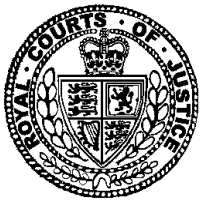

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FL-2022-000025
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FL-2023-000004
FL-2023-000009
FL-2023-000024

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
COMMERCIAL COURT (KBD)
FINANCIAL LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 April 2026

Before:

MR JUSTICE PICKEN

- -

BETWEEN:

AABAR HOLDINGS S.À.R.L. & OTHERS

Claimants

- and -

(1) GLENCORE PLC
(2) IVAN GLASENBERG
(3) STEVEN FRANK KALMIN

Defendants

- -
- -

Adam Kramer KC, Nicolas Damnjanovic, Kit Holliday and Samuel Burns (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **QE Claimant**.
Sharif Shivji KC, Richard Mott, Usman Roohani and Sabrina Nanchahal (instructed by **Stewarts LLP**) for the **Stewarts Claimants**.
Peter de Verneuil Smith KC, Henry Hoskins and Matthew Barry (instructed by **Pallas Partners LLP**) for the **Pallas Claimants**.

David Mumford KC, James Kinman and Emily Gailey (instructed by **Bryan Cave Leighton Paisner LLP**) for the **BCLP Claimants**.
Tony Singla KC, Gregory Denton-Cox, Kyle Lawson and Jacob Rabinowitz (instructed by **Clifford Chance LLP**) for the **First Defendant**.

Hearing dates: 9 & 10 March 2026.
Judgment provided in draft: 31 March 2026.

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APPROVED JUDGMENT

Mr Justice Picken:

Introduction

1. In an earlier judgment in these proceedings, I concluded that the so-called Shareholder Rule should be regarded as no longer existing ([2024] EWHC 3046 (Comm)), a conclusion with which the Privy Council subsequently agreed in ***Jardine Strategic Limited v Oasis Investments II Master Fund Ltd and 80 others No 2*** [2025] UKPC 34.

2. This judgment now addresses a further important privilege-related issue, as between the Claimants and the First Defendant ('Glencore') (but not the other Defendants), concerning the scope of legal advice privilege and, in particular, the extent to which that privilege applies to internal communications between members of the client group and/or documents created by a member of the client group.

3. I need not, in the circumstances, repeat the background which I set out in my earlier judgment at [2] to [9]. I can, instead, turn immediately to the issue.

Discussion

4. The various sets of Claimants are separately represented. For present purposes, however, it was Mr Kramer KC who advanced submissions, in effect, on behalf of all the Claimants.

5. By way of context for the submissions that he came on to advance, Mr Kramer described the Claimants as having to have raised concerns in correspondence about Glencore's approach to asserting legal professional privilege and the application of privilege redactions. Specifically, he highlighted how, on 17 November 2025, when giving its final tranche of Extended Disclosure, Glencore (through Clifford Chance LLP) informed the Claimants for the first time that it had been approaching its disclosure obligations in all the tranches since April 2025 on the basis that the Court of Appeal decision in ***Three Rivers (No 5)*** [2003] QB 1556 was wrongly decided inasmuch as that decision is understood as standing for the proposition that *"legal advice privilege attaches only to communications passing between a corporation's lawyers and employee(s) of the corporation who have been tasked with seeking and receiving such advice on behalf of the client"*, and that Glencore had been treating legal advice privilege as applying more widely to *"all communications made for the dominant purpose of seeking or receiving legal advice"*.

6. The Claimants (through Quinn Emanuel Urquhart & Sullivan UK LLP) responded on 27 November 2025, pointing out that Glencore's approach to legal advice privilege was inconsistent with ***Three Rivers (No 5)*** both, first, in treating every employee as *"the client"* and, secondly, in not confining the privilege to communications between client and lawyer (or those that disclosed legal advice).

7. Glencore's response to this, on 19 December 2025, was to maintain its position but to state that it would reconsider the relevant documents and issue an application with respect to those it decided to continue to withhold.

8. Glencore then wrote again on 12 January 2026 to inform the Claimants that it would no longer assert privilege on the basis that ***Three Rivers (No 5)*** was wrongly decided,

before, shortly afterwards on 16 January 2026, producing 885 documents that had been previously withheld and re-producing 290 documents.

9. It subsequently, however, became clear that, in doing this, whilst Glencore has not maintained its contention that every employee should be treated as *"the client"*, nonetheless Glencore continues to maintain that it is entitled to assert privilege over communications which are not between client and lawyer but are between members of the *"client group"* (as defined in ***Three Rivers (No 5)***).

10. Mr Kramer's submission was that Glencore should not be permitted to take this stance and that, on the contrary, Glencore should be ordered to produce all documents that it has withheld on the basis of legal advice privilege which are communications between members of the *"client group"* (rather than between the *"client group"* and lawyers), other than those which evidence the substance of privileged communications or are *"inchoate communications"* (as described by Longmore LJ in ***Three Rivers (No 5)***, namely any "*document which was intended to be a communication between client and solicitor … even if not in fact communicated*").

11. Mr Kramer emphasised in this context that it is, as he put it, a basic tenet of legal advice privilege that it applies to *communications* between lawyer and client, highlighting that, in ***Three Rivers (No 5)***, after reviewing the 19th century authorities on legal advice privilege, Longmore LJ concluded at [21] that those authorities:

"established that legal advice was a well established category of legal professional privilege, but that such privilege could not be claimed for documents other than those passing between the client and his legal advisers and evidence of the contents of such communications".

12. Mr Kramer stressed, in particular, the words *"other than those passing between the client and his legal advisers and evidence of the contents of such communications"*, before noting that Longmore LJ went on to observe that subsequent 20th century authorities did not alter the position, thereby rejecting the Bank of England's submission (recorded at [6]) that*"any document prepared with the dominant purpose of obtaining the solicitor's advice upon it came within the ambit of the privilege"*.

13. Mr Kramer further submitted that his position is supported by how Lord Carswell characterised the decision in ***Three Rivers (No 5)*** when the case came before the House of Lords (on a different point) in ***Three Rivers (No 6)*** [2005] 1 AC 610 since he said this concerning the Court of Appeal's decision in ***Three Rivers (No 5)*** at [72]:

"… its conclusions did not turn so much on the identity of the authors of the documents in question as on the more general point that in the court's view legal advice privilege … was restricted to communications between a client and his legal advisers, to documents evidencing such communications, and to documents that were intended to be such communications even if they were not in fact communicated. None of the four categories of documents concerned in the appeal came within that description and accordingly they were not covered by privilege."

14. Mr Kramer also drew attention to the fact that in ***Three Rivers (No 6)*** Lord Scott noted at [10] that *"Legal advice privilege covers communications between lawyers and their clients where legal advice is sought or given*"; and Lord Rodger noted at [50] that legal advice privilege *"attaches to all communications made in confidence between solicitors and their clients for the purpose of giving or obtaining legal advice even at a stage when litigation is not in contemplation"*.

15. That legal advice privilege is limited to communications between lawyer and client has also been confirmed, Mr Kramer noted, by the Court of Appeal in ***SFO v ENRC*** [2019] 1 WLR 791 at [61]-[66] and [79]-[81], and in ***R (Jet2.com Ltd) v CAA*** [2020] QB 1027 at [37], [42], [58] and [61]; and by the High Court in cases which include ***National Westminster Bank Plc v Rabobank Nederland*** [2006] EWHC 2332 per Simon J (as he then was) at [18]-[32]; and ***In re RBS Rights Litigation*** [2017] 1 WLR 1991 per Hildyard J at [64]. Moreover, Mr Kramer submitted, each of the leading textbooks on legal professional privilege supports the Claimants' position: see, by way of example, *Thanki, The Law of Privilege* 4th Ed. at §§2.03, 2.16-2.17, 2.33-2.46, 2.63; and *Passmore, Privilege* 5th Ed. at §§2-003, 2-015, 2-024.

16. For reasons that I will now explain, but which largely reflect the submissions put forward by Mr Singla KC, on behalf of Glencore, I do not agree with Mr Kramer (and so with the Claimants) that, as a matter of law, Glencore should be required to produce communications between members of a relevant *"client group"* and where no lawyer is a party to the communication, unless the document discloses the substance of a communication between members of the *"client group"* and a lawyer made for the dominant purpose of giving or receiving legal advice or the document was intended to be a communication to a lawyer but was not sent. I have concluded, on the contrary, that the true position, on the authorities, is that legal advice privilege applies to any intra-client document which is sent between or created by members of the *"client group"* for the dominant purpose of seeking legal advice. Nor, as I will come on to explain after first considering the authorities, does it seem to me that the position adopted by the Claimants can be right as a matter of principle.

17. It is convenient, given the reliance placed on it, to start with ***Three Rivers (No 5)*** itself. The appeal in that case arose in the context of a claim brought by the liquidators and creditors of BCCI against the Bank of England, the issue being whether the Bank was entitled to assert legal advice privilege in respect of documents relating to a prior inquiry into the Bank's supervision of BCCI.

