Recent developments on the law of privilege in England and Singapore

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Introduction

This paper provides an update on the issue of "privilege", which in broad terms is concerned with the issue of when a document has a "privileged" or "special status" such that it cannot be called for or deployed by another party. It considers recent case law in both jurisdictions on the three broad types of privilege.

1. Legal advice privilege which protects communications between client and lawyer which are part of the continuum of communication undertaken for the purpose of giving and getting of legal advice. It does not require the existence or contemplation of legal proceedings.

2. Litigation privilege which only applies where adversarial proceedings are in reasonable contemplation and where the document comes into existence for the dominant purpose of that litigations, but is wider in its ambit once that condition is met. It can protect communication which come into existence for the dominant purpose of gathering evidence for use in or advising in relation to proceedings, and will include communications with third parties if they come into existence for that dominant purpose and communications with non-lawyers.

3. Finally there is "without prejudice" privilege which applies to written or oral communications which are made for the purpose of a genuine attempt to compromise a dispute between the parties may generally not be admitted in evidence. As between the parties to those communications, who of course already know what they say, this is a rule which prevents the parties adducing them in court. As between third parties, it is a principle which both prevents the documents being obtained and used.

A LEGAL ADVICE PRIVILEGE

England: who is the client?

Any update on recent developments on the law of privilege in England must inevitably go back to the effect which the Three Rivers litigation had on the English law of privilege. As is well known, the Court of Appeal in Three Rivers (No. 5) [2003] QB 1556 concerned a case in which a special unit of the Bank of England, the BIU, had been formed which was responsible for obtaining and receiving legal advice from Freshfields, in relation to an enquiry being conducted by Lord Bingham into the Bank's supervision of BCCI. The BIU spoke to various Bank employees for the purposes of passing information onto Freshfields so that they could advise. The Bank claimed legal advice privilege in those communications with Bank employees.

The Court of Appeal held that legal advice privilege only extended to communications between the lawyer and the client and not third parties, and that communication with employees were communications with third parties unless the employees were those specifically charged with seeking and obtaining legal advice. The decision proved very unpopular with the profession, and the first two cases considered represent the latest attempts to get around it.

In RBS Rights Litigation [2016] EWHC 3161 (Ch), the attempt took the form of an invitation to Hildyard J. to distinguish Three Rivers. The context of that case was a series of interviews with current and ex-RBS employees conducted by lawyers retained by RBS. First, it was argued that Three Rivers was limited to the special case where the lawyers themselves had no direct communication with the employees. Hildyard J. rejected the suggestion that the decision was confined to its facts, noting that this was not how it had been treated by the House of Lords in Three Rivers (No. 6) [2005] 1 AC 610 or subsequent cases. In reaching this decision, Hildyard J. rejected the interpretation of Three Rivers adopted by the Singapore Court of Appeal in Skandinaviska Enskilda Banken AB v Asia Pacific Breweries (Singapore) Pte Ltd [2007] 2 SLR 367. RBS's second line of attack involved arguing that the Court could adopt a definition of "the client" which included the employees and ex-employees who were interviewed when they had been authorised by RBS to speak to those individuals. Hildyard J was clearly attracted by the argument but felt unable to reconcile it with Three Rivers. The interview notes concerned information gathering, to enable RBS to seek and receive legal advice, not communications between lawyer and client. The Judge gave RBS permission to pursue a leapfrog appeal to the Supreme Court, but the claimants chose not to seek production of the interviews, rather than allow the timetable of the action to be derailed by a further hearing which, one suspects, they thought they would lose.

The second attempt was Director of the Serious Fraud Office v Eurasian Natural Resources Corp. [2018] EWCA Civ 2006, a case more particularly concerned with litigation privilege, which we will come back to in that context, but in which the Court of Appeal was invited to hold that Three Rivers (No. 5) was wrong, but the Court held that that was an argument which was only open in the Supreme Court. However the Court gave strong encouragement to the critics of Three Rivers (No. 5), suggesting that the policy underlying the recognition of legal advice privilege could be undermined in a corporate context if privilege did not attach to the processing of obtaining information so that legal advice could be given, as well as the giving of advice itself. The Court was also troubled by the fact that England was out of step with the law of Singapore and Hong Kong on this issue, noting at [129] that:

"It is undoubtedly desirable for the common law in different countries to remain aligned so far as its development is not specifically affected by different commercial or cultural environments in those countries. In this regard, legal professional privilege is a classic example of an area where one might expect to see commonality between the laws of common law countries, particularly when so many multinational companies operate across borders and have subsidiaries in numerous common law countries".

It seems inevitable that English law will soon come to treat information provided by a company's lawyers with the company's authority for the purpose of providing legal advice to the company as covered by legal advice privilege. There seems to be basis here for distinguishing between information provided to an inhouse lawyer for this purpose, and that provided to external lawyers.

Legal advice privilege in England: some practical problems

There are four other issues which are worth further discussion?

First, is there any basis for distinguishing between lawyers' exchanges with existing and ex-employees so far as legal privilege is concerned? In the RBS Rights Issue case, there was an attempt in argument to distinguish between current and ex-employees, and the point was left open in Eurasian Natural Resources case. However, in so far as the ex-employees are communicating information in relation to which they owe the company a duty of confidentiality, and are doing so with the company's permission for the purpose of legal advice being provided to the company, it is suggested that the position of employees and ex-employees should be the same. The Court in Eurasian Natural Resources noted that one problem with Three Rivers is that it created loss of privilege issues for a corporate person which would not apply to a natural person. A differential treatment of ex-employees would raise the same issue.

Second, what of attachments to communications with solicitors? In Financial Reporting Council Limited v Sports Direct International Plc [2018] EWHC 2284 (Ch), Arnold J. considered that issue, and had little difficulty in rejecting the widest formulation of the argument that they were, which he note "would found a valid claim to privilege in respect of a scanned copy of the front page of *The Times* attached to such an email" [31]. The judge held that pre-existing non-privileged documents could not become privileged simply because they were attached to communications between lawyer and client.

Third, what when the lawyer is one among many addressees of the communication. Morris J summarised the position as follows in Queen on the application of Jet2.com Limited v Civil Aviation Authority [2018] EWHC 3364 (Admin) at [95]:

1. The mere involvement of a lawyer is not enough to justify a claim for privilege.

2. If the dominant purpose for sending the email was to seek advice from the lawyer, and others were copied in for information only, then the document is privileged.

