CA on appeal from the High Court QBD (Tomlinson J) before Lord Phillios of Worth Matravers, Mr Lord Justice Longmore, Thomas LJ. 1st March 2004.

JUDGMENT : Lord Phillips, MR: This is the judgment of the Court to which all members have contributed.

Introduction

1. This appeal is a consequence of the previous judgment of this Court on an earlier disclosure application now reported as ***Three Rivers District Council v Bank of England (No 5)*** [2003] EWCA Civ 474 [2003] QB 1556. In that appeal this Court decided that documents prepared by employees or ex-employees of the Bank of England ("the Bank") with the intention that they be sent to the Bank's solicitors ("Freshfields") whether or not they were prepared for the dominant purpose of obtaining legal advice were not privileged and should be disclosed. This was because, as the Bank accepted, there was no litigation privilege in such material (see *Re L* [1997] AC 16) and the Bank had to rely on legal advice privilege which extended only to communications between a client (or his agent for the purpose) on the one hand and his solicitor on the other.

2. The Bank's original claim for privilege was attacked by Mr Pollock QC for the liquidators on the basis (1) that the documents for which privilege was claimed were not documents of a class comprised within the doctrine of legal advice privilege and (2) that, in any event, they had not been prepared for the dominant purpose of obtaining legal advice from Freshfields but for the purpose of placing facts before Bingham LJ and assisting him in the inquiry into the collapse of BCCI which he was conducting at the request of the Government and the Bank. The Court accepted the first of these arguments on the basis of established authority; it also decided that, even if the first argument was wrong and the relevant documents could theoretically be the subject of a claim for privilege, the documents, which were the subject-matter of the application, had not been prepared for the dominant purpose of obtaining legal advice so that the claim for privilege would, in any event, have failed. The Court held that the dominant purpose for which these documents were prepared was *"so that the Bank could comply with its primary duty of putting all relevant factual material before Bingham LJ"*, page 1582H.

3. In the course of his submissions in *Three Rivers (No 5)* Mr Pollock made it clear that he was not seeking disclosure of any documents passing between Freshfields and the Bingham Inquiry Unit ("BIU"), which was set up as described in paragraph 3 of the earlier judgment and was agreed to constitute the client in this context. That was because he accepted that such documents were covered by legal advice privilege. In the light of the decision of the Court to accept the second part of his argument in relation to what we may call "*third-party documents*", he decided to withdraw that concession and argue that even communications between BIU and Freshfields are not properly within the category of legal advice privilege as claimed by the Bank. The judge has permitted Mr Pollock to withdraw his concession. There are no grounds on which that decision can be challenged, since it was a matter for his discretion. The judge then held further that what we may call *"solicitors' documents"* were not in this case capable of being the subject-matter of a privilege claim unless they came into existence for the purpose of obtaining legal advice; the reason for this decision was, broadly, that any other decision would have been inconsistent with *Three Rivers (No 5).* He made a declaration in the following terms:-
"It is declared that the only documents or parts of documents in the Bank's control and coming into existence between the closure of BCCI SA on 5 July 1991 and the issue of the present proceedings in May 1993 which the Bank is entitled to withhold from inspection on the ground of legal advice privilege are:-
(1) communications passing between the Bank and its legal advisers (including any solicitor seconded to the Bank) for the purposes of seeking or obtaining "legal advice" (which means, for the avoidance of doubt, advice concerning the Bank's rights and obligations); and
(2) any part of a document which evidences the substance of such a communication."

He then ordered a further and better list to be prepared in accordance with this declaration.