18. It is important to note in this respect that the issue before the Court of Appeal concerned, specifically, communications between three officials appointed by the Bank and known as the Bingham Inquiry Unit (or 'BIU') and the inquiry, and not communications involving other employees of the Bank, including even its Governor. In short, it was the BIU which was treated as the client for legal advice privilege purposes. That this is the case is apparent from what Longmore LJ had to say at [31], namely:

> *"We therefore conclude that the Bank is not entitled to privilege in any of the four categories itemised at the beginning of this judgment. Mr Stadlen asked what the position would be if the Governor himself had noted down what he remembered in relation to the supervision of BCCI with the intention of giving it to the BIU for transmission to Freshfields. No privilege has been claimed for any such specific document but, as it seems to us, Mr Pollock was right to say that on the evidence before the court, the BIU, which was established to deal with inquiries and to seek and receive Freshfields' advice, is for the purpose of this application, the client rather than any single officer however eminent he or she may be. It follows that no separate consideration need be given to the position of ex-employees who are, obviously, in no better position for the purpose of any claim to privilege."*

19. It is apparent also from earlier parts of Longmore LJ's judgment. Thus, at [4], he said this:

"Mr Pollock QC, for the appellants, has made clear in his submissions that disclosure is not sought of documents passing between the BIU and Freshfields or vice versa, nor is disclosure sought of any of Freshfields' internal memoranda or drafts. He accepted that the BIU was, for the purpose of the inquiry, the client of Freshfields and that communications passing between them are covered by legal advice privilege. But he submitted that documents prepared by the Bank's employees or ex-employees, whether prepared for submission to or at the direction of Freshfields or not, should be disclosed as being no more than raw material on which the BIU would, thereafter, seek advice."

He continued in the same paragraph as follows:

"The evidence isolated and the judge dealt with 4 separate categories of such documents; he asked himself the following questions: (1) Does legal advice privilege extend to documents prepared by Bank employees, which were intended to be sent to and were in fact sent to Freshfields? (2) Does it extend to documents prepared by Bank employees with the dominant purpose of the Bank's obtaining legal advice but not, in fact, sent to Freshfields (though, perhaps, their effect was incorporated into documents that were so sent)? (3) Does it extend to documents prepared by Bank employees, without the dominant purpose of obtaining legal advice, but in fact sent to Freshfields? (4) Are the answers to (1), (2) and (3) above any different if the documents were prepared by Bank employees who are now (viz. as at 11th March 2003) ex-employees of the Bank? It is accepted that some, at any rate, of the material sought could be highly relevant to the litigation eg, the first memorandum or statement of an officer intimately concerned in the supervision of BCCI."

These categories each comprise certain *"documents prepared by Bank employees"*; there is no mention of the BIU.

20. Later, at [15], after referring to certain dicta in ***Southwark and Vauxhall Water Company v Quick*** (1878) 3 QBD 315, Longmore LJ made this observation:

"Mr Stadlen submitted that these passages from the judgments of Cockburn CJ and Brett LJ showed that, if documents were prepared the contents of which were to be made known to a solicitor for the purpose of his giving advice, it did not matter that they were not submitted to him. It followed that, even the documents in category (2) set out in paragraph 4 above were privileged. However that does not address the question whether memoranda or documents, produced to the Bingham Inquiry Unit by Bank employees, are, in general, privileged at all. That question is not settled by these citations; it is fair to say that the judgment of Cockburn CJ is in general terms which might arguably encompass legal advice privilege as well as litigation privilege but it is quite clear that the 'rule' identified and addressed by Brett LJ is the rule relating to litigation privilege and that he is not talking of legal advice privilege in any way."

Longmore LJ was, in other words, drawing a distinction between *"documents prepared by Bank employees with the dominant purpose of the Bank's obtaining legal advice but not, in fact, sent to Freshfields"*, which he paraphrased as *"memoranda or documents, produced to the [BIU] by Bank employees"*, on the one hand, and documents prepared by the BIU, on the other.

21. Longmore LJ plainly had in mind the same distinction at [18] when referring to ***Wheeler v Le Marchant*** (1881) 17 ChD 675, specifically a passage in the judgment of Cotton LJ at pages 684-685, since he stated as follows:

*"Here Cotton LJ, unlike in his judgment in **Southwark v Quick**, considers each of the two categories of legal professional privilege and decides in terms that the documents in question do not fall within the first category because they are not communications between solicitor and client and not within the second category because litigation is not contemplated. This case thus makes clear that legal advice privilege does not extend to documents obtained from third parties to be shown to a solicitor for advice. Mr Stadlen, of course, accepts this but says that communications from an employee are different. The reason he gives is that a corporation can only act through its employees; while that is true, it is not a consideration that can carry Mr Stadlen home. Indeed the passage cited from **Anderson** shows that information from an employee stands in the same position as information from an independent agent. It may, moreover, be a mere matter of chance whether a solicitor, in a legal advice privilege case, gets his information from an employee or an agent or other third party. It may also be problematical, in some cases, to decide whether any given individual is an employee or an agent and undesirable that the presence or absence of privilege should depend upon the answer."*

Here, Longmore LJ was again distinguishing between employees of the Bank, on the one hand, and BIU members (although also Bank employees), on the other.

22. I am clear, in the circumstances, that Mr Singla was right when he submitted that ***Three Rivers (No 5)*** should be treated, for relevant present purposes, as concerned only with 'non-client' documents, and not with 'client' documents (including, therefore, 'intra-client' documents). That is why Longmore LJ referred at [31] to the Bank not being "*entitled to privilege in any of the four categories itemised at the beginning of this judgment*", which includes category (1) identified at [4] comprising *"documents prepared by Bank employees, which were intended to be sent to and were in fact sent to Freshfields"* and so documents prepared by non-BIU Bank employees. It is also why Longmore LJ earlier pointed out, at [4], that there was no challenge to privilege in respect of "*documents passing between the BIU and Freshfields*".

23. On that basis, as Longmore LJ explained at [32], it was unnecessary for the Court of Appeal *"to express a view on the question whether the internal documentation of the Bank, which came into existence after the setting up of the Bingham inquiry, was indeed prepared with the dominant purpose of obtaining advice"*. In fact, however, the Court of Appeal's conclusion, as expressed by Longmore LJ, was that, whilst it *"would, no doubt, be right to say that the obtaining and giving of advice was an important purpose"*, nonetheless *"we would not say on the facts of the present case that it was the dominant purpose"* since:

"On any natural view of the matter the dominant purpose of obtaining the information which employees and ex-employees could give to the Bingham inquiry was merely to present that evidence to the inquiry. ...".

As he continued at [37]:

"We recognise that no specific argument was addressed to us on this matter. Having reflected upon it, we have come to the conclusion that there can be no relevant legal distinction between material generated at the early stage of preparing the submission to Lord Justice Bingham and material generated in response to requests from him. All such material is, in our judgment, prepared for the dominant purpose of putting relevant factual material before the inquiry in an orderly and attractive fashion, not for the dominant purpose of taking legal advice upon such material."

It is clear, however, that the real basis for the Court of Appeal's decision was the 'client'/'non-client' distinction to which reference had earlier (and more than once) been made given that at [38] Longmore LJ stated, under the heading *"Conclusion"*, as follows:

"As stated, however, we do not, in any event, consider that privilege extends to any of the documentation or internal memoranda of the Bank's employees …" .

24. It is right to acknowledge that, as Mr Kramer pointed out, the evidence (in the form of evidence from the Bank's solicitor, Mr Croall) which was before Tomlinson J, at first instance in ***Three Rivers (No 5)***, suggests that some of the documents with which ***Three Rivers (No 5)*** was concerned were intra-client documents in the sense that they were internal to the BIU; indeed, it appears that the order that Tomlinson J made (as upheld by the Court of Appeal) includes this category of documents. However, there was no argument either before Tomlinson J or the Court of Appeal addressing intra-client documents, indicating that none of the parties had such documents as their focus. This, no doubt, explains why neither Tomlinson J nor the Court of Appeal addressed the issue of intra-client documents. Their reasoning was silent on the point that is now before the Court. In the circumstances and put simply, it would be wrong now to take it that ***Three Rivers (No 5)*** is authority in respect of intra-client documents merely because the order made by Tomlinson J (and upheld by the Court of Appeal) included such documents and notwithstanding that nowhere in either Tomlinson J or Longmore LJ's judgments was that category of documentation specifically addressed.

25. I conclude, in the circumstances, that ***Three Rivers (No 5)*** was not concerned with the issue that is now before the Court, namely the extent to which legal advice privilege applies to internal communications between members of the client group and/or documents created by a member of the client group – as opposed to communications outside the client group (between members of the client group and non-members of the client group and/or documents created by non-members of the client group).