3. However if the dominant purpose of sending the email was to seek commercial views, and the lawyer was copied in for information or even for the purpose of advising, then the copies of the email sent to the non-lawyers are not privileged.

4. If the email was sent both to a non-lawyer for commercial advice and to the lawyer for legal advice, then the emails between the non-lawyers will not be privileged save to the extent that the non-lawyers' responses disclose or might disclose the nature of the legal advice sought or given.

This last category of dual-purpose documents presents a dilemma. While it may be possible to attribute different legal characters to documents in the in-boxes of the legal and non-legal recipients, the same solution is not available for the email in the sent items box of the sender. It may be necessary to arrive at a dominant purpose for the document as a whole, and unless this is use in relation to actual or contemplated litigation, there will be no privilege.

Fourth, what of documents which evidence the substance of legal advice? In the Matter of Edwardian Group Ltd. [2017] EWHC 2805 (Ch), Morgan J. had to consider what the test was for whether those parts of a secondary document which evidenced the substance of legal advice

were themselves privileged. Was it enough that the substance of the legal advice could be inferred from the documents? Or was it necessary that the document actually state the substance of the advice? Some support for the latter view was offered by David Richards J. in Financial Services Compensation Scheme Ltd v Abbey National Treasury Services plc [2007] EWHC 2868, who suggested that the mere ability to infer the substance of legal advice would not be enough unless the inference was obvious and inevitable. However, Morgan J. applied a more generous test, namely it was sufficient that the contents of the document would provide a definite and reasonable foundation for the suggested inference. Something that would merely allow a reader to wonder or speculate whether legal advice had been obtained and as to the substance of that advice would not be enough.

Legal advice privilege in Singapore: the challenges of the Evidence Act

At Singapore common law, legal advice privilege applies to in-house counsel, but this was not expressly provided for in the Evidence Act, until s 128A was inserted in 2012. However, what was not clear was whether, prior to 2012, the legal professional privilege provisions in the Evidence Act applied to in-house counsel. In ARX v Comptroller of Income Tax [2016] 5 SLR 590, which concerned a claim by the CIT to legal advice privilege over advice given by a lawyer in its law division, the Court of Appeal decided that the pre-2012 Evidence Act provisions did not make provision for in-house counsel, but that the common law position was consistent with the approach taken by the Evidence Act to legal professional privilege and was therefore preserved by s 2(2). The Court of Appeal also rejected any presumption that in-house counsel were not discharging a legal role.

Singapore Courts typically prefer to take a broad approach in deciding what amounts to “legal advice”: it is not merely limited to telling the client the law but includes advice as to what should be done in the legal “context”. Even on this basis, however, Comptroller of Income Tax v ARW [2017] SGHC 16 demonstrates the need to carefully draft the affidavit in support of the privilege claim. ARW concerned the same litigation as ARX; this time the taxpayer sought discovery of the documents generated in the course of the CIT’s audit of the taxpayer’s affairs and which led the CIT to conclude that there had been tax avoidance by the taxpayer so as to allow it to reclaim a substantial amount of tax refunds. Aedit Abdullah JC rejected a claim for legal advice privilege over these documents, mainly for evidential reasons, i.e. no legal context had been shown to exist nor had it been shown that the communications were with the CIT’s legal division.

Litigation privilege in England

As is well known, in order to claim litigation privilege, it is necessary to establish two things.: that litigation is in reasonable contemplation; and that the predominant purpose for producing the document was for the purpose of the litigation. There are three recent English decisions in which both aspects have come under consideration.

The first is Single Buoy Moorings Inc v Aspen Insurance UK Limited [2018] EWHC 1763 (Comm). The privilege issues in that case arose in the context of the insurance of a mobile production platform. The insurers sought disclosure of documents relating to the prior decommissioning of the platform, to be met with the response in many cases that the documents were subject to litigation privilege. The case did not disclose any new principles, but it does illustrate how the Courts are showing a much greater readiness to second-guess parties’

litigation privilege assertions than previously. Teare J. reminded himself of the relevant principles, including:

1. That the onus was on the party asserting the privilege to establish it.

2. The assertions in witness statements as to the existence of privilege were not determinative, but would be scrutinised carefully.

3. It must be shown that litigation was reasonably contemplated or anticipated. A mere possibility of litigation, even a distinct possibility someone might at some stage bring proceedings, was not enough.

4. The documents must have been brought into existence for the dominant purpose of either (i) enabling legal advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings.

5. The evidence relied upon to claim privilege would be subject to "anxious scrutiny" given the difficulty of going behind that evidence.

Teare J. was critical of the short terms in which the claim to privilege was asserted, the absence of particularity, and he noted inconsistencies between the different terms in which privilege had been claimed in different affidavits at different times. He concluded that litigation privilege had been wrongly claimed in a number of respects.

The second English decision is <u>Minera Las Bambas SA v Glencore Queensland Ltd</u> [2018] EWHC 286 (Comm), a decision of Mrs Justice Moulder, a case in which a documents were said to attract litigation privilege because they were produced for the predominant purpose of litigation to which the claimant was not a party. The claimants purchased shares in a Peruvian company from the respondent, and claimed an indemnity under the SPA for a tax assessment imposed by the Peruvian authorities. The Defendant had exercised its right to take over the defence of the tax proceedings against the Peruvian company, and the issue arose of whether the defendant could claim litigation privilege in documents concerning those proceedings against the claimant. The Judge rejected the submission. There were cases in which the dominant purpose of a party other than the named party to the proceedings might be sufficient to confer litigation privilege on a document – for example that of a liability insurer in relation to proceedings which it was controlling. But that could not apply in the case where the defendant was controlling the proceedings on behalf of the very party against whom it was seeking to assert litigation privilege, still less where the proceedings controlled were not those in which the claim to privilege was made: [31]-[32]. The Judge did not consider the issues of joint or common interest (at [33]), but, with respect, that seems a more conventional perspective from which to tackle the issues in the case. The defendant should not have been able to assert litigation privilege against the claimant, but each ought to have been able to assert that privilege against the rest of the world.