The contentions

4. Mr Thanki QC for the Bank submitted:-

(1) the judge was wrong to hold that this Court in *Three Rivers (No 5)* had, expressly or by necessary inference, already decided that the documents now sought did not come into existence for the purpose of giving or obtaining legal advice;

(2) the judge should therefore have looked at the matter afresh and decided whether the documents did come into existence for that purpose; he should then have decided that the purpose for which the documents came into existence was so that Freshfields could give and the BIU receive legal advice;

(3) the phrase "legal advice" included giving legal assistance in the relevant legal context;

(4) the relevant legal context was, immediately, the Bingham inquiry but also the possible ramifications that might occur after the inquiry;

(5) part of that assistance was the use of Freshfields' skills in trying, by presenting material to the Bingham inquiry in what seemed to them and the BIU the most effective way, to counteract any suggestion of blameworthiness on the part of the Bank's officials;

(6) assistance of this kind, which many solicitors provide for their clients if they take part in a non-statutory inquiry, is part of the ordinary business of a solicitor; documents coming into existence as part of that assistance are, therefore, privileged;

(7) in the absence of an assurance that such communications are privileged, parties will no longer co-operate with non-statutory inquiries.

5. Mr Pollock QC for the liquidators submitted:-

(1) on a proper reading of the judgment in *Three Rivers (No 5),* this Court had already decided that the documents, of which he now sought disclosure, had not come into existence for the purpose of giving or obtaining legal advice;

(2) whether that had been decided or not, the documents did not come into existence for that purpose and, certainly, any such purpose was not the dominant purpose;

(3) whereas legal advice, in the context of legal advice privilege, could include "assistance" that assistance had to be rendered in the context of a request for legal advice in connection with a legal transaction;

(4) neither the Bingham inquiry nor its ramifications could be a legal transaction for the purpose of legal advice privilege;

(5) assistance to counteract suggestions of blameworthiness was no part of legal advice;

(6) before legal advice privilege can arise, there must be a context of legal advice being requested;

(7) the suggestion of non-cooperation with non-statutory inquiries was, if relevant at all, much exaggerated.

Did *Three Rivers (No 5)* decide the issue?

6. In *Three Rivers (No 5)* the Court held that the dominant purpose of obtaining documents from third parties was to provide evidence to the Bingham Inquiry. The same is not true of correspondence created by and passing directly between BIU and Freshfields. That correspondence was likely to include a high proportion of requests for and provision of advice as to how that material should be presented to the Bingham Inquiry, and one object of such advice would be to present the Bank and its officials in the best possible light. It would be advice on presentation. Does such advice constitute 'legal advice' for the purpose of legal advice privilege? The Court posed that question in the course of discussion in *Three Rivers (No 5)* – see paragraph 32. It was not unreasonable to expect the Court to go on to answer that question. The judge thought that it had done so, in the negative. Submissions made by counsel for the Bank in the context of seeking permission to appeal to the House of Lords suggest that they were of the same view. Subsequently, however, they argued that the Court had answered that question not in the negative but in the affirmative.

7. We have given careful consideration to the passages in the judgment that followed the posing of the question. We have concluded that they do not give a clear answer to it. We must address it ourselves, but in the light of the judgment in *Three Rivers (No 5).* The judge thought that, if the judgment did not give an express answer to the question, the answer could none the less be deduced from the reasoning of the Court. The issue for us is whether the judge's conclusion was correct.

The nature of the advice

8. In paragraph 8 of the judgment under appeal the judge said this about the advice sought from and given by Freshfields:- *"… the evidence demonstrates that assistance and advice was sought not as to what was required to be done in order to comply with the Bank's obligations but rather on how to present its evidence to the inquiry in the way least likely to attract criticism. That is not a matter concerning the Bank's rights and obligations."*

Subsequently, at paragraph 16, he added:- *"Of course it is possible that the dominant purpose of some communications between the BIU and Freshfields during the period when the conduct of the inquiry was a live issue may have been the provision of advice as to the legal rights and obligations of the Bank as opposed to the question how the Bank's evidence might be presented to the inquiry in the way least likely to attract criticism."*

9. We propose to consider first whether the corpus of advice that related to presentation, if considered in isolation, is capable of amounting to 'legal advice' for the purpose of legal advice privilege. We will then turn to consider whether the context in which that advice was given and, in particular, the fact that Freshfields may also, under the same retainer, have given advice in relation to the Bank's legal rights and obligations, brought the presentation advice within the cloak of privilege.