26. Nor, I am clear, do any of the earlier authorities, reviewed by Longmore LJ in ***Three Rivers (No 5)***, address the present issue.

27. ***Greenough v Gaskell*** (1833) 1 My & K 98 (addressed by Longmore LJ in ***Three Rivers (No 5)*** at [8]) considered whether the defendant solicitor, sued for fraudulently concealing that his client was insolvent and thereby inducing the plaintiff to issue a promissory note on the client's behalf, could claim privilege in respect of communications which he had received from his client. Lord Brougham LC held that the defendant could claim privilege, that it made no difference whether it was the client or the solicitor who was the defendant and that it did not matter that, at the time, there were no existing or contemplated proceedings. In doing so, he observed at pages 101-103 that:

"If it were confined to proceedings begun or in contemplation, then every communication would be unprotected which a party makes with a view to his general defence against attacks which he apprehends, although at the time no one may have resolved to assail him. But were it allowed to extend over such communications, the protection would be insufficient, if it only included communications more or less connected with judicial proceedings; for a person oftentimes requires the aid of professional advice upon the subject of his rights and his 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 attributes 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 to medical advisers. But it is out of regard to the interests of justice, which cannot be upholden, and to the administration 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; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case. If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous."

As Longmore LJ noted at [8]:

"It is apparent from this lengthy extract that the privilege stemmed from the confidential relationship of client and solicitor and attached only to communications between the client and solicitor."

That is undoubtedly the case. It is equally, however, undoubtedly the case that ***Greenough v Gaskell*** was not concerned with the question of whether legal advice privilege pertains in relation to communications as between clients (in other words, the intra-client position).

28. Nor, as it seems to me, would it be right to view the reference to lawyer/client communications (or, as Longmore LJ put it, *"communications between the client and solicitor"*) in ***Greenough v Gaskell*** as foreclosing the applicability of legal advice privilege to cases where the documents under consideration are not lawyer/client documents. This is because, as Longmore LJ went on to note at [8], ***Greenough v Gaskell*** was decided at a stage (an *"early stage"*) where *"in the law there was no distinction drawn between litigation privilege and legal advice privilege"*, Lord Brougham LC thinking that *"there was a singe lawyer/client privilege which applied even if proceedings were not contemplated"*. ***Greenough v Gaskell*** was, accordingly, concerned with a new development, the House of Lords deciding that privilege should attach to lawyer/client communications outside the context of litigation in the same way as it would in the litigation context. It was that extension of the privilege (from litigation privilege to legal advice privilege, even if these were not the terms then used) that explains Lord Brougham LC's emphasis on lawyer/client communications; it does not mean that legal advice privilege, as it has come to be known and as it has evolved, should be regarded in so restrictive a way.

29. The same applies to ***Reece v Trye*** (1846) 9 Beav. 316, to which Longmore LJ went on to refer in ***Three Rivers (No 5)*** at [9]. In that case, at pages 318-319, Lord Langdale MR said this:

"… I must refuse so much of the motion [for production] as relates to the documents alleged to be privileged; I have anxiously examined the subject, and arrived at a conclusion, which to me has seemed right; but it has not been approved, and I have no doubt, that, if I were to order the production of these documents, the order would be reversed elsewhere. The unrestricted communication between parties and their professional advisers, has been considered to be of such importance as to make it advisable to protect it even by the concealment of matter without the discovery of which the truth of the case cannot be ascertained."

The reference to *"communication between parties and their professional advisers"* makes it clear that what was being addressed in this case was communications received by a solicitor from his client, rather than intra-client exchanges. Furthermore, as to the fact that, as in ***Greenough v Gaskell***, there is reference to lawyer/client communications, the point to which I have previously referred again arises.

30. As for ***Anderson v Bank of British Columbia*** (1876) 2 ChD 644, as Longmore LJ explained in ***Three Rivers (No 5)*** at [10], this involved somewhat strange (and different) facts, which did not involve communications between a lawyer and a client and nor did it involve intra-client documents like those at issue in the present case. Litigation was threatened against an English bank concerning the conduct of an account kept at the branch of the bank in Oregon. The English bank's London manager thought it necessary to ascertain the full facts and cabled the branch manager in Oregon (Mr Russell) for full particulars of transactions on the account. Mr Russell replied with the particulars and in the ensuing litigation the bank claimed that the reply was privileged. There being no clear-cut distinction between litigation and legal advice privilege at this time, it was concluded both at first instance and in the Court of Appeal that Mr Russell's letter was not privileged - mainly because they concluded that the bank's London manager was taking steps to inform himself of the position rather than to obtain material which would find its way, in due course, into counsel's brief. As the passages cited by Longmore LJ at [11]-[14] reveal, there was no discussion of the intra-client position; the discussion was, rather, focused on an assortment of agency relationships.

31. Turning to ***Southwark and Vauxhall Water Company v Quick***, addressed by Longmore LJ in ***Three Rivers (No 5)*** at [15]-[16] and another case which did not involve intra-client exchanges, what is important to appreciate here is the submission that was advanced on behalf of the Bank in ***Three Rivers (No 5)*** in reliance on what was decided in ***Southwark and Vauxhall*** and how that submission was addressed by the Court of Appeal in ***Three Rivers (No 5)***, as reflected in this passage in Longmore LJ's judgment at [15]:

"Mr Stadlen submitted that these passages from the judgments of Cockburn CJ and Brett LJ showed that, if documents were prepared the contents of which were to be made known to a solicitor for the purpose of his giving advice, it did not matter that they were not submitted to him. It followed that, even the documents in category (2) set out in paragraph 4 above were privileged. However that does not address the question whether memoranda or documents, produced to the Bingham Inquiry Unit by Bank employees, are, in general, privileged at all. That question is not settled by these citations; it is fair to say that the judgment of Cockburn CJ is in general terms which might arguably encompass legal advice privilege as well as litigation privilege but it is quite clear that the 'rule' identified and addressed by Brett LJ is the rule relating to litigation privilege and that he is not talking of legal advice privilege in any way".

This demonstrates beyond any doubt that what the Court of Appeal were considering in ***Three Rivers (No 5)*** was the distinction between BIU members, on the one hand, and other (non-BIU) Bank employees on the other hand, since category (2) was concerned with the latter, not the former.

32. Lastly, as to ***Wheeler v Le Marchant***, which was considered by Longmore LJ in ***Three Rivers (No 5)*** at [17]-[18], as he made clear in the passage previously quoted, that was a case in which documents were *"obtained from third parties to be shown to a solicitor for advice"*. This is, again, underlined by reference to the submission that was advanced on behalf of the Bank, as made clear by what Longmore LJ had to say

at [18], after setting out certain passages from the judgments in ***Wheeler v Le Marchant***:

*"Here Cotton LJ, unlike in his judgment in **Southwark v Quick**, considers each of the two categories of legal professional privilege and decides in terms that the documents in question do not fall within the first category because they are not communications between solicitor and client and not within the second category because litigation is not contemplated. This case thus makes clear that legal advice privilege does not extend to documents obtained from third parties to be shown to a solicitor for advice. Mr Stadlen, of course, accepts this but says that communications from an employee are different. The reason he gives is that a corporation can only act through its employees; while that is true, it is not a consideration that can carry Mr Stadlen home. Indeed the passage cited from **Anderson** shows that information from an employee stands in the same position as information from an independent agent. It may, moreover, be a mere matter of chance whether a solicitor, in a legal advice privilege case, gets his information from an employee or an agent or other third party. It may also be problematical, in some cases, to decide whether any given individual is an employee or an agent and undesirable that the presence or absence of privilege should depend upon the answer."*

It is apparent from this that Longmore LJ was, in effect, treating employees outside of the BIU as being in the same position as third parties. This is why Longmore LJ himself went on to say the following at [19]:

"By the end of the nineteenth century it was, therefore, clear that legal advice privilege did not apply to documents communicated to a client or his solicitor for advice to be taken upon them but only to communications passing between that client and his solicitor (whether or not through any intermediary) and documents evidencing such communications. … ."

Longmore LJ was here addressing the Bank's submission as recorded at [18], making it clear that legal advice privilege does not apply where third parties are concerned and thereby rejecting the Bank's somewhat bold submission to the contrary as set out at [18]. This is why Longmore LJ referred at [19] to *"communications passing between that client and his solicitor (whether or not through any intermediary)"*, not because he was saying that legal advice privilege requires that there be such lawyer/client communications and, in their absence, cannot operate.

33. It is, of course, right to acknowledge that Longmore LJ, then, stated as follows at [21]:

"We, therefore, conclude that the nineteenth century authorities established that legal advice privilege was a well-established category of legal professional privilege, but that such privilege could not be claimed for documents other than those passing between the client and his legal advisers and evidence of the contents of such communications. Mr Stadlen made much play of the concession in the court below that it was not necessary for the communication to have actually been received before privilege could attach; if, for example, the sender of the communication had died before the communication had been sent to his legal adviser or the document concerned had been lost the privilege would still exist; but that concession is not inconsistent with the law as thus stated. If such a situation arose there would be no difficulty in saying that a document which was intended to be a communication between client and solicitor was still privileged even if not in fact communicated. That might be a modest extension of the principle but cannot be a foundation for the width of legal advice privilege which Mr Stadlen sought to maintain."