The third English decision is <u>WH Holding Limited v E20 Stadium LLP</u> [2018] EWCA Civ 2652. The issue in that case is whether litigation privilege could extend to documents other than those concerned with obtaining advice or evidence. Litigation privilege did not extend to documents concerned with purely commercial matters, and therefore to documents concerned with a commercial settlement of the dispute.

The final English decision takes us back to Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited [2018] EWCA Civ. 2006. In that case, Eurasian's solicitors and forensic accountants collected documents about fraudulent practices committed by Eurasian personnel in other jurisdictions. ENRC then held meetings with the SFO, in the context of the SFO's self-reporting guidelines on bribery and corruption. However, no agreement resulted. The SFO sought production of the interview notes and the work of the forensic accountants, and ENRC sought to resist the request by relying on litigation privilege. That claim was rejected by Dame Geraldine Andrews, on two bases.

First, that criminal litigation could not be said to be in reasonable contemplation until such time as ENRC had become aware of conduct on its part which provided a basis for such a prosecution. It should be noted that this would have made the assertion of litigation privilege an unattractive option in some ways, effectively telling the SFO through the assertion that material had been found which would warrant a prosecution.

Second, to the extent that the documents had been brought into existence for the purpose of submitting them to the SFO as part of the self-reporting procedure, litigation privilege did not apply, because it did not apply to documents produced to show them to a potential counter-party in litigation to dissuade them from initiating litigation. The Court relied upon certain Australian authorities to this effect.

The Court of Appeal essentially overturned the Judge's first decision on the facts. In doing so, the Court rejected two of ENRC's extreme arguments. It rejected the suggestion that any expression of concern by a prosecution authority would be sufficient to bring criminal litigation into reasonable contemplation. And it rejected the suggestion that when a criminal investigation came into being, it led inevitably to the conclusion that criminal litigation was in contemplation. However, it said that a party can sufficiently anticipate possible prosecution even if further investigations are necessary before it can be said that proceedings were likely, and that was the position on the evidence here. The Court held that Andrews J was not right to suggest a general principle that litigation privilege cannot attach until either a defendant knows the full details of what is likely to be unearthed or a decision to prosecute has been taken. Although the Court of Appeal did not expressly so state, it is possible to detect a different legal test in operation here which explains the difference in approach from the first instance judge. The threshold for a criminal prosecution is much higher than that required to commence civil litigation. It may, therefore, be necessary to appropriate a lower test of what constitutes "reasonable contemplation" when considering whether criminal litigation is in reasonable contemplation, as opposed to when civil litigation can be said to be in reasonable prosecution. On this basis, criminal litigation could be said to be in contemplation even if material sufficient to justify a prosecution has not been found.

On the second issue, the Court held that merely because solicitors prepare a document with the ultimate intention of showing the document to the opposing party did not deprive the preparatory work done of litigation privilege. In this case, while ENRC indicated its willingness to provide documents on a number of occasions, it never committed to doing so. Against that background, the Court was satisfied that the documents were brought into existence for the purpose of resisting or avoiding such proceedings.

In reaching these conclusions, the Court of Appeal was clearly influenced by the public interest in companies investigating allegations from whistle-blowers or journalists, before going to the

SFO, without the risk of losing legal professional privilege. Otherwise there might be too great a temptation not to investigate at all.

Litigation privilege in Singapore: further challenges from the Evidence Act

Litigation privilege is not referred to anywhere in the Evidence Act. In 2007, the Court of Appeal in Skandinaviska Enskilda Banken AB v Asia Pacific Breweries (Singapore) Pte Ltd [2007] 2 SLR 367 stated that litigation privilege existed by virtue of the common law, and that since it was not inconsistent with s 131 of the Evidence Act, it was preserved by s 2(2) of the Evidence Act. In 2011, the SAL Law Reform Committee recommended that litigation privilege be expressly codified in the Evidence Act, but this was not taken up during the 2012 amendments.

This is unfortunate, as there is in fact a respectable argument that s 2(2) of the Evidence Act has repealed common law litigation privilege, and that was effectively the conclusion of the Malaysian Court of Appeal in Tenaga Nasional Bhd v Bukit Lenang Development Sdn Bhd [2016] 5 MLJ 127, which however was very quickly disapproved by a differently-constituted Court of Appeal in Wang Han Lin v HSBC Bank Malaysia Bhd [2017] 10 CLJ 111, which expressly adopted the reasoning of the Court of Appeal in Skandinaviska. While it is unlikely that Tenaga Nasional would be followed in Singapore, there are five additional issues worth considering.

First, we have seen the English courts examine the issue of when litigation is in "reasonable contemplation" in ENRC, and the issue similarly arose in Comptroller of Income Tax v ARW [2017] SGHC 16, because the relevant documents were generated in the course of the CIT auditing the taxpayer and determining that there had been tax avoidance and a consequential overpayment to the taxpayer of tax refunds. The CIT then levied additional tax assessments on the taxpayer to reclaim the tax refunds. However, this was successfully challenged by the taxpayer as being ultra vires the CIT's powers under the Income Tax Act. The CIT then commenced a common law action for the recovery of the tax refunds, which led to the taxpayer's applications for discovery in ARW. Could litigation be said to have been reasonably in prospect when the documents were created during the audit? Abdullah JC accepted that there was a reasonable prospect of litigation, notwithstanding that it was contingent on whether the additional assessments would be challenged and whether the taxpayer decided to institute court proceedings.

Second, however, Abdullah JC considered that these same facts meant that the documents were not created for the dominant purpose of litigation, because the immediate outcome of the audit was a form of regulatory action, i.e. the statutory imposition of the additional assessments. It was only if that was resisted that litigation would follow, and therefore litigation could not be said to have been the dominant purpose.

Third, as is now the position under English law following ENRC, the fact that a document is prepared with the ultimate intention of showing it to the opposing party does not prevent the document from being protected by litigation privilege. In fact, in some circumstances, even the fact that it has been so shown does not prevent litigation privilege from arising. In United Overseas Bank v Lippo Marina Collection [2018] 4 SLR 391, the plaintiff commenced proceedings against three defendants but settled with the second and third defendants on terms that required them to provide the plaintiff with a draft affidavit detailing the first defendant's alleged wrongdoing. The first defendant sought disclosure of the affidavit and claimed there

could be no litigation privilege protecting it because it had been created for the purpose of being used at trial. Abdullah JC rejected this, and declined to follow Australian authority that, like Dame Andrews in ENRC at first instance, considered that litigation privilege could not attach to a document that was intended to be given to an opposing party.