The meaning of 'legal advice'

10. 'Legal advice' is a phrase frequently used in the authorities that were extensively considered in *Three Rivers (No 5).* Before turning to those authorities it is logical to start by considering what *'legal advice'* means as a matter of ordinary language. It does not mean *'advice given by a lawyer'.* Indeed it has not been suggested by the Bank that communications between a solicitor seeking or giving advice will automatically attract legal advice privilege, regardless of the nature of the advice or the circumstances in which it is given. The natural meaning of legal advice is 'advice in relation to law'. That is, in effect, the meaning that Tomlinson J held the phrase had when declaring that legal advice *"means, for the avoidance of doubt, advice concerning the Bank's rights and obligations".* That is also the meaning that Mr Pollock submits the phrase should have.

11. Mr Thanki's submissions can, we believe, be summarised as follows. Legal advice is advice given by a solicitor to his client in the normal course of his business. It is advice which arises out of and is given in the context of the normal professional relationship between a solicitor and his client and is not confined to advice about rights and obligations.

12. Support for each of the rival propositions is to be found in judicial statements, but it is important to pay careful regard to the context in which the statements have been made when considering the weight to be attached to them. Thus, in ***Greenough v Gaskell*** (1833) 1 My & K 98, which was cited at length in *Three Rivers (No 5)* at paragraph 8, Lord Brougham LC stated, in relation to lawyers, that:- *"If, touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, either from a client, or on his account, and for his benefit in the transaction of his business…they are not only justified in withholding such matters, but bound to withhold them."*

13. Lord Brougham went on, however, to explain the reason for this privilege:- *"for a person at times requires the aid of professional advice upon the subject of his rights and liabilities, with no references to any particular litigation, and without any other reference to litigation generally than all human affairs have, in so far as every transaction may, by possibility, become the subject of judicial inquiry….The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attaches to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially medical advisers. But it is out of regard to the interests of justice, which cannot go on, without the aid of men*

skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources"

14. The two passages, when read as a whole, do not support the proposition that legal advice extends beyond advice in respect of rights and liabilities which are capable of being the subject of proceedings in a court of law.

15. ***Wheeler v Le Marchant*** (1881) 17 Ch D 675, which again is extensively cited at paragraphs 17 and 18 of *Three Rivers (No 5),*was a case about legal advice privilege, not litigation privilege. The issue was whether legal advice privilege extended to documents obtained from third parties. In the course of his judgment Sir George Jessel MR said this at p. 681:- *"It must not be supposed that there is any principle which says that every confidential communication which it is necessary to make in order to carry on the ordinary business of life is protected. The protection is of a very limited character, and in this country is restricted to the obtaining the assistance of lawyers, as regards the conduct of litigation or the rights to property. It has never gone beyond the obtaining legal advice and assistance, and all things reasonably necessary in the shape of communication to the legal advisers are protected from production or discovery in order that that legal advice may be obtained safely and sufficiently."*

Brett LJ added, at p. 683:- *"The rule as to the non-production of communications between solicitor and client is a rule which has been established upon grounds of general or public policy. It is confined entirely to communications which take place for the purpose of obtaining legal advice from professional persons. It is so confined in terms, it seems to me it is so confined in principle, and it does not extend to the suggested case."*

16. Once again, these statements lend support to the argument that legal advice privilege is restricted to advice about legal rights and liabilities. In 1881 the rights in question were, when litigation was not in prospect, no doubt frequently rights to property, but we would not read the judgment of the Master of the Rolls as confining privilege to advice about those rights. The principle to be derived from his judgment is, however, that legal advice is advice about legal rights and liabilities.