I agree with Mr Singla, however, when he submitted that this should not be taken as Longmore LJ broadening what he had had to say at [19]. In my view, Longmore LJ was not meaning to set out an exhaustive statement as to the scope of legal advice privilege, specifically that it is only available in relation to lawyer/client communications. That cannot have been what Longmore LJ intended to be taken as saying, given that he himself recognised two major exceptions to the principle as stated, namely lawyers' working papers and documents created with the intention of being sent to a lawyer even if not sent. Rather than setting out an exhaustive statement as to the applicability of legal advice privilege, what Longmore LJ was doing was stating what is not within the ambit of this form of privilege in response to the Bank's submission that third party communications are included. That submission entailed an invitation to the Court of Appeal to cast the net wider than is permissible, and Longmore LJ was making that clear in what he had to say at [21].

34. My conclusions that ***Three Rivers (No 5)*** is a decision which was not concerned with intra-client documents and communications (in contradistinction to documents and communications from individuals outside the client group) and, furthermore, that nothing in that decision should be taken as restricting the scope of legal advice privilege to instances where the documents under consideration are lawyer/client communications are not undermined by the subsequent authorities to which Mr Kramer took me. Certainly, I have not been referred to any authority where ***Three Rivers (No 5)*** has been applied to defeat claims to legal advice privilege in respect of documents specifically identified as intra-client documents that were created for the dominant purpose of seeking legal advice.

35. As to ***Three Rivers (No 6)***, whilst Lord Scott and Lord Rodger noted what they did at [10] and [50] respectively, it should not be overlooked that, in fact, Lord Scott went on at [13] to recognise that the *"BIU, and no one else, was to be treated as Freshfields' client for privilege purposes"*, adding at [14] the following:

"As to the question of who, for privilege purposes, was to be regarded as Freshfields' client, the Court of Appeal said that information provided to solicitors by an employee stood in the same position as information provided by an independent third party (see [2003] QB at 1574 G/H) and, specifically, when considering whether information provided to Freshfields by the Governor of the Bank would have qualified for privilege, that 'the BIU … is… the client rather than any single officer however eminent he or she may be'."

36. The fact that Lord Scott regarded ***Three Rivers (No 5)*** as not being concerned with the intra-client documents position is confirmed by what he said at [20]:

"The Bank has now appealed to your Lordships. It is important to emphasise the narrowness of the actual issue. It is whether the communications between the BIU and Freshfields or counsel relating to the Inquiry are protected by legal advice privilege. The Bank plainly believe that the Court of Appeal order in ***Three Rivers (No 5)*** *went too far. But the Bank's petition for leave to appeal was refused and this is not an appeal against that order. Moreover the Bank has discharged the disclosure obligation required by that order. However, the narrow scope allowed by the Court of Appeal in the judgment now under appeal to 'legal advice' has heightened the concerns of many about the approach to legal advice privilege inherent in the first Court of Appeal judgment. …".*

He continued at [21]:

*"The written submissions from the interveners, and particularly that from the Law Society, make clear their concern that the **Three Rivers (No 5)** Court of Appeal judgment may have gone too far in treating communications between Freshfields and employees of the Bank, other than the BIU, as being for privilege purposes communications between Freshfields and third parties. Your Lordships have been invited to clarify the approach that should be adopted to determine whether a communication between an employee and his or her employer's lawyers should be treated for legal advice privilege purposes as a communication between the lawyers and their client. This is of particular importance for corporate clients, who can only communicate through employees or officers."*

He added at [21]:

"The employee/client point does not, however, arise as an issue on this appeal. … ."

37. Lord Scott returned to this issue later, saying the following at [46]-[48]:

*"46. One of the matters debated at the Court of Appeal hearing that led to the **Three Rivers (No 5)** judgment was whether, or which, communications between Freshfields and the Bank employees or ex-employees, or officers or ex-officers, could qualify for legal advice privilege. It was accepted that communications between the lawyers and third parties could not qualify. The Court of Appeal held that only communications between Freshfields and the BIU could qualify. All other communications had to be disclosed. This is not an issue which arises for decision on this appeal but, for reasons which I have explained (see paras. 20 and 21), submissions have been made to your Lordships on the issue and your Lordships have been invited to express views on them. I think your Lordships should decline the invitation for a number of reasons.*

*47. First, the issue is a difficult one with different views, leading to diametrically opposed conclusions, being eminently arguable. Second, there is a dearth of domestic authority. **Upjohn Co v United States** (1981) 449 US 383 in the United States Supreme Court constitutes a valuable authority in a common law jurisdiction but whether (or to what extent) the principles there expressed should be accepted and applied in this jurisdiction is debatable. Third, whatever views your Lordships may express, and with whatever unanimity, the views will not constitute precedent binding on the lower courts. The guiding precedent on the issue will continue to be the Court of Appeal judgment in **Three Rivers (No 5)**. Fourth, if and when the issue does come before the House (or a new Supreme Court) the panel of five who sit on the case may or may not share the views of your Lordships, or a majority of your Lordships, sitting on this appeal. Fifth, and finally, this House, represented by an Appeal Committee of three, refused leave to appeal against the **Three Rivers (No 5)** judgment.*

*48. For all these reasons I think your Lordships should refrain from expressing views on the issue. Nothing that I have said should be construed either as approval or disapproval of the Court of Appeal's ruling on the issue in **Three Rivers (No 5)**. The issue simply does not arise on this appeal."*

38. I would add that I do not agree with Mr Kramer when he submitted that Lord Scott's references to lawyer/client communications should be regarded as his recognising that legal advice privilege is restricted to documents of that nature, and so that legal advice privilege does not also cover documents that are not communications between lawyers and clients. Lord Scott was not addressing the present issue and, in expressing himself as he did, he was merely describing, as Mr Singla put it, the

quintessential category of documents to which legal advice privilege attaches; he was not setting out an exhaustive statement of the legal advice privilege principle.

39. Lord Rodger agreed with Lord Scott, at [49], that the point addressed by Lord Scott (the point addressed in ***Three Rivers (No 5)***) should not be dealt with, as did Baroness Hale, who said this at [63]:

> *"... there are particular difficulties in identifying 'the client' to whose communications privilege should attach in the case of a large organisation such as the Bank or a Government Department. As the point does not arise for decision in this case, I agree, for the reasons given by Lord Scott of Foscote, that we should not express any views upon the matter."*

Lord Carswell, similarly, agreed: see [118].

40. I come on to consider other subsequent authorities relied upon by Mr Kramer, starting with the apparently *ex tempore* decision in ***National Westminster Bank Plc v Rabobank Nederland***. In that case, Simon J accepted a submission advanced on behalf of the claimant bank that, in view of ***Three Rivers (No 5)***, legal advice privilege did not apply to documents amounting to preparatory work which did not constitute communications between lawyer and client. He noted, in particular, at [24], that in ***Three Rivers (No 5)*** the Court of Appeal were concerned with *"documents which were passed to the BIU"* and, at [26], that it had been decided that legal advice privilege *"could only be claimed for documents passing between the client and the legal advisers, and that Legal Advice privilege did not attach to 'preparatory' materials even if created for the purpose of enabling lawyers to advise, unless there was such communications"*. There is no indication that the relevant documents were intra-client documents. On the contrary, the inference is that they were not, given that there was no mention of any intra-client issue. An alternative, and equally plausible, inference is simply that neither party raised the present issue before Simon J. On either view, it seems to me that ***National Westminster Bank Plc v Rabobank Nederland*** is of somewhat limited assistance in the present context.

