants, on the other hand, argued that the dominant purpose test is to be confined to litigation privilege. It was submitted that our Court of Appeal in *Skandinaviska* did not lay down a dominant purpose test for legal advice privilege. As the COI Report was submitted to the defendants' in-house counsel for follow-up and legal advice, it was part of solicitor-client communications that are traditionally protected by legal advice privilege.

37 No doubt, the reason why the defendants had not sought to assert litigation privilege over the COI Report was that they would not have been able to prove that the dominant purpose for which it was produced was for use in the conduct or in aid of the conduct of actual or contemplated proceedings. Equally, the defendants would not have been able to prove that the dominant purpose of its creation was to seek legal advice from their in-house counsel. The COI Report remained, in my view, to be primarily of an investigative nature i.e. to find out what had happened during the incident and possibly to look into any measures to ensure safety within all the swimming complexes operated and maintained by the defendants.

38 The issue then which had arisen on this application was whether a document which was communicated between a lawyer and his client attracts legal advice privilege, *even though* it was not created or produced for the dominant purpose of obtaining legal advice.

The decision

39 The modern test for legal advice privilege was laid down by Taylor LJ (as he then was) in *Balabel v Air India* [1988] 1 Ch 317 ("*Balabel*"):-

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

40 The test as laid down by *Balabel* seems easy enough to apply but yet fencing the precise boundaries of legal advice privilege remains a task that the courts struggle with, especially with changing times and the evolving nature of the work of a legal adviser. Nowhere is this more evident than in the case of *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 ("*Three Rivers (No 6)*") **.** The Court of Appeal in that case felt that in circumstances where the traditional role of the solicitor has expanded, it was necessary to keep legal advice privilege in check. As such, legal advice which attracts legal advice privilege should be confined to material constituting or recording of communication between clients and lawyers seeking or giving advice about clients' legal rights and obligations. The House of Lords was of the view that this was too restrictive, and that the privilege could be extended to 'presentational' advice given by a legal adviser as to how best to present a case at an inquiry. Baroness Hale of Richmond, while agreeing with the rest of the other members of the House of Lord that the appeal should be allowed, stated at [61]:-

> I do sympathise with the Court of Appeal's anxiety to set boundaries to the scope of legal advice privilege. Legal advice privilege restricts the power of a court to compel the production of what would otherwise be relevant evidence. It may thus impede the proper administration of justice in the individual case. This makes the communications covered different from most other types of confidential communication, where the need to encourage candour may be just as great. But the privilege is too well established in the common law for its existence to be doubted now.

41 The effect of *Balabel* was to guide the courts away from a narrow approach in considering what

legal advice might be or its scope, taking into account the continuum and fluidity of information being exchanged within an on-going relationship between a lawyer and his client. Nevertheless, I did not believe that the case made a 'pendulum swing' to stand for an all-embracing approach either. To this extent, I agreed with the authors of *The Law of Privilege* (Bankim Thanki, ed) (Oxford University Press, 2011) at para 2.94 that:-

> Perhaps understandably, after *Balabel* lawyers tended to focus on the injunction to avoid a nit-picking or narrow approach so as to treat all lawyer-client communications as privileged or irrelevant. This was an incorrect reading of *Balabel.* While the case undoubtedly laid down a broad test, suggesting that many communications would impliedly be related to the seeking or giving of legal advice even if they did not expressly so provide, ***it nonetheless required documents to be considered individually and carefully before privilege could be asserted*** [emphasis added in bold italics]

42 Even in *Balabel*, although Taylor LJ was not in favour of the narrow approach, he was still mindful of "the need to re-examine the scope of legal professional privilege and keep it within justifiable bounds" ([39] *supra* at 332).

43 I must state at the outset that I was much persuaded by the argument that the mere submission of a document to legal advisers does not mean that the document must necessarily be protected by legal advice privilege and hence immune from disclosure. This is especially when the document would have been *created independently of the relationship between lawyer and client in any event*. In this case, it must be remembered that what was sought by the plaintiff was not the legal advice of the defendants' in-house counsel given on the COI Report. Neither was it the instructions or brief which the defendants would have given to their in-house counsel on the matter. Instead, it was a document which would contain the facts, the account of witnesses, and the outcome of investigations into a near-fatal incident. There was no suggestion that there was any legal advice embedded in or which formed an integral part of the COI Report. Such a document should not, as a matter of principle, be protected from disclosure.

