

THE DISCOVERY OF DOCUMENTS IN HONG KONG—TWO RECENT DECISIONS IN THE COURT OF FIRST INSTANCE

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The discovery process in civil litigation, whereby the parties are able to see and take copies of each other's documents, is a crucial stage in the journey towards the trial or the settlement of a dispute. Yet, despite the fact that discovered documents often form the core of the parties' evidence, upon which subsequent witness statements and experts' reports may be based, the process itself often is relegated to a secondary status. Sifting through reams of files is, it seems, not as "glamorous" as conducting interviews or cross-examinations. Nevertheless, as two recent decisions in the CFI demonstrate, the intricacies of discovery can determine the fate of one's client's case.

Introduction

In England and Wales, the discovery of documents was abolished in 1999 and a new regime, known as "disclosure", was put in its place. In Hong Kong, despite the recent Civil Justice Reform (CJR), "discovery" remains in place. Despite the differences between the two processes and an expressed desire in some parts of the Hong Kong legal community not to follow the English example, Hong Kong case law continues to be dominated by English authorities, including many which have been superseded or criticised in their home jurisdiction. Two recent decisions in the Hong Kong Court of First Instance (CFI) demonstrate the perils of relying on the English courts for guidance on discovery.

In *Toeca National Resources BV v Baron Capital Ltd*,¹ McWalters J considered an appeal from a Master's refusal to order specific discovery. In the course of doing so, the learned judge addressed the nature and application of the "relevancy test" for discovery established in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co*² and requirement of "necessity" in specific discovery. Of particular note

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¹ (unrep., HCA 1913/2009, [2011] HKEC 729).

² (1882–83) LR 11 QBD 55—the source of the *Peruvian Guano* test.

was the learned judge's insistence that "the determination of whether discovery is necessary involves a triangulation of interests—the interests of the plaintiff, the interests of the defendant and the interests of the judge".

In *Citic Pacific Ltd v Secretary for Justice*,³ Wright J addressed the tangled issue of the legal professional privilege (LPP) in respect of communications between lawyers and their corporate clients. The learned judge looked at and commented upon the English Court of Appeal's controversial judgment in *Three Rivers District Council v Governor and Company of the Bank of England (No 5)*⁴ in the course of doing so. His eventual decision may have far-reaching and unwelcome consequences for Hong Kong practitioners and their clients.

Toeca and *Citic* are not the first times these issues have been considered and despite both learned judges' efforts, they are unlikely to be the last. This analysis will look at both judgments and offer some suggestions on how they could and should have been made.

***Toeca*—The Dispute**

As the learned judge observed, the factual background of the case is rather complex, although, in essence, it amounts to a dispute between rival investors. A Mr Hung intended to use his company, Wealth Gain Global Investment Ltd (Wealth Gain), to buy a coal mine in Heilongjiang. He would then sell his shares in Wealth Gain to a Hong Kong publicly listed company. The first and second defendants identified Sino Resources Group Limited (Sino Resources) as a suitable purchaser and in September 2007, it agreed to buy his shares for HK\$700m. The purchase was to be financed by the issue of 250 million shares in Sino Resources. In May 2008, the plaintiff was persuaded by the defendants to subscribe 118 million Sino Resources shares at \$0.99/share.

Following the subscription, three separate agreements were entered into by which the plaintiff would have the means to recoup its investment if things went awry. Unfortunately, Wealth Gain failed to purchase the coal mine and the plaintiff's attempts in the early summer of 2009 to salvage its position using the agreements were unsuccessful. By that time, trading in Sino Resources shares had also been suspended.

The plaintiff brought claims against the first and second defendants for sundry remedies, including damages. The defendants alleged that they

³ (unrep., HCMP 767/2010, [2011] HKEC 1657).

⁴ [2003] QB 1556.

had entered into an oral collateral agreement with the plaintiff by which it agreed to sue Mr Hung first, if he defaulted, and that their liability would be limited to any sums which it could not recover from him. As for Mr Hung, he sought the annulment of the three agreements and Sino Resources claimed against Mr Hung for rescission of its purchase of his shares in Wealth Gain.

***Toeca*—The Discovery Application**

The plaintiff sought discovery under RHC O 24 r 7 of three classes of documents:

- All documents containing or relating to correspondence and communications between Sino Resources and the defendants including (but not limited to) notes, memoranda, records, facsimiles, electronic mail or any electronic document⁵ concerning, inter alia, Sino Resources' acquisition of Mr Hung's shares in Wealth Gain; the three agreements; and the dispute over the purchase of the coal mine.
- All correspondence, internal communications, notes, memoranda, drafts, recording or any electronic documents created by or exchanged between the defendants and others relating to various matters including the litigation itself.
- All the defendants' internal working papers, drafts, notes, files, memoranda, recording and any electronic document relating to various matters including the litigation.