41. As for ***SFO v ENRC***, it is significant that, at [79] and [80], Sir Geoffery Vos C quoted from Longmore LJ's judgment in ***Three Rivers (No 5)*** at [21] and [31], and then said the following at [81]:

> *"We can fully accept that the Court of Appeal* ***could*** *have decided* ***Three Rivers (No. 5)*** *on the simple basis that Freshfields' client was the BIU (not the Bank), and the documents had been prepared by the Bank (not the BIU), so that the position of the particular Bank employee who had prepared them was irrelevant to the question of legal advice privilege. We do not, however, think that, fairly read, that was the Court of Appeal's reasoning. As we have explained, it seems to us that Longmore LJ reasoned that, because agents and employees, on authority, stood in the same position in relation to legal professional privilege, once it was established that only communications between the lawyer and the client, and not between the lawyer and an agent of the client, could attract legal advice privilege, communications between a lawyer and an employee of the client (other than employees specifically tasked with seeking and receiving legal advice) could also not be privileged. As we have said, we are not sure that it is necessary for us to determine whether this reasoning* was the *ratio decidendi* , *but if that did have to be decided, we would hold that it was."*

This followed an earlier reference at [68] in these terms:

*"The issue in **Three Rivers (No 5)** arose from the fact that many of those documents had been prepared not by the BIU but by other employees of the Bank. The claimants maintained that such documents did not fall within the ambit of legal advice privilege, and the Court of Appeal agreed, overturning the first instance decision of Tomlinson J."*

The then Chancellor continued at [123] with this (under the heading *"What did **Three Rivers (No 5)** actually decide?"*):

*"Our conclusions under issues 1 to 3 make the question of legal advice privilege far less important. Since, however, the matter has been fully argued and the Law Society intervened to assist the court, we will say briefly how we would have determined these matters. As will be apparent from what we have already said, we would have determined that **Three Rivers (No 5)** decided that communications between an employee of a corporation and the corporation's lawyers could not attract legal advice privilege unless that employee was tasked with seeking and receiving such advice on behalf of the client, as the BIU was in **Three Rivers (No 5)**."*

He added at [127]:

"... large corporations need, as much as small corporations and individuals, to seek and obtain legal advice without fear of intrusion. If legal advice privilege is confined to communications passing between the lawyer and the "client" (in the sense of the instructing individual or those employees of a company authorised to seek and receive legal advice on its behalf), this presents no problem for individuals and many small businesses, since the information about the case will normally be obtained by the lawyer from the individual or board members of the small corporation. That was the position in most of the 19th century cases. In the modern world, however, we have to cater for legal advice sought by large national corporations and indeed multinational ones. In such cases, the information upon which legal advice is sought is unlikely to be in the hands of the main board or those it appoints to seek and receive legal advice. If a multi-national corporation cannot ask its lawyers to obtain the information it needs to advise that corporation from the corporation's employees with relevant first-hand knowledge under the protection of legal advice privilege, that corporation will be in a less advantageous position than a smaller entity seeking such advice. In our view, at least, whatever the rule is, it should be equally applicable to all clients, whatever their size or reach. Moreover, it is not always an answer to say that the relevant subsidiary can seek the necessary legal advice and, therefore, ask its own lawyers to secure the necessary information with the protection of legal advice privilege. In a case such as the present, there may be issues between group companies that make it desirable for the parent company to be able to procure the information necessary to obtain its own legal advice."

Sir Geoffery Vos C concluded as follows, at [130]:

*"If, therefore, it had been open to us to depart from **Three Rivers (No 5)**, we would have been in favour of doing so. For the reasons we have given, however, we do not think that it is open to us, so it is a matter that will have to be considered again by the Supreme Court in this or an appropriate future case."*

42. What these passages indicate to me is that the Court of Appeal in ***SFO v ENRC*** recognised that the *ratio decidendi* of ***Three Rivers (No 5)*** is as Mr Singla characterised it and not the broader characterisation urged upon the Court by Mr Kramer: in short, what was decided in ***Three Rivers (No 5)*** is confined to the position

concerning non-client documents, and nothing that was said in that case bears upon intra-client documents.

43. As for ***In re RBS Rights Litigation***, Mr Kramer highlighted passages in the judgment of Hildyard J at [60]-[64], in which he described ***Three Rivers (No 5)*** as confining legal advice privilege *"to communications between lawyer and client"*, whilst recognising that ***Three Rivers (No 5)*** had *"attracted disquiet and not a little academic criticism"*. However, ***In re RBS Rights Litigation*** was not an intra-client documents case. The issue, rather, was as described by Hildyard J, at [80], by reference to the case being advanced by RBS, namely:

"This is its submission to the effect (the following formulation below is my own synopsis) that it is not contrary to ***Three Rivers (No 5)*** *that where an individual, with the authority of a corporation which is seeking legal advice, communicates to the corporation's legal advisers at their request either instructions or factual information, in confidence and for the purpose of enabling that corporation to seek or receive legal advice, that communication (including any factual information) should be treated as if the individual were part or an emanation of the client and protected by legal advice privilege accordingly. Indeed, RBS contends that such treatment is necessary in order to fulfil the purpose of the protection afforded by legal advice privilege."*

Hildyard J continued at [81]:

"Thus, breaking down each component, it is RBS's case that it is consistent with ***Three Rivers (No 5)****, and to provide full content in a corporate context to the protection of legal advice privilege it is necessary, that: (1) Any confidential 'communication' between a client and a lawyer for the purpose of giving or obtaining legal advice (and any evidence of such a 'communication') is protected by legal advice privilege; (2) Where the client is a corporation, statements made to the corporation's lawyers by employees authorised (as a matter of fact) by the corporation to make them constitute lawyer-client 'communications' for the purposes of legal advice privilege, rather than merely information gathering preparatory to such 'communications'; (3) That is so whether or not the employee concerned was authorised to seek or receive legal advice: it is the identity of the parties to the communication, not the nature of the communication which determines whether the material is 'preparatory' and whether in turn it is protected by legal advice privilege: as Ms Tolaney put it in her Speaking Note handed up to me on the second day of the hearing, 'the moment the Court is satisfied that there was a communication directly to the solicitor from an authorised employee, the communication is by definition not preparatory material' ..., and on that footing, privileged."*

44. Hildyard J went on to answer these questions by reference to ***Three Rivers (No 5)*** in this way, at [91]-[93]:

"91. I agree with the Claimants that this conclusion must follow logically from the two facets of the decision in ***Three Rivers (No 5)****, namely (1) that the client for the purposes of privilege consists only of those employees authorised to seek and receive legal advice from the lawyer and (2) that legal advice privilege does not extend to information provided by employees and ex-employees to or for the purpose of being placed before a lawyer.*

92. Applied to this case, that reasoning is, in my judgment, fatal to RBS's claim of legal advice privilege for the Interview Notes in question.

> *93. In summary, I consider and hold that the Interview Notes, albeit that they record direct communications with RBS's lawyers, comprise information gathering from employees or former employees preparatory to and for the purpose of enabling RBS, through its directors or other persons authorised to do so on its behalf, to seek and receive legal advice. It is clear from the judgment in* ***Three Rivers (No 5)*** *that 'information from an employee stands in the same position as information from an independent agent' (see p1574H). The individuals interviewed were providers of information as employees and not clients: and the Interview Notes were not communications between client and legal adviser. I do not consider that any sufficient basis has been demonstrated for not applying* ***Three Rivers (No 5)****. … ."*

45. It is clear from [92] and [93] that ***In re RBS Rights Litigation*** was not concerned with intra-client documents: the individuals who were interviewed provided the information that they did as employees, not as clients. It follows that the case ought not to be regarded as a case which treats ***Three Rivers (No 5)*** as dealing with legal advice privilege insofar as intra-client documents are concerned. This is, furthermore, confirmed by what Hildyard J had to say earlier at [45]-[46]:

> *"45. The nub of the Court of Appeal's conclusions in* ***Three Rivers (No 5)****, therefore, was that, in a corporate context, information gathered from an employee is no different for these purposes from information obtained from third parties, even if the information is collected by or in order to be shown to a solicitor to enable fully informed advice to be given to that solicitor's client, the corporate entity (represented in the* ***Three Rivers (No 5)*** *case by the BIU).*
>
> *46. The Court of Appeal, in reaching those conclusions, thus refused to accept counsel for the Bank's primary argument that, in order to give full and modern effect to legal advice privilege in the context of a claim to it by a corporation, a corporation's employees cannot be regarded and should not be treated as third parties for the purposes of privilege: see page 1560E."*

46. I conclude, having considered authorities both before and after ***Three Rivers (No 5)***, that there is no authority which prevents the assertion of a claim to legal advice privilege where intra-client documents are concerned.