Fourth, it is a very well-established proposition of English law that litigation privilege does not apply in proceedings which are inquisitorial: In re L (A Minor) (Police Investigation: Privilege) [1997] AC 16. This explains why the Three Rivers litigation was not fought on the basis of litigation privilege. In re L, a majority of the House of Lords decided that, because proceedings under Part IV of the Children's Act 1989 were essentially non-adversarial, a mother could not rely on litigation privilege to prevent the police from seeking disclosure of a report filed by a consultant pathologist on the mother's behalf (which suggested that there had been child abuse) in those proceedings. It has always been assumed that re L is good law in Singapore. However, this is now more doubtful in light of Rahimah bte Mohd Salim v Public Prosecutor [2016] 5 SLR 1259, where Chao JA endorsed the principle that there is no property in an expert witness (Harmony Shipping Co SA v Saudi Europe Line Ltd [1979] 1 WLR 1380). An expert therefore cannot be prevented on grounds of litigation privilege from providing the court with evidence of his expert opinion on any facts or evidence that he has observed (unless those facts or evidence are themselves subject to litigation privilege). Chao JA suggested that, in re L, all the material to which the pathologist had access was material which was already available to the other parties, and therefore as the pathologist's report was based on non-privileged material, the mother had no property in his opinion and could not prevent its disclosure. If this is the true basis for re L, the availability of litigation privilege might perhaps be broadened.

Fifth, one of the aims of the CJRC reforms is to introduce a more judge-led, potentially "inquisitorial" approach to litigation. Does that mean the death of litigation privilege? There are certainly some indications that litigation privilege may be less relevant in the new civil litigation setting. Not only does the default rule providing for a single joint expert mean that there will be less scope for litigation privilege to be claimed, the new Rules of Court envision that discovery will generally not be ordered over documents that are merely confidential – in which case it is difficult to see what added protection litigation privilege confers.

Without prejudice privilege in England: threats and deals

The final category of privilege we are going to consider is that which applies to documents generated as a result of attempts to settle a dispute: so-called "without prejudice" privilege. One unusual feature of this head of privilege is that in most cases it is not about stopping an opposing party from seeing a document, but about preventing the opposing party from deploying a document it already has access to. However the privilege also arises in so-called "third party" cases when party A wants to prevent party B seeing documents generated in the course of an attempt to settle a dispute between party A and party C.

The first decision, Ferster v Ferster [2016] EWCA Civ 717, is a two-party case. It considered the exception to "without prejudice" privilege where the cloak of settlement negotiations was used for a communication which involved "unambiguous impropriety". The communication in that case was sent in the context of a mediation, and involved an offer to sell their shares which were the subject of the dispute at a price, against a suggestion that it was known that the other party had acted in contempt of court in failing to disclose assets and that this would come out if the offer was not accepted.

The issue for the court was where the line between robust negotiation and unambiguous impropriety fell to be drawn. The judge applied the test Mr Justice Flaux applied in Boreh v Republic of Djibouti [2015] EQHC 769 (Comm) at [132]: did the threat exceed that which was "permissible in settlement of hard fought commercial litigation". The Court had no hesitation in saying that they did: both because the threat of criminal action was used to settle civil proceedings; because of the stress put when making the threats on the impact of the other party's family; and because of the threat of immediate publicity. The Court held it was not necessary for the crime of blackmail to be committed before the "unambiguous impropriety" exception could be triggered: [24].

The second decision is Property Alliance Group Ltd v Royal Bank of Scotland plc [2015] EWHC 1557 (Ch). This case recognised the application of "without prejudice" privilege in a novel context. RBS had engaged with overseas regulators, in particular U.K. and U.S. regulators, in relation to allegations of LIBOR-fixing, which had resulted in agreed fines and admissions. However, the terms of those admissions, and indeed the amounts of the fines, had followed a lengthy negotiation between the relevant authorities and RBS. The Financial Conduct Authority intervened in the action to support RBS's claim to "without prejudice" privilege. The Court upheld the claim, accepting the FCA's submission that there was a powerful public policy in facilitating early settlement and an early final notice, and holding that negotiations to settle FCA investigations attracted the privilege.

However, it was a qualified version of the "without prejudice" rule. First, in contrast to the conventional two-party "without prejudice" situation, it did not stop the regulator from acting on the information received: at [99]. And perhaps as a consequence of that, it remained open to the regulated firm to take a unilateral decision to deploy the material for its own purposes. The Judge found that the FCA could not prevent production of the material if the regulated firm had itself put in issue the basis on which the regulator's final decision had been taken. This particular species of "without prejudice" privilege, therefore, appears to allow for unilateral rather than mutual waiver in at least some circumstances. The Judge held that RBS had itself put the basis of the FCA final notice in issue in its pleadings, but RBS were allowed to amend the pleading and thereby avoid disclosure.

The final English case on this subject brings us back to Single Buoy Moorings Inc v Aspen Insurance UK Limited [2018] EWHC 1763 (Comm), a case in which insurers sought production of the negotiations between the insured and a third party because it was said that they bore on whether the insured intended to maintain or abandon the insured rig. The insurers said they were not seeking to rely on admissions made by the insured to embarrass them. The Court noted that there were exceptions to the "without prejudice" principle when facts were relied on for particular purposes. In particular, the Supreme Court had held in Oceanbulk v TMT Asia Ltd [2011] 1 AC 662 that where negotiations resulted in a settlement, "without prejudice" privilege did not render those negotiations inadmissible to the extent that they were otherwise admissible to interpret or rectify that settlement agreement. However the Court was not persuaded that a new exception was appropriate in circumstances in which the material was sought to prove what the insured's long term plans for the project were.

