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Charting New Waters: English High Court Confines Effect of *Three Rivers (No 5)*, Confirming Privilege Can Apply to Intra-Client Communications

By James Norris-Jones and Tim Vogel*

In this article, the authors discuss a decision by the High Court of England and Wales holding that legal advice privilege is not limited to communications between a lawyer and client and extends to any document sent between (or created by) members of a corporate's "client group" for the dominant purpose of seeking or receiving legal advice.

The English High Court has held that legal advice privilege is not limited to communications between a lawyer and client and extends to any document sent between (or created by) members of a corporate's "client group" for the dominant purpose of seeking or receiving legal advice.[1]

Picken J's judgment affords companies a degree of protection in respect of the kinds of internal communications which are typically generated when a company seeks legal advice. That may be especially valuable where litigation privilege does not also apply.

Although the decision strengthens claims to legal advice privilege for communications within a client group, it does not resolve the long-standing issues caused by the narrow definition of a client group set down by the Court of Appeal in *Three Rivers (No 5)*.[2] It remains the case that communications with employees or agents outside a client group will not be covered by legal advice privilege unless they fall within the limited exceptions to the rule.

Placed alongside an earlier ruling on privilege by Picken J in these proceedings (which abolished a restriction on a company's ability to assert privilege against its shareholders), this decision marks a move away from a narrow, restrictive, and formalistic application of privilege in a corporate context. However, the decision is a first instance authority and its reasoning may yet be tested on appeal.

BACKGROUND

The proceedings underlying this decision are a group shareholder action brought against the defendant issuer (Glencore) under sections 90 and 90A of the Financial

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[1] Aabar Holdings S.à r.l. v. Glencore plc & Ors [2026] EWHC 877 (Comm), available at https://www.bailii.org/ew/cases/EWHC/Comm/2026/877.html.

[2] Three Rivers District Council & Ors v. The Bank of England [2003] QB 1556.

Services and Markets Act 2000. During disclosure, the defendant initially withheld documents on the basis that *Three Rivers (No 5)* was wrongly decided. Specifically, the defendant had treated legal advice privilege as applying not only to communications between a lawyer and client, but to all communications made for the dominant purpose of seeking or receiving legal advice regardless of who authored them. After objections from the claimants, the defendant retreated from that position but continued to assert privilege over a narrower category of documents, namely, communications passing between members of its "client group" as defined in *Three Rivers (No 5)* (*i.e.*, those individuals within the defendant tasked with seeking and receiving legal advice on its behalf).

The claimants argued that "intra-client documents" (that is, any communication sent between, or document created by, members of a client group) fell outside the scope of legal advice privilege. On their case, legal advice privilege attached only to communications between lawyer and client, subject to two narrow exceptions:

- documents evidencing the substance of a privileged lawyer/client communication, and
- documents intended to be sent to a lawyer but never in fact communicated ("inchoate communications").

The claimants contended this principle had been established by the Court of Appeal in *Three Rivers (No 5)*, was confirmed by subsequent authority, and had been endorsed by leading commentary on the law of privilege.

THE HIGH COURT'S JUDGMENT

Picken J rejected the claimants' argument and held that there was no justification for prohibiting the application of legal advice privilege to intra-client documents.

Three Rivers (No 5) Distinguished

The central plank of his reasoning was that *Three Rivers (No 5)* was not concerned with the issue before the High Court, namely the extent to which legal advice privilege applies to intra-client documents. *Three Rivers (No 5)* was instead concerned with the application of legal advice privilege to communications involving employees who were outside of the client group.

The Court of Appeal's statement in *Three Rivers (No 5)* that legal advice privilege "could not be claimed for documents other than those passing between the client and his legal advisers" was not, in Picken J's view, intended as an exhaustive definition of the scope of legal advice privilege. Rather, it was a response to a submission made in *Three Rivers (No 5)*, that documents prepared by employees outside the client group should be privileged. On Picken J's reading, the Court of Appeal intended to identify material that fell outside legal advice privilege (*i.e.*, third-party and non-client communications) rather than setting out a closed list of the material which falls within it.

Support from Subsequent Authorities

The High Court also confirmed that several more recent authorities which applied *Three Rivers (No 5)*, supported the conclusion that the scope of legal advice privilege was not restricted to instances of lawyer/client communications.[3] In the High Court's view, all of those authorities recognized that the decision in *Three Rivers (No 5)* is confined to the position concerning "non-client documents" or third party communications, as opposed to communications between lawyers and clients or between members of a client group.