47. The same applies to the academic commentary relied upon by Mr Kramer.

48. *Passmore* addresses ***Three Rivers (No 5)*** in a section starting at §2-046, under the heading *"Identifying the client:* ***Three Rivers (No 5)****"*, as follows:

> *"It is extraordinary that there should be any real confusion in 2024 surrounding the question, who can be a client for advice privilege purposes, at least where the client is a corporate entity? Unfortunately English law continues to be wrapped in uncertainty in this area because of the Court of Appeal's 2003 decision in [****Three Rivers (No 5)****]. This is an uncertainty that may well continue throughout the life of this edition of this work. Where the client is an individual, no issue arises. But where the client is, for example, a corporate entity or other large organisation, it is only a small group of individuals - perhaps a board of directors, a specially constituted sub-committee thereof, a steering group, or some other identifiable group of delegated individuals employed by that entity and who are expressly charged or tasked with seeking legal advice on its behalf who can engage in protected communications with the entity's lawyers (whether internal or external lawyers) under the advice head of privilege. This approach has the consequences that neither (i) preparatory communications made with or by other representatives of the client, even if intended for submission to*

the client's lawyers or prepared at the request of the client or its lawyers for use in seeking legal advice, nor (ii) direct communications between the legal advisers and current or former employees of the corporate that seek or convey factual information needed by the legal advisers to enable them to advise the corporate, even where those employees are expressly authorised by the corporate so to communicate will be privileged. Accordingly, it is presently only the fact of actual communication between the small group of specially tasked employees or officers of the ultimate corporate client and the corporate's lawyers, undertaken for the purposes of seeking and giving legal advice, that will attract advice privilege, and not what Tomlinson J. at first instance in ***Three Rivers (No 5)*** *described as 'the process of communication' between that client generally and its lawyers."*

49. *Passmore* goes on at §2-47 to say this:

*"The state in which English law now finds itself on this issue is even more curious since, not only is English law now 'out of step' on a seriously important issue with the rest of the common law world, but two further English Court of Appeal decisions, in 2018 in [****SFO v ENRC****] and again in [****Jet2.com****], have expressly doubted the correctness of* ***Three Rivers (No 5)*** *as a matter both of policy and practical application and that it therefore needs to be substantially overruled. However, on account of precedent, this can only now be achieved by a Supreme Court ruling should an appropriate case ever reach that court (and in 2024 there still seems to be no sign of such a case winding its way through to that court). …".*

50. As for *Thanki*, under the heading *"Who is the Client?"*, ***Three Rivers (No 5)*** is addressed in a section starting at §2.08, with this being stated at §§2.16 and 2.17:

"Given the difficulties caused by the decision in ***Three Rivers 5*** *…, attempts were made in subsequent cases to distinguish the decision and to confine its ratio as narrowly as possible. For example, the Singapore Court of Appeal in* ***Skandinaviska Enskilda Banken v Asia Pacific Breweries*** *sought to limit the effect of* ***Three Rivers 5*** *by interpreting the decision as one based on the particular fact that only the members of the BIU had been authorized to communicate with the Bank's lawyers. The effect of this interpretation - which was advocated for strongly by previous editions of this work - would be to allow privilege to be claimed over communications between lawyers and any employee authorized to act for the company in the process of obtaining legal advice (and not merely those who were tasked with seeking or receiving such advice). However, this argument was rejected as a permissible interpretation of* ***Three Rivers 5*** *in* ***RBS Rights Issue Litigation****, where Hildyard J held that notes of interviews with employees and former employees of the defendant bank taken by the defendant's lawyers were not protected by legal advice privilege. In particular, Hildyard J held that to fall within the scope of legal advice privilege, the employee communicating with the lawyer had to be authorized to provide instructions to the lawyers and/or to receive the legal advice on behalf of the client; it was insufficient if the employee was only authorized by the client to provide information to the client's lawyers. A similar argument was advanced again in* ***ENRC*** *… . This view of the ratio of* ***Three Rivers 5*** *was again confirmed by the Court of Appeal in* ***Jet2****, where Hickinbottom LJ held that the Court of Appeal was bound by the decision in* ***Three Rivers 5*** *that legal advice privilege covered only communications between the corporation's lawyers and the 'particular employee... tasked with seeking and receiving such advice on behalf of the client'. It therefore appears clear that, as a matter of authority, a narrower reading of* ***Three Rivers 5*** *is no longer available as a means of escaping the unsatisfactory consequences of the decision."*

51. I set these passages out in some detail for a simple reason: what they focus upon is what I have previously identified as the *ratio decidendi* in ***Three Rivers (No 5)***, namely that legal advice privilege cannot arise where non-client documents are concerned, and so in that case in relation to exchanges involving Bank employees who were not members of the BIU. *Passmore* and *Thanki's* disapproval of ***Three Rivers (No 5)*** is as to that, and their recognition that ***Three Rivers (No 5)*** represents binding authority unless and until there is a Supreme Court decision that overrules it is limited to this issue, rather than the question which arises in the present case, namely the position in relation to intra-client documents. The position would be different if the documents now under consideration were documents that involved third parties (including employees who do not come within the ambit of the client group). That, however, to repeat, is not the position since Glencore's only focus, at least at this stage of the proceedings, is as to intra-client documents, not communications or exchanges outside of the client group.

52. Accordingly, unfettered by any binding authority to the effect that legal advice privilege cannot operate in relation to intra-client documents, I come on to consider the position as a matter of principle.

53. I consider the position here to be clear; indeed, it is to be noted that, in his submissions, Mr Kramer had little to say concerning the matter of principle, his almost exclusive focus instead being his contention - a contention which I have rejected - that ***Three Rivers (No 5)*** should be regarded as binding authority in relation to intra-client documents.

54. As Mr Singla observed, although it is often said (not least by Mr Kramer in his submissions), at least in general terms, that legal advice privilege attaches only to communications between a lawyer and client, it is recognised in both the authorities (as has already been seen) and in the academic commentary that, as *Thanki* puts it in §2.03 (echoed at §2.31), *"an actual communication passing between lawyer and client is not in fact required in all circumstances"* or, as Passmore puts it in §2.06, legal advice privilege *"extends to other types of confidential communications that do not pass directly between client and lawyer but nonetheless are made as part of the process of seeking or giving legal advice or assistance"*. Mr Kramer, indeed, himself expressly acknowledges this to be the case since he accepts, in terms, that legal advice privilege applies to an intra-client document that discloses the substance of a communication between members of the client group and a lawyer made for the dominant purpose of giving or receiving legal advice and also to an intra-client document that was intended to be communicated to a lawyer but was not sent.

55. Given this, I agree with Mr Singla when he submitted that it would make no sense for legal advice privilege not to be available in respect of intra-client documents whose dominant purpose is to identify an issue on which the client proposes to seek advice from a lawyer but at a time at which advice has not yet been sought from the lawyer in relation to the issue identified. There can be no distinction in principle between, on the one hand, an engagement or instruction letter that identifies the issue on which legal advice will be sought and, on the other hand, another document or communication created by the client which identifies the issue on which legal advice will be sought. On the Claimants' case, however, whereas the former can be the subject of legal advice privilege on the basis that it discloses the issue on which legal advice will be sought, legal advice privilege is not available in respect of the latter, even though a document or communication created by the client which identifies the issue on which legal advice will be sought will disclose the issue on which legal advice will be sought just as much as will an engagement or instruction letter that identifies the issue on which legal advice will be sought. There is, in practical terms,

no difference between the two types of document, and it is illogical, therefore, to permit legal advice privilege to apply in the one case but not also the other.

56. The more so, since I agree also with Mr Singla when he observed that an intra-client document in the second category will inevitably evidence the substance of any later privileged communication between client and lawyer in which the client seeks advice from the lawyer in relation to the relevant matter. As *Thanki* puts it at §2.42 (under the heading *"Secondary evidence principle in respect of anterior documents"*):

"It is relatively easy to apply the category of documents evidencing lawyer-client communications to documents created after a privileged communication has taken place, but it is suggested that the protection must extend to some documents which are anterior or preparatory to the actual lawyer-client communication. This would most obviously apply to drafts of actual communications, such as a draft letter to the client or the lawyer (as to which there can be no serious dispute that privilege would apply). The intention to communicate with the lawyer accounts for the existence of the draft letter. There is no principled reason why privilege could not be claimed in whole or in part for other anterior documents where their contents evidence the substance of a subsequent privileged communication. If a lawyer's working papers are privileged, why should his/her client's working papers not also be privileged, provided they are sufficiently connected with the actual lawyer-client communications? As Bray noted:

'Where a document has been prepared ... by the client for the purpose of communicating it to his solicitor it must stand on the same footing as an actual letter, for instance rough notes or memoranda for this purpose ...'."

I agree with these observations.

57. Nor would it make sense for legal advice privilege not to apply to intra-client documents whose dominant purpose is to identify facts that the client proposes to communicate to a lawyer for the purpose of seeking legal advice, but where the document itself is not intended to be sent to the lawyer. An example might be a client, the day before he or she is due to meet his lawyer for the first time, writing himself or herself a memorandum with notes for the meeting. Another example might be one member of the client group, who will not be attending the meeting with the lawyer, emailing another member of the client group with information or thoughts in preparation for the meeting. I agree with Mr Singla when he submitted by reference to these types of documents that there can be no distinction in principle between an intra-client document which is itself intended to be communicated to a lawyer and an intra-client document which contains information that is intended to be communicated to a lawyer but the document itself is not intended to be sent. However, again, if Mr Kramer's submissions were to be accepted, then, whereas documents in the first category would attract legal advice privilege, documents in the second category would not. There would be no logic to such a position.