Without prejudice privilege in Singapore: more threats and more deals

The question of when robust negotiations cease to be without prejudice also arose in Ernest Ferdinand Perez De La Sala v Compania De Navigacion Palomar, SA [2018] 1 SLR 894, which concerned the question of whether two communications were protected by without prejudice

privilege. The first was a letter written by an English silk to the lawyers for the opposing party, while the other was an email to one of the witnesses for the opposing party. The Court of Appeal held that neither communication was without prejudice. In order to properly qualify for without prejudice privilege, a communication must be for the purpose of settling a dispute. Whether or not that is so depends on the facts, but when a party's exclusive emphasis on the other party's legal weakness and precarious position is made so strongly, and at such great length, that a reasonable observer would find it hard to understand why the first party would be willing to accept anything short of acquiescence or to offer any concession of its own, references to "negotiation" or "settlement" might then be regarded by the court as a fig leaf, and the only real purpose of the communication held to be to pressure the other party into acquiescing.

The English silk's letter was of this nature, notwithstanding that it had avoided the veiled threats in the letter in Ferster, e.g. it made clear that there was no intention to report the other side's allegedly illegal actions to the authorities. However, practically the entirety of the letter focused not only on the weaknesses of the other side's case, but also potential criminal consequences if the other side lost the trial. It was therefore written to exert pressure rather than invite settlement. The email to the witness referred to the existence of the English silk's letter, which was said to potentially affect the witness's interests, and invited the witness to discuss its contents with the other side. However, a communication with a third party who is not a party to the dispute is not covered by without privilege unless the third party is being used as a conduit through whom a communication made for the purpose of settlement is passed between parties to the dispute. Since, on the facts, that was not the case, the email was not privileged. The Court of Appeal therefore did not see the need to discuss the "unambiguous impropriety" exception, but indicated that both communications came very close to and possibly crossed the line, and were to be strongly discouraged.

United Overseas Bank v Lippo Marina Collection [2018] 4 SLR 391 dealt with without prejudice privilege in the context of multi-party litigation, where UOB sued three defendants but settled with two of them on terms that required them to produce a draft affidavit of evidence-in-chief detailing Lippo's wrongdoing, which Lippo sought discovery of. There was no problem arising from the fact that it was only UOB who was asserting without prejudice privilege without the involvement of the two defendants, as the privilege could only be waived by all the parties involved in the negotiations. However, the claim for without prejudice privilege failed for two reasons. First, the affidavit was the product or outcome of settlement negotiations, and such documents were not privileged; and second, while the affidavit was against the interests of Lippo, it was not against the interests of the remaining defendants, who were the makers of the affidavit.

Privilege under foreign law in England and Singapore

Increased cross-border commercial activity means that very often documents arising from a relationship of lawyer and client which is governed by a law other than the law of the forum, and which may have been generated under very different expectations of what would and would not be privileged from production. We are next going to look at two decisions in which the courts have grappled with these issues.

The first brings us back to In re RBS Rights Issue Litigation [2016] EWHC 3161 (Ch), and RBS's attempts to claim privilege in interviews with employees conducted by its lawyers. One of RBS's many arguments was that the Court should apply US law to the claim for privilege,

which it contended offered a more generous test of privilege than English law. Historically, the issue of disclosure, and immunity from disclosure, had been seen as raising issues of procedure, quintessentially an issue for the law of the forum. However, more recent authorities have stressed that privilege is a fundamental right, RBS argued that the identification of the law governing that fundamental right should be performed using lex causae principles of "closest and most real connection".

While noting that commentators supported the view that the existing principle was ripe for reconsideration, the Judge concluded that there was no sufficient basis for disturbing what he found to be a well-established convention or practice of the English court that privilege was to be determined by applying the *lex fori*. The Judge noted that applying the law of the forum meant giving effect to an approach which that forum had determined to be the manner in which justice was best served. This was not a conflict of law question, but ultimately an issue of English public policy. However, the Court retained a discretion to refuse production where the interests of justice justified this course – as it did in refusing to order the production of confidential course. The Judge held that the law of forum rule, coupled with this "discretionary override", was "the least objectionable course".

In CIFG Special Assets Capital I Pte Ltd v Polimet Pte Ltd [2016] 1 SLR 1382, George Wei J endorsed the common law approach of treating legal professional privilege as being governed by the *lex fori* in deciding that advice given by a Malaysian lawyer was, applying Singapore law, privileged.

The decision in CIFG raises two other difficult issues. First, what if the Malaysian lawyer had been based in Singapore and was advising on Singapore law? According to International Business Machines Corp v Phoenix International (Computers) Ltd [1995] 1 All ER 413, under English law, advice by a foreign lawyer on English law is privileged, and CIFG approved the decision in IBM. However, note that CIFG did not concern such a situation: the Malaysian lawyer was based in Kuala Lumpur and was giving what appears to have been advice on Malaysian law.

Second, Wei J in CIFG noted that as foreign lawyers were neither "advocates or solicitors" or "legal counsel" within the meaning of the Evidence Act, advice given by foreign lawyers would not be privileged under ss 128 or 131 of the Evidence Act, but would be at common law, which however was not inconsistent with the statutory provisions, in light of the Minister for Law's statements in Parliament in 2012 that the amendments to the Evidence Act to extend legal professional privilege to in-house counsel were not intended to deal with or affect the privilege over foreign lawyers' communications with local clients. However, this is perhaps questionable.

Common interest or joint privilege in England

There have been two recent English decisions of interest on common interest or joint privilege.

The issue of common interest privilege was considered by reason of something of a side-wind by the Supreme Court in James-Bowen v Commissioner of Police of the Metropolis [2018] UKSC 40. The issue in the case was whether the Police Commissioner, when defending claims brought by third parties about the conduct of police officers, owed the officers a duty of care under the contract of employment or in tort to take reasonable care to safeguard the welfare and reputation of the offices in their defence of the claim. So far, you might think we are some

way from any issue of common interest privilege. But one of the reasons the Commissioner gave for not imposing or implying such a duty was because, if such a duty existed, the employer would effectively be obliged to waive privilege in legal advice because otherwise the correctness of the litigation could not properly be tested. The officers response was that there would be a joint or common interest privilege between the Commissioner and the officers, so showing the officers the advice would not waive privilege against the rest of the world.

