

privilege: when is a client not a client?

Legal advice privilege was (amongst other things) left in a state of uncertainty by the BCCI litigation. The decision of the House of Lords in *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 ("Three Rivers 6") cut across, without expressly disapproving, the reasoning of the Court of Appeal in *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2003] QB 1556, CA ("Three Rivers 5") and raises serious questions as to the scope of legal advice privilege. One stands out: who is the client for the purposes of legal advice privilege?

In *Three Rivers 5* the Liquidators of BCCI applied for disclosure of documents created by employees of the Bank for use by the Bingham Inquiry Unit ("BIU"): a crack team appointed by the Bank to respond to the Bingham Inquiry. These documents informed the BIU in seeking advice from Freshfields and responding to the Inquiry. The Bank resisted the application claiming that the documents were subject to legal advice privilege.

At first instance Tomlinson J found that the documents had been created for the dominant purpose of enabling the BIU to seek legal advice and were privileged.

His decision was overturned by the Court of Appeal, which held that privilege could only be claimed over documents passing between a client and his lawyer or evidencing legal advice. The evidence showed that the BIU was the client of Freshfields, not the Bank nor its employees, and accordingly privilege would not attach to the documents created by the Bank's employees for use by the BIU. The House of Lords refused the Bank's petition for permission to appeal.

In *Three Rivers 6* the Liquidators sought disclosure of communications passing between the BIU and Freshfields relating to "presentational" matters - i.e. how the BIU should present the Bank's case, not as to the Bank's legal rights and obligations. The House of Lords cut across the decision in *Three Rivers 5* and held that this material was privileged having regard to the legal context in which it was created. However, despite invitation, the House of Lords declined to comment upon the Court of Appeal's restrictive definition of the client in *Three Rivers 5*, which accordingly remains current.

It is suggested that this narrow approach is wrong. In *Three Rivers 6* the House of Lords applied legal advice privilege broadly. It is

consistent with this that all materials properly created on behalf of a client in order to obtain legal advice should be privileged. Second, if the objective of legal advice privilege, that a client can obtain advice freely, is to be met then a client must be able to inform his lawyer fully. This can only be achieved if, for example, employees who hold relevant knowledge can provide that knowledge in confidence, whether or not they are themselves authorised to seek legal advice. Third, it is consistent with the disclosure obligation resting upon an entire company that privilege should vest in the same entity. Nonetheless - until the matter is clarified, beware.



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chambers: news

Conference

In July, Serle Court co-hosted a Trust Litigation Conference in conjunction with prominent Isle of Man Advocates Dickinson Cruickshank. The one day event was held at the Mount Murray hotel, and attended by over 150 invited delegates. The barrister and advocate speakers were joined by the Honourable Mr Justice Lightman and Deemster Kerruish to discuss topical issues in the trusts sphere.

Chambers & Partners Bar Awards

In August Chambers & Partners announced the shortlist for the Chambers Bar Awards. We received 6 nominations - and we were especially pleased to have been shortlisted, for the second consecutive year, as Client Service Set of the Year. Our other nominations were for Chancery set of the year, Chancery junior of the year (Douglas Close), Insolvency set of the year, Insolvency junior of the year (Philip Jones) and International arbitration junior of the year (Khawar Qureshi). At the Awards dinner in September we were named Insolvency Set of the Year.

Directories

The 2006 Legal 500 directory was published in September and Serle Court and its members received a significant number of recommendations. The total individual barrister recommendations increased to 64 and Serle Court as a whole is also recommended in 9 practice areas.

The Chambers & Partners directory was published in October and Serle Court again attracted more recommendations both for individual barristers and as a set. We now have 80 individual recommendations, giving us the 5th most recommendations per member in the country, higher than any other Chancery/Commercial set. The number of our members listed as "stars at the bar" has also risen, with Philip Jones QC and Philip Marshall QC being joined this year by Alan Boyle QC and David Blayney. Finally, we saw an increase in the set practice areas recommendations from 10 to 11, with the addition of Telecommunications; only 4 other sets are recommended in more practice areas.

Members

In June Michael Briggs QC was appointed as Justice of the High Court in the Chancery Division. We are all delighted for Michael and wish him every success. Michael has contributed enormously to the success of Serle Court and the development of other members' practices during his 26 years as a barrister. As a result he leaves behind him a strong chambers with strength in depth across all of the areas of business law that he practised in.

In July the results of the first Queen's Counsel appointment round in three years were announced and Chambers was delighted that both Philip Jones and Khawar Qureshi were successful.

Finally, we would like to take this opportunity to wish all of our clients a very Merry Christmas and a Happy New Year.