58. *Thanki* addresses a similar point at §2.46:

"It ought to be possible to say whether a document created by a client or his/her lawyer is privileged at the time of its creation; the use to which a document happens subsequently to be put is irrelevant to its privileged status. Its privileged status will turn on the reasons for which the document comes into existence. Whether privilege can be claimed in relation to a document which is not itself an actual communication between lawyer and client is likely to depend, as with an actual communication, on the intentions of the author of the document or of the person under whose direction the document is produced: if the intention was that the contents of the memorandum

would be communicated to the lawyer, then the memorandum ought to be privileged even if it was not subsequently sent. If this was not the intention at the time the document was created or the author was undecided as to what to do until after the document had been created or considered, it is doubtful that the logic of the Court of Appeal's decision in ***Three Rivers 5*** *would extend protection to such a document."*

59. Again, I agree with this. It seems obvious to me that a document of this nature would inevitably evidence the substance of any subsequent communication between client and lawyer in which the client communicates facts to the lawyer as part of communications intended to enable the lawyer to provide advice. That is the point made by *Thanki* at §2.42 in the passage previously quoted, which was followed by §2.43:

"To give a concrete example, a lawyer might ask for information on a particular topic from the client to enable the lawyer to give advice and this may be recorded by the client in a memorandum which the client does not intend to and does not in fact physically send to the lawyer. The memorandum would not therefore strictly speaking constitute a communication. Nor does it constitute an intended communication ... . But the intention to communicate with the lawyer entirely accounts for the existence of the memorandum and the contents of the memorandum are utilized in the communication sent by the client to his/her lawyer. In such a case the actual letter would undoubtedly be privileged, but the prior memorandum might evidence the contents of the letter to a sufficient degree that it could also legitimately be the subject of a valid claim to privilege, whether in whole or in part, in the same way that a draft letter would be privileged. ...".

It is important to note in this context that in this and the other passages to which I have referred *Thanki* is not taking issue with ***Three Rivers (No 5)*** – in contrast to the commentary at §§2.08-2.26.

60. As Mr Singla observed, if (as is obviously the case and is not in dispute) a lawyer's working papers are the subject of legal advice privilege, it is difficult to see why what are, in effect, a client's working papers should not also attract such privilege. They are the mirror image of each other and, as such, should be treated in the same way for legal advice privilege purposes.

61. Accordingly, my conclusion is that, as a matter of principle, it cannot be correct that the application of legal advice privilege to intra-client documents is as circumscribed as the Claimants maintain. I am clear, on the contrary, that there can be no justification for treating intra-client documents, created as part of the process of seeking legal advice or assistance and/or for which the intention to communicate with the lawyer accounts for the existence of the document, as not attracting legal advice privilege in circumstances where that privilege is available in relation to other documents that are materially similar. There is no justification for such a restrictive approach and, in truth, Mr Kramer was unable to explain why there should, as a matter of principle, be the differentiation for which he contended. His almost exclusive focus, rather, was as to ***Three Rivers (No 5)*** and his submission that that decision precludes the assertion of legal advice privilege in respect of intra-client documents, yet I have previously explained why I do not consider that to be the case on a proper reading of the Court of Appeal judgment in ***Three Rivers (No 5)***.

62. Support for the conclusion that I have reached is, moreover, to be found in the decision of the Court of Appeal in ***Jet2.com***.

63. As is apparent from the first instance decision of Morris J at [90] ([2018] EWHC 3364 (Admin)), ***Jet2.com*** concerned claims to privilege over drafts of a letter from the defendant that had been shared via multi-addressee emails to personnel including in-house lawyers, and multi-addressee emails in which those drafts were discussed. At [95], Morris J summarised the principles which he considered to be established by the authorities, holding that each draft of the letter would only be privileged if it had been drafted for the dominant purpose of seeking legal advice on it (see [95(3)] and [99]-[100]) and that each multi-addressee email would only be privileged if the dominant purpose of each email to each addressee was to seek legal advice (or if the email might disclose the nature and content of the legal advice sought and obtained) (see [95(5)] and [101]-[102]). He went on to conclude that the dominant purpose of the first draft of the letter (which had been disclosed) was not to seek legal advice (see [102]) and expressed doubt as to whether subsequent drafts and/or discussion of those drafts would be privileged (see [103]).

64. The defendant's appeal was dismissed. Under Ground 1 (*"legal advice privilege and purpose"*), Hickinbottom LJ confirmed, at [96], that *"for LAP to apply to a particular communication or document, the proponent of the privilege must show that the dominant purpose of that communication or document was to obtain or give legal advice"*. Under Ground 2 (*"legal advice privilege and multi-addressee communications"*), as explained more fully later, he addressed this at [100], rejecting the challenge which was made to the approach adopted by Morris J.

65. In arriving at these conclusions, Hickinbottom LJ identified a number of propositions. These included what he described as *"Proposition 2"*, which he addressed at [45] in this way:

> *"Although the privilege attaches to communications between a lawyer and his client, the law recognises that legal advice is not given for hypothetical purposes, but to be considered and (insofar as accepted) applied by the client. It is therefore well-established that it covers, not only a document from the lawyer containing advice and the client's own written record of advice (whether given in writing or orally), but also any communication (again, whether written or oral) passing on, considering or applying that advice internally* ***(Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Limited (The Good Luck)*** *[1992] 2 Lloyd's Rep 540 (****'The Good Luck'****) at pages 540-1 per Saville J, and* ***USP Strategies Plc v London General Holdings Limited*** *[2004] EWHC 373 (Ch) (****'USP Strategies'****) at [19(c)] per Mann J). Indeed, there are circumstances in which the privilege will attach to the dissemination of advice to third parties (****USP Strategies*** *and* ***Gotha City v Sotheby's*** *[1998] 1 WLR 114). Equally, LAP attaches to communications from a lawyer to a third party containing information provided by the client to the lawyer which is covered by LAP and which the client has given the lawyer authority to disclose (****Raiffeisen Bank International AG v Asia Coal Energy Ventures Limited and Ashurst LLP*** *[2020] EWCA Civ 11 at [63])."*

66. Importantly, Hickinbottom LJ, then, dealt with a fourth proposition, as follows at [47]:

> "*The second proposition to which I referred concerns the extent to which legal advice, privileged when given, can be disseminated internally and externally without the loss of privilege, where the law has taken a flexible and realistic approach, reflecting the realities of modern corporate and commercial arrangements. However, the law has taken a somewhat different approach to the collection of material, internally and externally, for the purpose of obtaining legal advice, based upon the principle set out in* ***Wheeler v Le Marchant****. The fourth proposition derived from the authorities is that*

*material collected by a client (or by his lawyer on his behalf) from third parties or independent agents for the purposes of instructing lawyers to give advice is not covered by LAP; and, further, where the relevant client is a corporation, documents or other materials between an employee of that corporation and a co-employee or the corporation's lawyers, even if required or designed to equip those lawyers to give legal advice to the corporation, do not attract LAP unless the employee was tasked with seeking and receiving such advice on behalf of the company (**Three Rivers (No 5)** at [8] and following, and the judgment of this court (Sir Brian Leveson PQBD, Sir Geoffrey Vos C and McCombe LJ) in [**SFO v ENRC**] ... especially at [79]-[81] and [123]-[130]).*"

67. I agree with Mr Singla's submission that the reference to "*documents or other materials between an employee ... and a co-employee*" is obviously to be taken to mean a situation where the employee and co-employee are each within the client group, and that the reference to *"the employee [being] tasked with seeking and receiving such advice on behalf of the company"* ought, likewise, to be treated a reference to a situation where the exchanges are intra-client, and not involving any third party (including any non-client employee in a scenario such that in ***Three Rivers (No 5)*** involving the BIU). In other words, Hickinbottom LJ was referring to intra-client documents and acknowledging that in relation to these legal advice privilege can arise provided that the dominant purpose test is met.

68. Mr Kramer submitted that this is not the case, noting that, in any event, ***Jet2.com*** was not concerned with communications that do not involve lawyers and so what Hickinbottom LJ had to say at [47] was *obiter*. I will address the latter point in a moment, however, as to the first, I reject Mr Kramer's submission that the passage relied upon by Glencore was *"merely infelicitous drafting"* since the intention of the sentence appears to have been only to reaffirm the uncontroversial statement that there is an exception to the lack of legal advice privilege for communications between employees and co-employees or lawyers where communications are between an employee tasked with seeking legal advice and the corporation's lawyers, which attract legal advice privilege. That is not how I read what Hickinbottom LJ had to say.

69. This, indeed, appears to have been the view taken also by O'Farrell J in ***Northumbria Healthcare NHS Foundation Trust v Lendlease Construction (Europe) Limited*** [2022] EWHC 1266 (TCC) at [85]-[86]:

*"In [**Jet2.com**], the Court of Appeal confirmed at [95] that for communications or documents to fall within the scope of legal advice privilege, they had to be created or sent for the dominant purpose of seeking legal advice…, and communications covered by legal advice privilege include documents which evidence the substance of such confidential communications.*

Such privilege extends to internal communications where an employee has been tasked with seeking and receiving such legal advice ... ".