44 In *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357, Stone J was not prepared to follow the principle in *Wheeler v Le Marchant* (1881) 17 Ch D 675 that only a communication made through the agent of a client as a *conduit* (on the basis that the agent stands in exactly the same position as the client) to the solicitor is protected by legal advice privilege. She highlighted that the case of *Wheeler v Le Marchant* could be understood in a different way, in the light of Cotton LJ's reasoning in that case that although the surveyors were employed on behalf of the defendants to do certain work, their work *did not* include communication with the defendants' solicitor to obtain legal advice. She stated (at [95]):-

> Understood that way, it is not at all surprising that the claim was rejected. It simply did not meet the purpose criterion. The letters from the surveyors *were not created for the purpose of obtaining legal advice* for the client. *In the absence of such purpose, the rationale for legal professional privilege does not require that a communication be protected.* [emphasis added in italics]

45 In *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2002] EWHC 2730 (Comm) ("*Three Rivers (No 5)*"), the plaintiffs sought discovery of four categories of documents from the defendants, the Bank of England ("the Bank"):-

(a) documents prepared by the Bank's employees, the dominant purpose of preparing which was that they should be sent to counsel and which were in fact so sent;

(b) documents of the same class which were not in fact so sent to counsel;

(c) documents prepared by the Bank's employees without the dominant purpose of obtaining legal advice, which were in fact sent to counsel;

(d) documents in categories (a) to (c) which had been prepared by the Bank's employees who were no longer employed by the Bank.

46 Tomlinson J, hearing the application at first instance, was of the view that if an internal confidential document, not being a communication with a third party, was produced or brought into existence with the dominant purpose that it or its contents be used to obtain legal advice, it was privileged from production (see at [30]). This test was applied to all the documents, regardless of whether they were sent to the counsel of the Bank. He was convinced, after examining the authorities that "actual communication is not the touchstone for the attraction of privilege. The touchstone is…the dominant purpose which accounts for the creation of the confidential material" (see at [20]).

47 Tomlinson J's decision was subsequently overturned by the Court of Appeal (see *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474 ("*Three Rivers (No 5)(CA)*"). The Court of Appeal preferred a narrower scope for legal advice privilege and confined the privilege to:-

(a) communications between a client and his legal adviser;

(b) documents evidencing such communications; and

(c) documents that were intended to be such communications even if not in fact communicated.

48 Notwithstanding this, I observed that the Court of Appeal did not reject the dominant purpose test. In fact, Lord Carswell in *Three Rivers (No 6)* described the Court of Appeal as reaching "a subsidiary but distinct conclusion" ([40] *supra* at [73]) that legal advice privilege did not apply because the dominant purpose of the preparation of the documents by the Bank's employees was not to obtain legal advice but to put all relevant factual material before the inquiry conducted by Bingham LJ (as he then was) in an orderly and attractive fashion (see at [35] of *Three Rivers (No 5)(CA)*). The Court of Appeal, as such, did apply the dominant purpose test but characterised the dominant purpose of the documents differently from Tomlinson J.

49 Although the House of Lords in *Three Rivers (No 6)* declined to make any observations on the correctness of the decision of the Court of Appeal in *Three Rivers (No 5)(CA)*, especially in relation to the point of whether communication between an employee and the employer's lawyers ought to be treated for legal advice privilege purposes as a communication between the lawyer and his client, Lord Carswell commented that Tomlimson J's reasons in upholding the Bank's claim on privilege (i.e. in

applying the dominant purpose test) appear to have "considerable force" (see at [70] of *Three Rivers (No 6)*).

50 I agreed with Tomlinson J that the touchstone for legal advice privilege (at least in relation to documents which are created independently of the relationship between a lawyer and his client) ought not to be actual communication to the lawyer. Instead, it should depend on the purpose of the document, which has to be objectively determined at the time of its creation. The yardstick should, however, be the dominant purpose of the document, rather than its sole purpose; the latter test not having found favour with the courts since its application by the majority of the High Court of Australia in *Grant v Downs.* I would, therefore modify the question posed by Jacobs J (at [5]) as follows:-

> Does the **(dominant)** purpose of supplying the material to the legal adviser account for the existence of the material? [word in bold and in brackets added by me]

If the dominant purpose of a document is for it to be supplied to legal advisers for the purposes of seeking or obtaining legal advice, the document would be privileged. There is no reason why privilege should attach to documents which, quite apart from being supplied to legal advisers, would have come into existence for other purposes, for which there would have been no privilege to speak of.

51 In my view, the dominant purpose test provides a sound and rationale basis for determining the scope of legal advice privilege. If documents were made for the dominant purpose of submission to legal advisers, then legal privilege would apply, notwithstanding that the documents might not have been eventually communicated to the legal advisers. If the documents were not made for the dominant purpose of submission to legal advisers, then legal privilege would not apply, notwithstanding that the documents have, in fact, been communicated to the legal advisers. Legal advice privilege is thus not dependent on the arbitrary distinction of whether a document has been communicated to legal advisers or not.