17. Mr Thanki relied upon statements in three leading cases. The first was this passage from the judgment of Lord Lyndhurst LC in ***Carpmael v Powis*** (1846) 1 Ph 687 at 692:- *"I am of the opinion that the privilege extends to all communications between a solicitor, as such, and his client, relating to matters within the ordinary scope of a solicitor's duty."*

The context in which this statement was made appears in the following further passage from his judgment:- *"Now, it cannot be denied that it is an ordinary part of a solicitor's business to treat for the sale or purchase of estates for his clients. For some purposes his intervention is indispensable in such transactions: he is to draw the agreements, to investigate the title, to prepare the conveyance. All these things are in the common course of his business. But it is said that the fixing of a reserved bidding and other matters connected with the sale are not of that character, inasmuch as they might be entrusted equally well to anyone else. It is impossible, however, to split the duties in that manner without getting into inextricable confusion. I consider them all parts of one transaction – the sale of an estate : and that a transaction in which solicitors are ordinarily employed by their client. That being the case, I consider that all communications which may have taken place between the witness and his client in reference to that transaction are privileged."*

18. This decision affords little assistance to Mr Thanki. The advice in question was held to be inextricable from assistance being provided by a solicitor to his client in relation to the requirements of the law relating to a sale of real property.

19. Next Mr Thanki relied on the following statement by Lord Buckmaster in ***Minter v Priest*** [1930] AC 558:- *"The relationship of solicitor and client being once established, it is not a necessary conclusion that whatever conversation ensued was protected from disclosure. The conversation to secure this privilege must be such as, within a very wide and generous ambit of interpretation, must be fairly referable to the relationship …"*

At issue in that case was whether a conversation between a person seeking the services of a solicitor in relation to the purchase of real property and the solicitor was privileged in circumstances where the solicitor was being requested to lend the deposit payable under the transaction but was not prepared to do so and declined to act. In holding that the conversation was privileged, Lord Buckmaster said

this at p. 568:- *"… the idea that it was possible to split the interview into two parts, treating the first as a proposal to lend money personally and the second, contingent on this, to act as a solicitor is, to my mind, outside the bounds of reasonable inference.*

I am not prepared to assent to a rigid definition of what must be the subject of discussion between a solicitor and his client in order to secure the protection of professional privilege. That merely to lend money, apart from the existence or contemplation of professional help, is outside the ordinary scope of a solicitor's business is shown by the case of ***Hagart and Burn-Murdoch v. Inland Revenue Commissioners [****1929] AC 386. But is does not follow that, where a personal loan is asked for, discussions concerning it may not be of a privileged nature.*

In this case the contemplated relationship was that of solicitor and client, and this was sufficient."

20. In the same case, Lord Dunedin observed at p. 573:- *"Now, if a man goes to a solicitor, as a solicitor, to consult and does consult him, though the end of the interview may lead to the conclusion that he does not engage him as his solicitor or expect that he should act as his solicitor, nevertheless the interview is held as a privileged occasion."*

The most detailed and precise analysis is to be found in this passage of the speech of Lord Atkin at pp. 580-1:- *"The test for such protection has been defined in different words in a number of cases. I think it is best expressed in two phrases used in the Court of Appeal in the leading case of* ***O'Shea v. Wood*** *[1891] p. 286, 289. Lindley LJ adopts the language of Cotton LJ in* ***Gardner v. Irvin*** *(1878) 4 Ex D. 49, 53 : "****professional communications of a confidential character for the purpose of getting legal advice.****" Kay LJ refers to the language of Kindersley VC in* ***Lawrence v Campbell*** *(1859) 4 Drew. 485, 490, and adopted by Lord Selborne LC in* ***Minet v Morgan*** *(1873) LR 8 Ch. 361, 368, communications passing as "professional communications in a professional capacity." The Lord Justice prefers the former phrase, and emphasizes the importance of the confidential character. As to this it is necessary to avoid misapprehension lest the protection be too limited. It is I think apparent that if the communication passes for the purpose of getting legal advice it must be deemed confidential. The protection of course attaches to the communications made by the solicitor as well as by the client. If therefore the phrase is expanded to professional communications passing for the purpose of getting or giving professional advice, and it is understood that the profession is the legal profession, the nature of the protection is I think correctly defined."*