The issues identified by McWalters J were “whether the classes as drafted are too wide; the consequence if they inevitably capture material that is not discoverable, and whether, in these circumstances, a discovery order is necessary under Order 24 rule 8(1)”.

***Toeca*—The Judgment**

McWalters J first analysed the applicable law, albeit he did not “canvass all aspects of the law of discovery”. He looked at the concept of “relevancy” in discovery and how it is applied before moving on to the further

⁵ The actual term was “any document maintained in an electronic storage device”.

requirement under O 24 r 8(1) for specific discovery⁶ to be necessary. He then applied this three-stage approach to the facts before him.

Stage 1—The Concept of Relevancy

McWalters J recited the classic test for a document's relevance to the matter before the court laid down by Brett LJ in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* and observed that it had been adopted by the Hong Kong Court of Appeal in *Deak & Co (Far East) Ltd v NM Rothschild & Sons Ltd*⁷ and remained in place here despite its replacement in England and Wales⁸ and Hong Kong's own Civil Justice Reform (CJR).⁹ The learned judge accepted that the test had the potential to be "all-encompassing" given that it covers:

- a party's own documents upon which it relies in support of its cases;
- documents which adversely affect a party's own case or support another's;
- "story" or "background" documents which are relevant to "the issues in the proceedings" but which do not obviously support or undermine anyone's case; and
- "train of inquiry" documents;¹⁰

but added that the test was "just the starting point, not the finishing point" of determining if "a document or class of document is in fact relevant and if so, whether disclosure is necessary". It is, of course, important to bear in mind that the learned judge was not just discussing the "starting point" of specific discovery but discovery as a whole.

Stage 2—Applying the Test

McWalters J observed that the latter two categories of documents and the task of identifying "the issues in the proceedings" caused the greatest

⁶ Under O 24 r 7. Also applies to O 24 r 3 applications.

⁷ [1981] HKC 78.

⁸ The learned judge referred to "the UK" but can be assumed to be referring to the adoption of the Civil Procedure Rules (CPR) in England and Wales in April 1999 and, in particular, CPR Part 31 on Disclosure. See <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/menus/rules.htm>.

⁹ See Meggitt.G, "Civil Justice Reform in Hong Kong – Its Progress and its Future" (2008) 38 HKLJ 89.

¹⁰ These are the four categories identified by Lord Woolf in his "Access to Justice" reports.

difficulties when applying the *Peruvian Guano* test. With respect to the same, the learned judge noted and followed Colman J in *O Co v M Co*¹¹ and Deputy High Court Judge H Wong SC in *Chan Hung v Yung Kwong Chung*¹² (who was himself quoting and approving Colman J's remarks in the former case) thus:

“For the purpose of discovery, the relevance of a document should not be solely tested against the detailed particulars pleaded by the parties. It is the pleaded case of the parties in the broad sense that one should be concerned with. A document may be generally relevant to a party's case as pleaded (many so-called ‘background documents’ are of this nature) although its relevance cannot be specifically pinned to some pleaded particulars.”

McWalters J, like Deputy High Court Judge Wong SC before him, did not accept Colman J's attempt in *O Co* to limit the scope of the *Peruvian Guano* test given that the Hong Kong Court of Appeal upheld the unrestricted version of the test in *Deak & Co*.

Further, the learned judge noted that the *Peruvian Guano* test can cause further difficulties when it is applied to a class of documents. As a consequence, in *Deak & Co* it was held that the correct approach when “drafting” a class was to focus on the nature of the documents sought rather than the issue or issues. In addition, further restrictions in the “drafting” of a class, such as limiting the documents sought to “particular period of time” or “a particular event”, could and should be used to prevent any overly generous application of the *Peruvian Guano* test.¹³

Stage 3—Necessity

After considering the wider issue of the “relevance” of a document for the purposes of discovery, the learned judge moved on to the nature of the application before him. When making an order for discovery under O 24 r 3 or 7, a court will only do so, by virtue of O 24 r 8(1), if it is necessary “for disposing fairly of the cause or matter or for saving

¹¹ [1996] 2 Lloyd's Rep 347.

¹² (unrep., HCA 216–217/2004, [2009] HKEC 74).