The Court held that there could be no joint privilege because the lawyers had been instructed only on behalf of the Commissioner, not the officers who had interacted with the officers only in their capacity as witnesses. But the officers held that they had a common interest in the advice and that this entitled them to call for the advice: in effect, to use the common interest "as a sword". The Supreme Court held that they did not, because "something more than a shared interest in the outcome of the litigation" was required before the common interest could be used as the basis for demanding to see the advice, rather than merely ensuring privilege was not lost if the advice was voluntarily shared with the commonly interested party. The Court approved the test adopted by the Court of Appeal in Commercial Union Assurance Co plc v Mander [1996] 2 Lloyd's Rep. 640 at 647-648 that it was necessary to "establish a right to obtain access to them by reason of a common interest in their subject matter which existed at the time the advice was sought or the documents were obtained." The Court noted that the relationship of a company and shareholders, trustee and beneficiary or of parties to a joint venture met that test, but indicated that the relationship between employer and employee, or similar relationships, did not.

The other case was Accident Exchange Ltd v McLean [2018] EWHC 23 (Comm). Accident Exchange was a credit hire company who provided hire cars to drivers whose cars were damaged in road accidents. Accident Exchange then brought legal proceedings in the clients' names to recover the hire charges. Accident Exchange alleged that there had been a conspiracy between the solicitors defending those claims to defraud them by adducing false expert evidence. The solicitor defendants sought disclosure of documents held by solicitors acting for AE's clients to which AE had a contractual right to access. The issue was whether AE was in a position to waive privilege in those documents alone.

Sir Andrew Smith rejected the suggestion that this was a case of joint privilege because there was no evidence in the solicitors' care letters or elsewhere that AE were clients of the solicitors. He agreed that there was common interest privilege in the documents, noting that the law has become less strict as to the nature of a common interest necessary for such a privilege. This raised the issue of when a common interest privilege could be waived by one party alone. There is Australian authority holding that there are cases in which one party to a common interest privilege can waive that privilege provided this is what fairness requires: Farrow Mortgage Services Pty Ltd v Webb (1996) 39 NSWLR 601 and Patrick v Capital Finance Corpn (Australian) Pty Ltd (2004) 211 ALR 272. And the Judge envisaged that there may be such cases – for example where A obtains a counsel's opinion, and shows it to B who has a common interest in it, because B would not understand that A was giving up his primary right of control of the opinion merely by showing it to B. The answer appears to depend on whether it is possible to regard one of the parties to the common interest privilege as the primary rights holder, who will be sole determinant of waiver, or whether the rights of the parties are essentially equal, in which case the same requirement of unanimous consent which prevails in joint interest privilege will apply.

Common interest or joint privilege in Singapore

This topic came before Chua Lee Meng JC in Motorola Solutions Credit Co LLC v Kemal Uzan [2015] 5 SLR 752, where the issue was whether common interest privilege had been waived over various emails, which had been obtained by the plaintiffs pursuant to a Hong Kong court order from an alleged nominee of the defendants'. The nominee did not object to the disclosure of the emails, and the defendants did not have the opportunity to object to disclosure prior to that point.

Chua JC drew a distinction between waiver by the provider of the privileged materials and waiver by the recipient in a common interest privilege group. Common interest privilege could be waived unilaterally by the provider, and such waiver would destroy the common interest privilege altogether. By contrast, waiver by a recipient would not constitute waiver by the other common interest holders, including the provider, unless any other common interest holder had in some way participated in the waiver. As the alleged nominee was merely a recipient of the emails, and the defendants had not participated in the waiver, the defendants could assert privilege over the emails. Chua JC also noted that even if the Farrow Mortgage Services test was adopted, it would not be unfair for innocent common interest holders to continue to assert privilege despite waiver by one recipient in the common interest group, unless they had themselves participated in the waiver.

Motorola Solutions concerned common interest privilege rather than joint privilege, which arises where there is either a joint retainer or a joint interest (i.e. where even though the parties have not jointly retained a lawyer, they have a joint interest in the subject matter of the communication). In CIFG Special Assets Capital I Pte Ltd v Polimet Pte Ltd [2016] 1 SLR 1382, CIFG agreed to extend loan facilities to Polimet, and subsequently entered into discussions with Polimet and its shareholders about implementing a moratorium of Polimet's obligations. A lawyer was appointed to draft an agreement to put the moratorium into effect, although the agreement was never concluded. When CIFG sued Polimet on the loan facilities and its shareholders on their personal guarantees, the defendants sought to obtain communications between CIFG and the lawyer, contending that the lawyer's advice was subject to joint privilege.

George Wei J did not agree that there was a joint interest in the communications: the relationship between CIFG and Polimet was that of lender-borrower and they had opposing interests. Further, on the facts, there was no joint retainer: the lawyer had been retained to represent only CIFG, or, alternatively, represented the defendants pursuant to a separate retainer.

The fraud exception to privilege in England

It is often said that there is "no privilege in iniquity", meaning legal professional and litigation privilege cannot be claimed for documents which are themselves part of an iniquitous proceedings or communications made to obtain advice for the purpose of carrying out iniquity.

In Accident Exchange Ltd v McLean [2018] EWHC 23 (Comm), Sir Andrew Smith had to consider a particular facet of this rule, namely the position where the iniquity alleged was not that of the solicitors' clients, but of a third party A House of Lords authority – R v Central Criminal Court, Ex parte Francis & Francis [1989] AC 346 – had considered in a statutory context the position to a case where the client was used as an "innocent tool" of a criminal. That is an expression often used in litigation, often pejoratively, but which is seldom

satisfactorily defined. The particular facts of Francis were a drug dealer using his innocent wife's property purchases to launder his drug proceeds. And at first instance, Burton J in Owners of the Kamal XXVI v Owners of the Ariela [2011] 1 All ER (Comm) 477 had considered the issue in the context of communications between the solicitor and the claimant's insurer, in a case in which it was accepted that the solicitor and the insurer were both innocent, but it was alleged that they were being used as an "instrument of fraud" by the claimant. Burton J. accepted this argument, rejecting the contention that the insurers could not be the claimant's tool because they had their own legitimate and interest in the action.