21. It seems to us that the speeches in this case demonstrate that, if privilege is to attach, the starting point is that the services of a solicitor must be sought for the purpose of providing professional advice of a kind to be sought from lawyers. Communications ancillary to that purpose will be privileged. The services in question were conveyancing services - a paradigm example of assistance requiring the expertise of a lawyer.

22. The third statement upon which Mr Thanki relied was that of Templeman LJ in ***Great Atlantic Insurance v Home Insurance*** [1981] 1 WLR 529 at pp 535-6. The issue in that case was whether the plaintiffs could adduce evidence of part of a memorandum, but decline to disclose the rest on the ground of privilege. The Court of Appeal held that the entirety of the document was privileged and that, by disclosing part, the plaintiffs had waived privilege in relation to the whole document. The observations of Templeman LJ relied upon by Mr Thanki were as follows:- "*In* ***Minter v Priest*** *… the House of Lords affirmed that a communication between solicitor and his client is privileged provided the relationship of solicitor and client is established and that the communication is such that the communication is "****such as, within a very wide and generous ambit of interpretation, must be fairly referable to the relationship …****" …*

In the present case the relationship of solicitor and client between the American attorneys and the plaintiffs is undoubted. The plaintiffs were seeking and the American attorneys were proffering advice in connection with a business transaction. The fact that litigation was not then contemplated is irrelevant. This appeal may serve a useful purpose if it reminds the profession that all communications between solicitor and client where the solicitor is acting as a solicitor are privileged subject to exceptions to prevent fraud and crime and to protect the client and that the privilege should only be waived with great caution."

23. It is important to note that, before making these observations, Templeman LJ had identified as the *"clearest authority relevant to the present point"* the case of ***Wilson v Northampton and Banbury Junction Railway Co*** (1872) LR 14 Eq 477, from which he had cited the following passages:- *"It is of the highest importance … that all communications between a solicitor and a client upon a subject which may lead to litigation should be privileged, and I think the court is bound to consider that … almost any contract entered into between man and man … may lead to litigation before the contract is completed. Any correspondence passing between the date of the contract which afterwards becomes the subject of litigation and the litigation itself is, in my opinion, on principle, within the privilege extended to the non-production of communications between solicitors and clients … it is absolutely essential to the interest of mankind that a person should be free to consult his solicitor upon anything which arises out of a contract which may lead to litigation; that the communications should be perfectly free, so that the client may write to the solicitor, and the solicitor to the client, without the slightest apprehension that those communications will be produced if litigation should afterwards arise on the subject to which the correspondence relates."*

24. The subject matter of the advice with which Templeman LJ was concerned was a reinsurance contract which ultimately led to litigation.

25. All of the cases to which we have thus far referred were ones in which the relationship of client and solicitor arose in relation to transactions involving legal rights and obligations capable of becoming the subject matter of litigation. We have been referred to no case in which legal advice privilege has been established where this was not the case. The authorities appear to us to support the following statement in the 1967 Report on Privilege in Civil Proceedings of the distinguished Law Reform Committee who, having observed in paragraph 18 of their report that the true rationale of legal advice privilege was that it was "*a privilege in aid of litigation*", continued :-

"19. What distinguishes legal advice from other kinds of professional advice is that it is concerned exclusively with rights and liabilities enforceable in law, i.e. in the ultimate resort by litigation in the courts or in some administrative tribunal. It is, of course, true that on many matters on which a client consults his solicitor he does not expect litigation and certainly hopes that it will not occur; but there would be no need for him to consult his solicitor to obtain legal advice unless there were some risk of litigation in the future in connection with the matter upon which advice is sought. As Lord Brougham pointed out, it is to minimise that risk by ensuring that he so conducts his affairs as to make it reasonably certain that he would succeed in any litigation which might be brought in connection with them, that the client consults his solicitor at all."