¹³ The learned judge gave *Fuji Photo Film Co Ltd v Carr's Paper Ltd* [1989] RPC 713 as an example of a case where the class of documents was correctly identified but drafted too widely.

costs”.¹⁴ The learned judge interpreted the words “for disposing fairly of the cause or matter” as having two tenses—the present and the future.

Insofar as the present tense was concerned, the court had to consider:

- the inconvenience and cost for the party compelled to give discovery;
- the amount of irrelevant documentation discovered due to “the width with which the class is described”; and
- whether the exercise would lengthen the pre-trial processes for little gain.

If, due to these “or other” reasons, discovery would be oppressive, then it should be refused.

As to “the future goal of ensuring a fair trial”, the aim was “equipping each party properly for trial so that they are both in the best possible position to advance their respective cases before the trial judge”. McWalters J then added a crucial caveat—the judge himself also had an interest in the litigation:

“Whilst the parties to the action will be focusing on their narrow interests, the judge, standing above it all, will be focused on the wider interest of uncovering the truth so that when he comes to discharging his duty of determining the rights and liabilities of the parties he can be confident he is truly dispensing justice in the case... [in addition]... The efficient disposal of the litigation is a matter which may or may not be of concern to the parties but it must be of concern to the judge.”

In McWalters J’s view, a judge must not only prevent the discovery process from being used as a “tactical weapon” to create delays or increase costs but “pro-actively maximise the case management benefits” of discovery. In a telling passage, the learned judge remarked:

“Thus in the context of civil litigation the determination of whether discovery is necessary involves a triangulation of interests — the interests of the plaintiff, the interests of the defendant and the interests of the judge. The judge accommodates all these interests by a balancing exercise in

¹⁴ RHC O 24 r 8 reads “(1) On the hearing of an application for an order under rule 3 or 7 the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs. (2) No order for the disclosure of documents shall be made under section 41 or 42 of the Ordinance, unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.”

which he firstly takes into account the likely value of the materials to the person seeking discovery. This is expressed as assessing what information it is reasonable to suppose the documents contain and determining whether such information may, not will, enable the party seeking them to advance its own case or damage that of its opponent. After making this assessment he then places into the balance the interests of the opposing parties and his own interests as ultimate arbiter of the rights and liabilities of the parties and his case management responsibilities.”

The judge could fulfil this task by ordering discovery, declining it or by ordering a “more qualified form of discovery” than that sought.

The Order

The learned judge was satisfied that each of the three classes of document sought by the plaintiff was “correctly drafted”. He did not accept the defendants’ contention that if a class was so wide as to contain irrelevant documents it was “not a valid class”. McWalters J also held that the documents in the three classes were relevant. Finally, the learned judge was understandably dismissive of the defendants’ counsel’s submission that there could be irrelevant documents among those sought given he “(could not) say how many, primarily because he and his solicitors have not examined them”. Nor would the discovery process “be unfairly onerous, unreasonably inconvenient or unduly costly” to the defendants. Accordingly, the specific discovery application was granted as sought, subject to a minor amendment.

Toeca—Consequences

The judgment combines both an explanation of the traditional *Peruvian Guano* test and a call for judicial activism. The former is brief and, with respect to the learned judge, does not adequately address the deficiencies of *Peruvian Guano* whilst the latter is, ironically, necessitated by these deficiencies. Indeed, the judgment reveals the inconsistencies of the present discovery regime. The irony is that McWalters J need not have to set down his thoughts on *Peruvian Guano* given that the application before him was a relatively narrow one requiring only a consideration of O 24 rr 7 and 8. Nevertheless, we should be grateful for his words given that they provide one of the few insights into how the courts will—post CJR—deal with discovery in general and specific discovery in particular.

The Concept of Relevancy—the Problem with Peruvian Guano

In 1993, a joint English Law Society and Bar Council report “Civil justice on trial - the case for change” (also known as the Heilbron/Hodge report)¹⁵ contained the following, by today, familiar comment:

“At present, the cost of litigation makes it uneconomic to go to court unless the amounts at stake are very large. Our system of justice is in practice available only to the very rich or the very poor. Much of the expense is caused by discovery.”