52 I should add that the Court of Appeal in *Skandinaviska* observed (albeit in a narrower area of third party communications), that the dominant purpose test might "constitute an appropriate safeguard against an overly broad application of legal advice privilege" ([13] *supra* at [65]).

53 Recently in 2012, section 128A was introduced into the Evidence Act (Cap 97, 1997 Rev Ed) to extend legal advice privilege to communications to a legal counsel within an entity (i.e. in-house counsel) made for the purpose of seeking legal advice. A large volume of documents could be generated within a corporation and many of them may pass through the hands of the in-house counsel. In *Grant v Downs* ([24] *supra*), Stephen, Mason and Murphy JJ noted a point of importance that emerged from Hamilton LJ's observations in *Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Railway Co* (1913) 3 KB 850 (at [20]):-

> ..that the day-to-day records of a corporation which come into existence in the ordinary course of its business may lend themselves to a claim of privilege if the purposive element of a submission to a solicitor is too easily satisfied, thereby excluding effectively the documents from production and inspection or at least subjecting the other party to the disadvantage of surprise when they are used.

54 Even though this observation was made in the context of the majority of the Australian High Court preferring the sole purpose over the dominant purpose test, I would echo the underlying sentiments that the element of submission to a legal adviser should not easily satisfy a claim to privilege. To my mind, the dominant purpose test acts an appropriate control mechanism to ensure that corporations or other entities do not cloak their documents with privilege (and immunity from

disclosure) by ostensibly submitting them to their in-house counsel for legal advice and without regard to the purpose for which they were created or prepared.

55 I would make some final remarks about the cases of *Grant v Downs* and *Waugh.* These two cases were concerned, as with this application, with reports prepared in the wake of accidents. In *Grant v Downs* ([24] *supra*), the documents before the High Court of Australia were reports prepared on injuries or death suffered by patients in mental hospitals which were to be submitted to the Department of Public Health as well as to legal advisers. In *Waugh* ([15] *supra*), the House of Lords were deliberating privilege over an internal inquiry report incorporating the statements of witnesses, made with the purpose of establishing the cause of the railway accident and with the equal purpose of being submitted to the solicitors of the British Railways Board ("the Board") for advice on its legal liability.

56 It was widely accepted that the judges in *Grant v Downs* made no distinction between legal advice privilege and litigation privilege in considering the purpose of the report to be conclusive when ordering its disclosure. In fact, the High Court of Australia subsequently confirmed that the dominant purpose test applies to both legal advice privilege and litigation privilege: see *Esso v Federal Commissioner of Taxation* (1999) 201 CLR 49 and *Daniels Corporation v Australian Competition and Consumer Commission* (2002) 213 CLR 543. The case of *Waugh* was less clear as to whether the House of Lords was mindful of the distinction, although the Court of Appeals in *Three Rivers (No 5) (CA)* appeared to view *Waugh* as undoubtedly concerned only with litigation privilege.

57 Notwithstanding this, it was clear that one of the purposes of the reports in either of the cases was for submission to legal advisers. In fact, in *Waugh*, the affidavit filed on behalf of the Board stated that on the face of the internal inquiry report, it had "finally to be sent" to the solicitor for the purpose of enabling him to advise the Board.

58 Although there was no indication within the decisions of both cases that the reports were finally and actually submitted to legal advisers, I did not doubt from the reasoning, the language and the tenor of the judgments, that the outcome would have been the same, *even if* it was found that the reports had been communicated to the legal advisers. The principal focus of the judges in these cases remained that of the purpose for which the reports were created or made. Privilege was denied in both cases since it could not be established that the reports were made either for the sole (in *Grant v Downs)* or the dominant purpose (in *Waugh*) for obtaining legal advice.

59 For the foregoing reasons, I found that the COI Report is not protected by legal advice privilege.

Conclusion

60 As neither the witnesses' statements nor the COI Report are protected by litigation privilege and legal advice privilege respectively, I therefore ordered that they be produced by the defendants. For the avoidance of doubt, the enclosures to the COI Report are also to be disclosed. As the plaintiff had succeeded in his application, costs were awarded in his favour. I would take this opportunity to record my appreciation to both counsel for their able assistance in this application.

[note: 1] Para 6 of Boey Ghim Huat's affidavit filed on 22 February 2013

[note: 2] Para 8 of Boey Ghim Huat's affidavit filed on 22 February 2013

[note: 3] Paras 7 to 9 of Fong Hung Ying's affidavit filed on 11 April 2013

[note: 4] Paras 11 to 15 & 20 of Fong Hung Ying's affidavit filed on 11 April 2013

[note: 5] Para 10 of Fong Hung Ying's affidavit filed on 11 April 2013