26. In summary, the authorities to which we have referred show that, where a solicitor-client relationship is formed for the purpose of obtaining advice or assistance in relation to rights and liabilities, broad protection will be given to communications passing between solicitor and client in the course of that relationship. In all the cases, however, the primary object of the relationship was to obtain assistance that required knowledge of the law. We do not consider that the same principle applies to communications between solicitor and client when the dominant purpose is not the obtaining of advice and assistance in relation to legal rights and obligations.

This case

27. Mr Thanki argued that the advice given by Freshfields was given in the course of a professional relationship that related to the Bank's legal rights and obligations. In the course of his reply he drew our attention to paragraph 8 of Mr Croall's second witness statement in the following terms:-

"I am informed by Lord Kingsdown [the Governor of the Bank of England at the time], . . . that from the time of the Government's decision to establish the Bingham Inquiry it was clear to him that the Inquiry would require the assistance of the Bank. It was also obvious to Lord Kingsdown that anything the Bank did or said in relation to the Inquiry was legally very sensitive. This concern underpinned the retention of Freshfields and Counsel to advise the Bank from the earliest stages of the Inquiry (see below). The Bank was conscious of the need to deal with the Bingham Inquiry as efficiently and effectively as possible and to seek to limit any "blame" (the word used by the Prime Minister in Parliament) that might be attached to the Bank or any criticism of its conduct of the supervision of BCCI. The Bank remained, at that time, responsible for the supervision of banks under the Banking Act 1987 and any criticism and consequential damage to its reputation (or to that of any of its senior officials in the Banking Supervision Division) might impair its ability to supervise efficiently. The Bank was also

conscious from a very early stage of the danger of litigation against the Bank (or otherwise affecting the Bank) that might follow if the Bank were the subject of criticism or if blame was attached to it or any of its officials."

Mr Croall does not explain why Lord Kingsdown thought that anything done by the Bank was "*legally"* very sensitive as opposed to sensitive in general as a result of possible "*blame*" that might be attached to the Bank which appears to have been Lord Kingsdown's primary concern. The last sentence, however, does refer to the danger of litigation *"if the Bank were the subject of criticism or if blame were attached to it."* Mr Thanki submitted that this statement was a complete answer to Mr Pollock's application and claimed that the judge had wrongly ignored this vital evidence.

28. This amounted to an attack on the judge's findings in the first quotation in paragraph 8 above. Indeed Mr Thanki attacked those findings in his skeleton argument. The judge dealt at length with the nature of the assistance provided by Freshfields in his judgment of 13 December 2002. The findings in question were a distillation of that part in his judgment and, in particular, his finding at paragraph 19 that the function of Freshfields was "to prepare submissions and/or to advise on the nature, presentation, timing and/or content of the Bank's submission to, evidence for and response to requests from the Inquiry". There is no basis upon which, in this appeal, we can review the findings made by the judge on the basis of detailed consideration of the evidence as to the nature of the role played by Freshfields. We conclude that the dominant role of Freshfields was to advise on preparation and presentation of evidence for the Bingham Inquiry but that it is possible that they may have given some advice as to the Bank's legal rights and obligations. We do not consider that this possibility, should it be established as a fact, can clothe the entirety of the advice given by Freshfields with privilege on the ground that it was all "in the context of" a professional relationship that involved advising on legal rights and obligations. This appeal falls to be determined on the basis of the judge's finding that the advice and assistance sought was primarily in relation to the presentation of evidence to the Inquiry rather than in relation to the Bank's rights and obligations.