Academic Commentary

The academic commentary relied on by the claimants told a similar story. Picken J acknowledged that both Passmore[4] and Thanki[5] are critical of *Three Rivers (No 5)*, but their criticism is directed at the decision's treatment of non-client employees (*i.e.*, the question of who counts as "the client") and not at the question of intra-client documents. Their recognition that *Three Rivers (No 5)* represents binding authority is limited to the issue of documents or communications involving employees outside of the client group.

Points of Principle Supporting Privilege for Intra-Client Documents

Having concluded that no binding authority prevented legal advice privilege from attaching to intra-client documents, Picken J identified several points of principle that supported the defendant's broader interpretation of legal advice privilege:

- Both authorities and commentary recognized that an actual communication passing between lawyer and client is not required in all circumstances. Legal advice privilege may extend to other types of confidential communication which are made as part of the process of seeking or giving legal advice. The claimants themselves accepted as much, conceding that privilege covers both documents evidencing the substance of a privileged lawyer/client communication as well as inchoate communications.

- It would make no sense for legal advice privilege to be unavailable in respect of an intra-client document whose dominant purpose was to identify an issue on which a client proposes to seek advice from a lawyer, merely because the advice has not yet been sought. There is no principled distinction between:

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[3] Three Rivers (No 6) [2005] 1 AC 610; SFO v ENRC [2019] 1 WLR 791; National Westminster Bank Plc v Rabobank Nederland [2006] EWHC 2332; In re RBS Rights Litigation [2017] 1 WLR 1991.

[4] Privilege, 5th ed.

[5] The Law of Privilege, 4th ed.

- an engagement letter/letter of instruction that identifies an issue on which legal advice will be sought (which would be privileged on the claimants' case), and
- a communication between members of a client group which identifies the same issue (which would not be privileged if the claimants' position was accepted).

- The category of documents evidencing lawyer/client communications is not limited to documents created after a privileged communication has taken place. It must extend to some documents created before the privileged communication. As Picken J observed, if a lawyer's working papers are privileged, a client's working papers should be treated no differently, provided they are sufficiently connected with privileged lawyer/client communications.
- There is no material distinction between an intra-client document which is 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. In the High Court's view, both of the following documents should be covered by legal advice privilege:
  - a memorandum written by a client which contains the client's notes for a meeting with their lawyer that is taking place the following day, and
  - an email sent by one member of a corporate client group to another, which sets out the sender's thoughts in respect of a meeting with the corporate's lawyer the following day, which the sender is unable to attend.

The High Court thought the claimants' position (that documents in the first category attracted legal advice privilege but those in the second did not) was illogical.

Support from *Jet2.com*

Picken J found further support for the defendant's position in the Court of Appeal's decision in *R (Jet2.com Ltd) v CAA*.[6] In that case, Hickinbottom LJ stated that documents or materials passing between an employee of a corporation and a co-employee did not attract legal advice privilege unless the employee was tasked with seeking and receiving advice on behalf of the company. Picken J read this language as acknowledging that intra-client communications can attract privilege where the dominant purpose test is met.

[6] [2020] QB 1027.

IMPLICATIONS

This decision matters as a company seldom obtains legal advice via a single lawyer/client communication. It is usually a process involving some degree of internal documentation and communication. This judgment recognizes those materials do not have to be disclosed merely because they involve intra-client communications which precede lawyer/client contact.

This is the second major privilege ruling by Picken J in these proceedings (an earlier decision abolished the "Shareholder Rule" under which a company was unable to assert privilege against its shareholders in respect of legal advice obtained by the company). That decision has since been endorsed by the Privy Council.[7]

Each of Picken J's rulings plugs a gap in the coverage provided by legal advice privilege, and each may be of assistance to companies seeking to protect documents from disclosure. However, Picken J's latest judgment concerning intra-client documents is a first instance authority and is reasoned through a nuanced reading of existing authority. It is open to appellate scrutiny, which may test whether *Three Rivers (No 5)* and *Jet2.com* can bear the weight which Picken J places on them. Companies should not yet feel secure that this judgment marks the final word on whether privilege attaches to intra-client documents.

Nor does the decision alter the narrow definition of a client group given in *Three Rivers (No 5)* (*i.e.*, those individuals tasked with seeking and receiving legal advice on behalf of an organisation). Although that decision has attracted significant judicial criticism and is widely regarded as ripe for reconsideration by the Supreme Court, it remains binding authority. Companies should be mindful that communications involving employees or agents outside a client group will not attract legal advice privilege unless they fall within one of the limited exceptions to the rule.

[7] Jardine Strategic Ltd v Oasis Investments II Master Fund Ltd and Others (No 2) [2025] UKPC 34.