Sir Andrew Smith concluded that the exception only applied where the relationship between the client and the lawyer could not be regarded one in the ordinary course of a lawyer's engagement. On the facts at hand, the drivers and the insurers were properly using solicitors' services even if, unbeknown to them, their engagements were being exploited by dishonest experts for their own purposes. It would be a matter of "fact and degree" if the nexus between the dishonest party and the lawyer-client relationship was enough to bring the inequity principle into operation

The second case which considered the fraud exception is Holyoake v Candy [2017] EWHC 52 (QB), in the context of whether litigation privilege afforded a basis for refusing to respond to a subject access data request, it being common ground that if the iniquity principle was engaged, it did not. The Court held that the applicant had failed to make out the "strong prima facie" case of fraud or crime, leaving the applicant to argue that iniquity should be extended beyond those categories to cases of breaches of fundamental human rights. The Court rejected that contention, on the basis that it sought "a substantial expansion of the iniquity principle which would, on the face of it, significantly erode the right to LPP", and failed to recognise that legal professional privilege was itself a fundamental human right.

Waiver and/or recovery of inadvertently disclosed privileged communications in England

In England, the issue of recovery of inadvertently disclosed privileged documents is the subject of CPR 31.20

"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."

For a party to be prevented from using such a document, it will ordinarily be necessary to show that it ought, objectively, to have been obvious to the receiving party that the document had been disclosed by mistake, and relief is more likely if the party ought to have realised that mistake before using the document.

In Tchenguiz v Director of the SFO [2014] EWCA Civ 1129, the Court of Appeal considered the issue of "obvious mistake" and held that where a qualified lawyer had inspected the document without realising that it had been disclosed by mistake, it was a "strong thing" to hold that it was obvious that the document had been disclosed by mistake. The Court held that it had both to be obvious that the document was privileged **and** that it had been disclosed by mistake. However, Longmore LJ expressed some doubts as to whether the requirement of an "obvious mistake" should remain the test for prohibiting use of the document, preferring the Australian approach in Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd [2013] HCA 46 in which the High Court declined to follow the English authorities requiring the mistake to be obvious to a reasonable solicitor and

held that this was simply a discretion to be applied in accordance with the overriding requirement to try cases justly.

In Single Buoy Moorings Inc v Aspen Insurance UK Limited [2018] EWHC 1763 (Comm) the issue arose as to whether the recipient could be said to have "used" the document before the error was drawn to its attention. Teare J. rejected the argument that a document was only "used" when it was tendered in evidence or deployed in a statement, letter or pleading. The documents had mistakenly provided by the claimant to the defendant to persuade the defendant of a particular point, and then read and evaluated by the defendant's solicitor in that context. The Judge held that was sufficient use.

Waiver and/or recovery of inadvertently disclosed privileged communications in Singapore

In Mykytowych, Pamela Jane v V I P Hotel [2016] 4 SLR 829, the Court of Appeal approved the much-criticised English law rule that, where a privileged document or a copy thereof comes into the hands of the other party, the other party can prima facie admit that document as evidence at trial, but the privilege-holder is entitled to obtain an injunction to prevent the other party from doing so, in order to protect their confidential character, unless the other party has already put them into evidence or otherwise relied on them.

However, two subsequent cases have shown that this rule is not as straightforward as it might first appear. In Rahimah bte Mohd Salim v Public Prosecutor [2016] 5 SLR 1259, a court at first instance wrongly ordered the production of a privileged document (a medical report) to the prosecution, and an application to stay the order was refused, with the result that further privileged evidence was led by the prosecution from the doctor who authored the report. Upon a criminal revision, notwithstanding that the evidence had already been relied on at trial by the prosecution, Chao Hick Tin JA ordered the privileged material to be delivered up and struck from the record.

In Wee Shuo Woon v HT SRL [2017] 2 SLR 94, HT SRL's computer systems were hacked into by a third party, which then uploaded privileged emails between HT SRL and its lawyers pertaining to the lawsuit with Wee onto Wikileaks. Wee sought to rely on the emails and HT SRL sought an injunction. Although the emails were technically in the public domain, the Court of Appeal considered that they had not lost their confidential character and could be protected by way of injunction since they constituted a fraction of the hacked data, and few if any people knew of the existence of the emails, which had not been adduced as evidence or otherwise relied on.

In addition, the Court of Appeal considered that public policy would not allow a litigant to make use of a copy of a privileged document which he had improperly obtained, including by taking advantage of an obvious mistake by his opponent, even if he was not responsible for his opponent's misfortune.

However, it would appear that, under the new Rules of Court formulated by the Civil Justice Commission, it will no longer be the law that a party who comes into possession of privileged material may admit such material unless the privilege-holder manages to restrain him from doing so before the material is admitted. Chap 8, r 7(1) of the new Rules of Court provides that a document which "was at any time" subject to any privilege "must not be relied on" unless the privilege-holder consents or the court approves, while r 7(2) provides that such a document

does not lose its privilege even if it was disclosed or taken inadvertently or unlawfully by anyone.

Privilege can be lost over a document if it is waived, either expressly or impliedly. A number of recent cases in Singapore have illustrated that, in either case, a waiver will not be easily found.

In Rahimah bte Mohd Salim v Public Prosecutor [2016] 5 SLR 1259, the question was whether there had been an express waiver of litigation privilege where an examining physician had administered a warning that what he was told was not confidential and might be revealed in court. Chao JA held that an express waiver of legal privilege had to be a voluntary, informed and unequivocal election, and that there would be no such election if the privilege-holder was unaware of his rights. Accordingly, courts should exercise caution before finding that privilege has been waived, and there had been no waiver on the facts.

In ARX v Comptroller of Income Tax [2016] 5 SLR 590, the Court of Appeal held that the proper test for an implied waiver of legal advice privilege was whether it would be unfair for the privilege-holder to assert privilege while at the same time taking certain action which is inconsistent with the maintenance of the privilege. The test is a fact-sensitive one applied by reference to all the circumstances, and there was likewise no implied waiver where an affidavit had referred to the fact of legal advice being given, but not its contents.

There was also no express or implied waiver in United Overseas Bank v Lippo Marina Collection [2018] 4 SLR 391 in circumstances where the affidavit had not been served, even though it was finalised and intended to be used as an affidavit of evidence-in-chief at trial. Nor was privilege waived by the disclosure of the affidavit to UOB, who was (initially) an adverse party: confidentiality was not thereby intended to be waived over the affidavit vis-à-vis Lippo.

The Court's power of inspection of documents where privilege is disputed: Singapore and England

Singapore: Rules of Court, Order 24 Rule 13(2) provides:

"Where on an application under this Order for the production of any document for inspection or to the Court privilege from such production is claimed or objection is made to such production on any other ground, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid."