Lord Woolf referred to the above passage in the “Access to Justice” Interim Report¹⁶ two years later and added that many practitioners whom His Lordship had consulted also identified discovery as a source of delay and expense. Whilst His Lordship accepted that discovery was, in theory, necessary and desirable for the proper resolution of disputes, there was a problem with its practice:

“The result of the *Peruvian Guano* decision was to make virtually unlimited the range of potentially relevant (and therefore discoverable) documents, which parties and their lawyers are obliged to review and list, and which the other side is obliged to read, against the knowledge that only a handful of such documents will affect the outcome of the case. In that sense, it is a monumentally inefficient process, especially in the larger cases. The more conscientiously it is carried out, the more inefficient it is.”

The problem, His Lordship added, was that the *Peruvian Guano* test was “more readily applied to the limited number of documents” in that case than the “vast bulk of documents” which arise in complicated modern litigation. It is, perhaps, worth noting that there were only five “groups” of documents (amounting to 20–30 individual items at most) sought by defendants from the plaintiffs in *Peruvian Guano*, a number which would be considered minuscule by today’s courts.¹⁷

¹⁵ The report, published in June 1993, suggested the replacement of *Peruvian Guano* with a new procedure for limiting discovery by mutual agreement. Many of its other recommendations, including the increased use of ADR, reappeared in Lord Woolf’s reports and also in the CJR Working Party’s interim and final reports.

¹⁶ See <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/interim/contents.htm>. The Interim and Final Reports led to the introduction of the Civil Procedure Rules (CPR) in England in 1999.

¹⁷ See (1882-83) LR 11 QBD 55 at pp 56–57.

The advent of the photocopier was identified by Lord Woolf as a major culprit in the creation of the aforementioned “vast bulk of documents”. Indeed, as noted by McWalters J, the following observation was made by Colman J in *O Co*:

“The excessively wide application of Lord Justice Brett’s formulation of relevance has probably contributed more to the increase of the costs of English civil and commercial litigation in recent years than any factor other than the development of the photocopying machine.”

In 1882, the mimeograph and hot metal typesetting were at the cutting edge of printing technology. The fax machine and photocopier were still decades away, to say nothing of audio and video cassettes, DVDs, CDs, emails, messages on mobile telephones, word-processed documents and internet-based “social media”. Yet, not only did these developments increase the quantity of “documents” for the purpose of discovery, they increased the “nature” of documents.

The definition of a “document” in both England and Wales and Hong Kong has long been accepted as being broader than mere sheets of printed paper. The English CPR 31.4 defines a document as “anything in which information of any description is recorded” and a “copy” as “anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly”. In Hong Kong, the definition of a “document” is left to the courts but the term is understood in much the same way.¹⁸ The problem is, however, that many people—lawyers included—still think of printed texts rather than USB flash drives when they hear the word “document”. That failure of imagination, combined with an adherence to a discovery test that was created when “document” meant paper and little else, led to the problems recounted by Lord Woolf. These problems were not resolved in the CJR and were not even addressed by McWalters J in *Toeca*.

Applying the Test—a Divergence of Approach

McWalters J’s defence—if we can call it that—of the *Peruvian Guano* test was, in essence, that it was “just the starting point, not the finishing

¹⁸ Audio recordings were held to be documents in *Grant v Southwestern and County Properties Ltd* [1974] 3 WLR 221; films and film negatives in *Senior v Holdsworth, ex p Independent Television News Ltd* [1975] 2 WLR 987; and computer files and e-mails in *Derby & Co Ltd v Weldon (No 9)* [1991] 1 WLR 652 and *CSAV Group (HK) Ltd v Jamshed Safdar* (unrep., CACV 55/2007, [2007] HKEC 980).

point” of discovery. The next stage was to apply the test. Yet, the manner of applying the test, if the learned judge is correct, is little more than ensuring that any document for which discovery is sought relates to the party’s pleaded case. Moreover, that pleaded case should be looked at “broadly” rather than in a “detailed” manner, as per Colman J in *O Co v M Co* and Deputy High Court Judge H Wong SC in *Chan Hung*. If so, this second stage adds little to the discovery process.

As Bokhary JA stated in *Aktieselskabet Dansk Skibsfmansiering v Wheelock Marden & Co Ltd*,¹⁹ one of the purposes of pleadings is to “limit and define the issues to be tried and as to which discovery is required”. To suggest, as McWalters J does, that discovery should be so limited merely reiterates the purpose and primacy of pleadings without clarifying how and to what (paper documents and non-paper documents alike) that process should be applied.