29. Mr Thanki contended that the professional role of the solicitor has widened in modern times and that the scope of legal advice privilege has widened with it. In support of this submission Mr Thanki relied upon the following passages from the judgment of Taylor LJ in ***Balabel v Air India*** [1988] Ch 317:-

"Although originally confined to advice regarding litigation, the privilege was extended to non-litigious business. Nevertheless, despite that extension, the purpose and scope of the 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 purpose of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches 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 [as] appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. … 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 such words as "please advise me what I should do". But, even if it does not, there will usually be implied in 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."

30. Mr Thanki pointed out that, in *Three Rivers (No 5)* this Court summarised the effect of *Balabel* as follows, at paragraph 29:- *"once a solicitor had been instructed, legal advice privilege extend[s] to all communications between solicitor and client on matters within the ordinary business of the solicitor and referable on the relationship."*

Mr Pollock submitted that this summary was not correct. We agree with him, if it is considered in isolation. The material passage in the judgment of Taylor LJ is at pp. 331-2 where, after considering a number of authorities, he said this:-

"It follows from this analysis that those dicta in the decided cases which appear to extend privilege without limit to all solicitor and client communications upon matters within the ordinary business of a solicitor and referable to that relationship are too wide. It may be that the broad terms used in the earlier cases reflect the restricted range of solicitors' activities at the time. Their role then would have been confined for the most part to that of lawyer and would not have extended to business adviser or man of affairs. To speak therefore of matters "within the ordinary business of a solicitor" would in practice usually have meant the giving of advice and assistance of a specifically legal nature. But 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 the need to re-examine the scope of legal professional privilege and keep it within justifiable bounds"

We agree with this observation of Taylor LJ to the effect that in circumstances where the traditional role of a solicitor has expanded, it is necessary to keep legal professional privilege within justifiable bounds. The fact that work done is within what may be the ordinary business of a solicitor does not necessarily mean that it attracts privilege. This case raises the question of the scope of the 'justifiable bounds'.

Inquiries

31. One activity that now falls within the ordinary business of a solicitor is the representation of witnesses at Inquiries. Public Inquiries are now commonplace, both statutory and non-statutory. It is also commonplace for witnesses at such Inquiries to be represented by lawyers. Often witnesses will be exposed to, and concerned about, the risk of legal liability as a consequence of their role in the matter under enquiry. In such circumstances their communications with their lawyers will plainly be subject to legal advice privilege. Sometimes, however, the concern of witnesses is not that they will be exposed to legal liability but simply that they will be exposed to criticism. The BSE Inquiry is an example of such an Inquiry; Lord Hutton's Inquiry is another. Criticism can be a serious matter, as the resignations following Lord Hutton's Report demonstrate. Are individuals whose concern is solely for their reputation not entitled to legal advice privilege?

32. Mr Pollock submitted that witnesses at statutory Inquiries are entitled to legal advice privilege by virtue of section 1(3) of the Tribunals of Inquiry Evidence Act 1921, which provides:- *"A witness before any such tribunal shall be entitled to the same immunities and privileges as if he were a witness in civil proceedings before the High Court or the Court of Session."*

This provision begs the question rather than answers it. It seems to us that its principal target is protection in relation to evidence given in the proceedings. If a witness in civil proceedings consults a lawyer, this will normally be because of concern as to the impact of the proceedings on his rights and liabilities. Communications in such circumstances will be privileged whether or not the proceedings are in court, before a statutory tribunal or before a non-statutory tribunal. If the witness' concern is only to have advice on presentation, the question remains of whether the advice attracts privilege. We know of no case in which the issue now under consideration has been raised. It can be argued that an individual whose reputation is in jeopardy at a Public Inquiry, but who needs no advice in relation to his legal rights and obligations, ought to be able to seek the assistance of a solicitor without inhibition. Is reputation to be equated with legal rights and obligations so that the advice of a solicitor for the purpose of protecting reputation attracts legal advice privilege?