This is based on s 164 of the Evidence Act, which provides:

"**Production and translation of documents**

164. – (1) A witness summoned to produce a document shall, if it is in his possession or power, bring it to court notwithstanding any objection which there may be to its production or to its admissibility.

(2) The validity of any such objection shall be decided on by the court.

(3) The court, if it sees fit, may inspect the document unless it refers to affairs of State, or take other evidence to enable it to determine on its admissibility."

The equivalent provision in England is CPR 31.19(6)(a) which provides:

"For the purpose of deciding an application under paragraph (1) (application to withhold disclosure) or paragraph (3) (claim to withhold inspection) the court may –

(a) require the person seeking to withhold disclosure or inspection of a document to produce that document to the court".

The traditional attitude to the court's power of inspection is described in Hollander, *Documentary Evidence* at 15-12 as follows:

"Whilst the court has power to inspect documents and may do so in order to determine a disputed claim for privilege, this is now regarded as a solution of last resort. First, there is a real danger in the court looking at documents out of context. Secondly, if it is suggested that the side whose documents are in question may make submissions but the other side may not see the documents, which will usually be the case in relation to inspection by the court, there is a danger of inequality of arms and this will rarely be a satisfactory solution."

However, there are cases in which it is done. For example, in Property Alliance Group Birss J. ordered production of documents over which a disputed claim for privilege had been made. The documents were reviewed by Snowden J., who largely upheld the claim for privilege. In WH Holding Limited v E20 Stadium LLP [2018] EWCA Civ 2652 the Court of Appeal considered the circumstances in which the court should inspect documents which were subject to a disputed claim for privilege. The Court held that the power to inspect involved a matter of general discretion, and is not limited to cases where the court is "reasonably certain" that privilege has wrongly been claimed. The Court said that courts should be cautious about exercising the power, guided by the nature of the privilege claimed, the number of documents and their relevance to the issues.

In Singapore, the Court of Appeal in Skandinaviska took the view that, in a disputed claim for privilege, an inspection by the judge pursuant to s 164 of the Evidence Act would quickly solve the dispute. However, the Court of Appeal said that this approach should be used only in cases where the judge has a real doubt about the claim to legal professional privilege, though this approach might perhaps now have to be revisited in light of WH Holding. In practice, therefore, documents over which legal professional privilege is claimed are rarely inspected by the court, either because the court is satisfied that the evidence in support of the claim to privilege appears to formally support the privilege claimed, in which case the claim is upheld; or because the evidence is not so satisfied, in which case disclosure is ordered without further inspection.

In Comptroller of Income Tax v ARW [2017] SGHC 180, after the CIT's claim to legal professional privilege over its audit documents failed, it sought to make further arguments to persuade the judge that the documents should have been inspected before disclosure was ordered. However, Aedit Abdullah JC refused to inspect the documents, on the basis that the evidence in support of the claim to privilege was deficient (rather than doubtful or ambiguous) and did not support the claim.

The treatment of privilege questions in international arbitrations (including investment treaty arbitration

In international commercial and investment treaty arbitration, there is no "law of the forum" to provide a common and overriding set of rules for legal professional and other evidential privileges, and the parties are highly likely to come from two very different legal cultures would different expectations of confidentiality and privilege. Neither investment treaties nor arbitration institution rules identify the rules which determine what is and is not privileged. And the option of inspection in cases of dispute by another judge not concerned with the merits determination is not available.

As a result, the treatment of privilege issues in international arbitration has been modified to reflect these features. The best evidence of practice in international arbitration is probably to be found in the IBA Rules on the Taking of Evidence in International Arbitration. Article 9.2 provides that:

"The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any document, statement, oral testimony or inspection for any of the following reasons: ...

(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable"

This allows the Tribunal, therefore, itself to select the applicable law of privilege, but the principles by which they should do so – lowest or highest common denominator, the law of privilege of the seat or the law with which the exchange or the dispute has its "closest connection" – remain open for debate. Equally, is there room for different privileges to apply to each party – so that communications with in-house lawyers will be privileged if that would have been the reasonable expectation in the jurisdiction in which the documents were created, but not otherwise? If so, should the Tribunal make a further "level the playing field" order under Article 9.2(g) of the IBA Rules, to ensure like cases are treated alike, regardless of privilege.

The Tribunal has considerable flexibility in determining what law to apply. In *Glamis Gold Ltd v United States of America* , UNCITRAL, Decision on the Parties' Requests for Production of Documents Withheld on Grounds of Privilege (17 November 2005), a NAFTA case, the parties agreed that the Tribunal should look to the law of the U.S. for guidance, but disagreed as to which particular state's law. The Tribunal looked for, and applied, what they found to be general principles which could be discerned from the law of different states. And in *Apotex Holdings Inc and Apotex Inc v United States of America* , ICSID Case No ARB(AF)/12/1, Procedural Order on Document Production Regarding Parties' Respective Claims to Privilege and Privilege Logs (5 July 2013), the Tribunal said that 'as an international arbitration tribunal, the Tribunal bases its decision directly upon the exercise of its discretional powers under the IBA Rules and the ICSID Arbitration (Additional Facility) Rules, rather than national rules of law'.

It might well be thought that the option of the court inspecting the document to determine disputed issues of privilege would not be possible in arbitration. Certainly there are difficulties in the Tribunal itself conducting such an inspection, but this is possible, and a Tribunal who did this is unlikely on that ground alone to have been found to have misconducted itself. But could the Tribunal appoint a third party to do so?

Article 3(8) of the IBA Rules provides for the Tribunal to appoint a neutral person to review the disputed documents on a confidential basis, and report to the Tribunal.

"In exceptional circumstances, if the propriety of an objection can be determined only by review of the Document, the Arbitral Tribunal may determine that it should not review the Document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such Document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed."

In *Mary's VCNA, LLC v Government of Canada*, UNCITRAL, Report on Inadvertent Disclosure of Privileged Documents (27 December 2012), a NAFTA case under the UNCITRAL Arbitration Rules, the Claimant mistakenly disclosed 11 documents during the disclosure process that it later asserted were protected by attorney–client privilege. At Canada's request, the documents were reviewed by a neutral third party to consider whether any privilege in relation to these documents had been waived. Justice James Spigelman, QC, AC, was appointed in this capacity.

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