Colman J’s solution to the *Peruvian Guano* problem was to limit discovery to those documents which “in the ordinary way can be expected to yield information of substantial evidential materiality to the pleaded claim and the defence to it in the broad sense which I have explained”. This approach was referred to with approval by Simon Brown LJ in *Portman Building Society v Royal Insurance Plc*.²⁰ At about the same time as Colman J’s comments, the English judiciary issued *Practice Direction (HC: Civil Litigation: Case Management)*²¹ in which it was clearly stated that the courts would henceforth exercise their discretion “to limit” discovery.

In the event, both Colman J’s efforts and this practice direction were rendered obsolete by the introduction of disclosure and the abolition of discovery in the CPR.²² Other common law jurisdictions have also abandoned *Peruvian Guano* or are in the process of doing so. Under the Australian Federal Court Rules, there is “standard discovery” of documents which are “directly relevant”²³ and the state courts in New South Wales, Victoria and Queensland adopt a similar approach. Singapore has abandoned *Peruvian Guano* in favour of a form of standard disclosure

¹⁹ [1994] 2 HKC 264 at 269–270. The learned judge was adopting *The Supreme Court Practice* 1993 para 18/12/2.

²⁰ [1998] PNL 672.

²¹ [1995] 1 WLR 262.

²² By CPR Part 31.6, standard disclosure requires a party to disclose only—(a) the documents on which he relies; and (b) the documents which (i) adversely affect his own case; (ii) adversely affect another party’s case; or (iii) support another party’s case; and (c) the documents which he is required to disclose by a relevant practice direction. In essence, automatic disclosure is required only of the first two of the four categories of document identified by Lord Woolf.

²³ Division 20.14 (1)(a) see http://www.comlaw.gov.au/Details/F2011L01551/Html/Text#_Toc297989757.

similar to that in the CPR.²⁴ In the Canadian jurisdictions of Alberta, Ontario and British Columbia, traditional discovery has been replaced, to varying degrees, by a process which focuses on a “discovery plan” or “case plan”.²⁵ In New Zealand, the strict *Peruvian Guano* approach was replaced by a revised set of rules in February 2012.²⁶

With respect to the challenges of technology, Practice Direction 31B²⁷ was introduced in England to encourage and assist litigants to disclose electronic documents (or e-discovery, as it is commonly known) “in a proportionate and cost-effective manner”. Similarly, the Australian Federal Court Practice Note CM6—Electronic Technology in Litigation²⁸ governs those cases where the discovery of electronic documents has been ordered and the Supreme Court of New South Wales introduced Practice Note No SC Gen 7²⁹ on e-discovery as long ago as July 2008. The Singapore Practice Direction 3 of 2009 on Discovery and Inspection of Electronically Stored Documents³⁰ also contains detailed guidance on how parties should approach e-discovery. In January 2008, a group of Canadian lawyers, judges and computer experts published “The Sedona Canada Principles: Addressing Electronic Discovery”,³¹ which have subsequently been approved by judges in Alberta and Ontario.

Hong Kong lags behind its common law cousins on all three issues. First, although Colman J’s “limiting discovery” approach was followed in several cases,³² it was ultimately rejected in *Chan Hung*. Second, the post-CJR RHC retained the *Peruvian Guano* test rather than adopting standard disclosure. Third, the RHC is silent on e-discovery and, three years after the CJR, there is no Practice Direction on the issue. How this lamentable state of affairs could be remedied is addressed in the conclusion of this article.

²⁴ Order 24 r 1, see <http://app.supremecourt.gov.sg/data/doc/ManagePage/97/eROC2006rev/eROC2006.htm>.

²⁵ Ontario r 29.1, see http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm.

²⁶ Part 8, subpart 1, r 8.7, see http://www.legislation.govt.nz/act/public/1908/0089/latest/DLM147653.html?search=ts_act_judicature+act_resele.

²⁷ See http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/practice_directions/pd_part31b.htm.

²⁸ See http://www.fedcourt.gov.au/how/practice_notes_cm6.html.

²⁹ See http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/pages/444.

³⁰ See http://app.supremecourt.gov.sg/data/doc/ManagePage/temp/4nuc3c45i15f0f45uffl1b55/practice_direction_no.3_of_2009.pdf.

³¹ See <http://www.lexum.com/e-discovery/documents/SedonaCanadaPrinciples01-08.pdf>.

³² *A v B* (unrep., [1998] HKLRD (Yrbk) 542); *Yung Yuen Ling v Wong Ming Kan* (unrep., HCA 231/2004, [2006] HKEC 2231); *Chan Kwok Hong v AXA China Region Insurance Co (Bermuda) Ltd* (unrep., HCA 2563/2007, [2009] HKEC 797).