33. We do not find it necessary to answer that question on the facts of the present case. Freshfields were retained by the Bank. No claim for privilege has been advanced by any individual witness. The precise status of the Bank has not been explored before us as only its regulatory functions are directly in issue, but it seems to us questionable as to whether our private law affords any protection to the reputation of the Bank. Certainly it does not afford the same protection as is afforded by the law of defamation to the reputation of an individual. It has been suggested that the Bank was concerned to protect its reputation because it was anxious to avoid more intrusive regulation. We do not think that a desire to protect reputation for this reason puts the Bank on the same footing as an individual whose reputation is at risk in a public Inquiry, whatever that footing may be.

34. Is the interest that the client seeks to protect relevant to the question of legal advice privilege in the present context? The role of Freshfields in assisting with the preparation of evidence and submissions

for the Bingham Inquiry was very similar to the role that a solicitor plays in relation to litigation. But, in contradistinction to litigation, a typical inquiry is not necessarily (or even primarily) concerned with legal rights and liabilities. Does the provision of advice in relation to an Inquiry involve the type of professional relationship between solicitor and client that attracts legal advice privilege regardless of whether any legal rights or liabilities are in play?

35. Mr Pollock described this possibility as 'quasi-litigation privilege'. He submitted that no such privilege existed. He also argued that it was not open to the Bank to invoke privilege on this basis, having specifically renounced any reliance on litigation privilege.

36. We have found this the most difficult question that arises on this appeal. No authority bears on it. An affirmative answer will extend legal advice privilege to circumstances where the established test of whether the advice and assistance relates to legal rights and liabilities is not satisfied.

37. We do not consider that the facts of this case justify this extension to the law of privilege. The Inquiry in this case was a private, non-statutory Inquiry. One of the sponsors of that Inquiry, albeit a reluctant sponsor, was the Bank itself. The Bank's primary concern was, or should have been, to ascertain whether the collapse of BCCI was attributable to any regulatory shortcomings in this country. We cannot see that in these circumstances communications between the Bank and the solicitors who were assisting in the obtaining, preparation and presentation of evidence and submissions to the Inquiry should attract privilege, even if the Bank was anxious that this assistance should enable the Bank's role to be presented in the best possible light.

38. Mr Pollock emphasised that he was not asserting that no communications passing between BIU and Freshfields could be privileged; he was merely objecting to an assertion that all such communications were automatically privileged. If some such communications were made in the context of seeking specific legal advice (whether about the construction of the provisions of the Banking Act or any other point of law) then a statement to that effect can be made and all documents coming into existence during that part of the investigation necessary for that advice to be given will, as Mr Pollock accepted, be privileged in accordance with the *Balabel* decision. But no examination of the communications now sought had been carried out to see if they had indeed come into existence for the purpose of giving specific legal advice; the judge's order now requires that exercise be done. We consider that the judge was right to so order.

39. We have found this area of law not merely difficult but unsatisfactory. The justification for litigation privilege is readily understood. Where, however, litigation is not anticipated it is not easy to see why communications with a solicitor should be privileged. Legal advice privilege attaches to matters such as the conveyance of real property or the drawing up of a will. It is not clear why it should. There would seem little reason to fear that, if privilege were not available in such circumstances, communications between solicitor and client would be inhibited. Nearly fifty years have passed since the Law Reform Committee looked at this area. It is perhaps time for it to receive a further review.

40. For the reasons that we have given we would dismiss this appeal

Order: Appeal dismissed in accordance with the order as agreed between counsel. Leave to appeal to the House of Lords refused. Stay granted until 22 March 2004 pending petition to the House of Lords on terms that (I) the bank continues to give discovery of documents required; and (ii) liberty to apply should the stay cause practical difficulties. (Order does not form part of the approved judgment)

Bankim Thanki QC & Ben Valentin (instructed by Freshfields, Bruckhaus Deringer) for the Appellant

Gordon Pollock QC, Barry Isaacs & Nathan Pillow (instructed by Lovells) for the Respondents