70. Nor is Glencore's point undermined by the fact that it is clear from the remainder of Hickinbottom LJ's judgment that he intended to follow, and apply, the reasoning and decision in ***Three Rivers (No 5)***, including the principle that legal advice privilege applies to communications between client and lawyer, since, as previously explained, whilst ***Three Rivers (No 5)*** was not concerned with intra-client documents, nonetheless there is no issue as to the applicability of the dominant purpose test discussed in ***Three Rivers (No 5)***. In particular, having referred to what Sir Geoffery Vos C had had to say in ***SFO v ENRC*** at [81] and [127], Hickinbottom LJ said the following at [56] to [58]:

> *"56. I respectfully agree. In addition: (i)* ***Three Rivers (No 5)*** *does not appear to allow for any caveats to the proposition that material sent by a third party/agent/employee to a lawyer (and vice versa) is not covered by LAP. However, where lawyers are instructed, the individual within a corporation instructing them must be able to ensure that the instructions are in accordance with the wishes of the senior executives in the company, which may involve input from more junior employees who are knowledgeable about the relevant issues. Internal communications settling instructions must be covered by LAP. It is unclear to me how the proposition in* ***Three Rivers (No 5)*** *quite allows for that. (ii) For no obvious reason, the law in relation to LAP as set out in* ***Three Rivers (No 5)*** *in respect of collection of information for the instruction of lawyers appears to be out of line with the law in respect of the dissemination of advice from lawyers, once received (i.e. Proposition 2, as described in paragraph 45 above).*
>
> *57. For those reasons, like the constitution of the court in [****SFO v ENRC****], on the basis of both principle and practical application, I respectfully doubt both the analysis and conclusion of this court in* ***Three Rivers (No 5)*** *on this issue; and, had it been in this court's power, I too would be disinclined to follow it.*
>
> *58. But, as I have indicated, we do not have that power. In* ***Three Rivers (No 5)****, this court held that communications between an employee of a corporation and the corporation's lawyers does not attract LAP unless that particular employee was tasked with seeking and receiving such advice on behalf of the client; and, as confirmed in* ***Three Rivers (No 6)*** *at [47] per Lord Scott and [****SFO v ENRC****], that is binding on this court. As Hildyard J succinctly put it in [****In re RBS Rights Litigation****] [2016] EWHC 3161 (Ch); [2017] 1 WLR 1991:*
>
> *'... [T]here can be no real doubt as to the present state of the law in this context…:* ***Three Rivers (No 5)*** *confines legal advice privilege to communications between lawyer and client, and the fact that an employee may be authorised to communicate with the corporation's lawyer does not constitute that employee the client or a recognised emanation of the client.'"*

Hickinbottom LJ was here again recognising the proper ambit of ***Three Rivers (No 5)***, specifically that it was concerned not with intra-client documents but only with documents involving third parties (including employees who are not part of the client group).

71. This brings me to Mr Kramer's submission that what Hickinbottom LJ had to say at [47] was *obiter*. I do not agree with him about this. On the contrary, it can be seen that the first category of documents in issue in ***Jet2.com*** comprised drafts of a letter from the defendant, including versions drafted by members of the client group rather than lawyers (as well as other versions that were drafted by lawyers). These are intra-client documents, in respect of which the Court of Appeal dismissed the appeal, so confirming the correctness of the approach that Morris J had taken at first instance, namely that a draft is privileged if and insofar as it has been drafted for the dominant purpose of seeking legal advice. Similarly, as to the second category of documents in issue, these comprised multi-addressee emails involving both lawyers and non-lawyer members of the client group. As to these, Hickinbottom LJ had the following to say at [100]:

> *"… In my view, the following is the appropriate approach to multi-addressee emails such as those of which Jet2 seek disclosure in this case.*

(i) As I have indicated, the dominant purpose test applies to LAP. As I have indicated …, although the general role of the relevant lawyer may be a useful starting point (and may, in many cases, in practice be determinative), the test focuses on documents and other communications and has to be applied to each such.

(ii) In respect of a single, multi-addressee email sent simultaneously to various individuals for their advice/comments, including a lawyer for his input, the purpose(s) of the communication need to be identified. In this exercise, the wide scope of 'legal advice' (including the giving of advice in a commercial context through a lawyer's eyes) and the concept of 'continuum of communications' must be taken fully into account. If the dominant purpose of the communication is, in substance, to settle the instructions to the lawyer then, subject to the principle set out in ***Three Rivers (No 5)*** *(see paragraphs 47 and following above), that communication will be covered by LAP. That will be so even if that communication is sent to the lawyer himself or herself, by way of information; or if it is part of a rolling series of communications with the dominant purpose of instructing the lawyer. However, if the dominant purpose is to obtain the commercial views of the non-lawyer addressees, then it will not be privileged, even if a subsidiary purpose is simultaneously to obtain legal advice from the lawyer addressee(s).*

…

(iv) There was some debate before us – as there is in the textbooks (e.g. in Hollander …) – as to whether multi-addressee communications should be considered as separate bilateral communications between the sender and each recipient, or whether they should be considered as a whole. My preferred view is that they should be considered as separate communications between the sender and each recipient. LAP essentially attaches to communications. Where the purpose of the sender is simultaneously to obtain from various individuals both legal advice and non-legal advice/input, it is difficult to see why the form of the request (in a single, multi-addressee email on the one hand, or in separate emails on the other) in itself should be relevant as to whether the communications to the non-lawyers should be privileged. That is not to say, of course, that the form may not in some cases reveal the true purpose of the communication, e.g. it may appear from the form of the email that the dominant purpose of the email is to settle the instructions to the lawyer who has merely been copied in by way of information, or to the contrary that the dominant purpose of sending the email to the non-lawyers is to obtain their substantive (non-lawyer) input in any event.

(v) In my view, there is some benefit in taking the approach advocated by Hollander …, namely to consider whether, if the email were sent to the lawyer alone, it would have been privileged. If no, then the question of whether any of the other emails are privileged hardly arises. If yes, then the question arises as to whether any of the emails to the non-lawyers are privileged, because (e.g.) its dominant purpose is to obtain instructions or disseminate legal advice.

(vi) However, whether considered as a single communication or separate communications to each recipient, and whilst there may perhaps be 'hard cases', I doubt whether in many cases there will be any difference in consequence, if the correct approach to LAP is maintained. Where there is a multi-addressee email seeking both legal advice and non-legal (e.g. commercial) advice or input, if regarded as separate communications, those to and from the lawyer will be privileged: otherwise, they will not be privileged, unless the real (dominant) purpose of a specific email to/from non-lawyers is that of instructing the lawyer. If it is not for that

purpose, in most cases, the email as a whole will clearly not have the dominant purpose of obtaining legal advice.

… .”

72. I do not, in the circumstances, regard what Hickinbottom LJ had to say in these passages as being *obiter*.

73. It is clear from what Hickinbottom LJ stated at (v) that he was considering not only the situation where an email was sent *to “the lawyer alone”* but also *“whether any of the e-mails to the non-lawyers are privileged”*, by reference, for example, to whether their *“dominant purpose is to obtain instructions or disseminate legal advice”*. It is clear also from what he went on to say at (vi) concerning *“the real (dominant) purpose of a specific e-mail to/from non-lawyers”* being *“that of instructing the lawyer”*. Here, Hickinbottom LJ was, accordingly and in short, squarely addressing emails that do not involve lawyers and acknowledging, in doing so, that legal advice privilege is available in such cases – and so in the intra-client situation. This is, of course, consistent with what he had to say at [47], at least on what I regard as the proper reading of that paragraph, and illustrates why Mr Kramer cannot be right when he submitted that Hickinbottom LJ had engaged in *“merely infelicitous drafting”* when he used the language that he did at [47]. On the contrary, he clearly had in mind intra-client communications both at [47] and at [100].

74. I would make a final observation in relation to ***Jet2.com***. This is that, whilst I note that Hickinbottom LJ referred on several occasions to legal advice privilege applying to lawyer/client communications, I agree with Mr Singla when he made the point that these references principally comprise citations of, or references to, dicta in ***Three Rivers (No 5)*** in circumstances where it was nonetheless recognised in ***Jet2.com*** that the Court of Appeal in ***Three Rivers (No 5)*** were dealing with non-client or third party communications, as opposed to communications between lawyers and clients or, indeed, communications between clients.

Conclusion

75. It follows, for reasons that I have sought to explain, that Glencore is entitled to assert legal advice privilege in respect of intra-client documents provided that those documents were created with the dominant purpose of seeking legal advice, and that the position is not as the Claimants have maintained, namely that legal advice privilege only applies to intra-client documents insofar as the documents disclose the substance of a communication between members of the client group and a lawyer made for the dominant purpose of giving or receiving legal advice or the document was intended to be a communication to a lawyer but was not sent.

76. I end, in an echo of what I had to say at the conclusion of my earlier judgment, by expressing my gratitude to all counsel and solicitors, whose preparation and presentation have again been of the highest quality.