Necessity—a Limited Solution

As McWalters J observed, a court will only order discovery under O 24 rr 3, 7 and 7A if it is necessary “for disposing fairly of the cause or matter or for saving costs” as per RHC O 24 r 8. This is a useful check on *Peruvian Guano* and, as the learned judge set out, provides a means by which the courts can ensure that the process is not used as a “tactical weapon”. Unfortunately, however, it does not apply to discovery by the parties without order under O 24 r 2. Therein is the limit of its utility and an oddity.

Peruvian Guano survived the CJR because of “insufficient compliance rather than excessive disclosure” with CPR-style standard disclosure “thought likely to facilitate the unscrupulous hiding of material documents”.³³ It hardly needs saying that, if true, this is a sad indictment of the legal profession in Hong Kong. Moreover, given that O 24 r 2 on “automatic discovery” has been left unchanged by the CJR, there is no preset obligation upon the parties to remedy this substandard approach.

Under the CPR, English parties must include a “disclosure statement” in their lists of documents³⁴ whereas a Hong Kong party need only verify its list of documents if specifically asked to do so by the other side.³⁵ In addition, English parties must “make a reasonable search for [the disclosed] documents” by reference to the numbers involved, the complexity of the proceedings and the practical difficulties of carrying out such a search. They must also explain if and why they have not searched for any documents.³⁶ By contrast, Hong Kong’s Practice Direction 5.2 para 5 simply states that the parties “should proceed with discovery without the need to wait for an order of the Court” and “try to agree” on limiting discovery “with a view to achieving economies in respect of discovery”.

If it is true that Hong Kong litigants and lawyers do not take their discovery obligations seriously, then it is curious that the RHC and Practice Direction 5.2 leave them to their own devices. A judge may, of course, intervene at a case management conference (CMC)³⁷ or upon an application under RHC Order rr 3 or 7. The damage, however, in terms

³³ Another reason for keeping discovery given by respondents in the CJR consultation exercise was that CPR-style disclosure would require greater input by senior lawyers.

³⁴ CPR 31.10(6) A disclosure statement is a statement made by the party disclosing the documents—(a) setting out the extent of the search that has been made to locate documents which he is required to disclose; (b) certifying that he understands the duty to disclose documents; and (c) certifying that to the best of his knowledge he has carried out that duty.

³⁵ Under RHC O 24 r 2(7).

³⁶ CPR 31.7.

³⁷ Under RHC O 25 r 1A, the first CMC usually takes place shortly after the close of pleadings and it fixes the procedural timetable thereafter.

of wasted time and wasted costs incurred in dealing with a party that has sought to starve or bury its opponent of or in documents, may have already been done by the time this takes place.

At this stage some readers may ask “What of Order 24 rule 15A? Surely that is the answer to the problem?” This provision does, of course, enable the court to make an order limiting the discovery of documents or directing that the discovery take place in a particular manner (eg by exchange of copy documents without the need for a list) on its own initiative. Unfortunately, despite being in existence for almost three years, we have no guidance on how or when this power will be exercised. McWalters J did not refer to O 24 r 15A in his judgment in *Toeca* and there are no other reported authorities which address it. Another problem is that, unless an early application is made by one or more of the parties, such an order would first be considered by the court at the CMC. As indicated above, Practice Direction 5.2 para 5 instructs the parties to get on with discovery rather than wait for the court’s intervention. As with O 24 r 8, r 15A is an *ex post facto* provision which provides acts as palliative rather than a vaccine for the abuse and misuse of discovery.³⁸

Citic—the Dispute

On 20 October 2008, the plaintiff published a profit warning announcement³⁹ that it had entered into various forward contracts in respect of three foreign currencies which led to a “Mark to Market” potential estimated loss of \$14.7 billion. The profit warning announcement indicated that the plaintiff became aware of its financial exposure on 7 September 2008.

The plaintiff obtained three bank loans on 25 September and 10 and 14 October 2008 (ie before the profit warning announcement). The defendants alleged that, at the time of negotiating and obtaining these loans, the plaintiff had not disclosed its financial risk exposure to any potential lenders. In the absence of any evidence to the contrary, Wright J drew the inference that no such disclosure was made. Unsurprisingly, the defendants added that the plaintiff attempted to conceal its knowledge of the sustained and anticipated losses on the forward contracts and to conceal its financial risk exposure from its creditors and both existing and potential investors.

³⁸ McWalters J’s “triangulation of interests” was referred to by Deputy Judge Coleman SC in *Re LehmanBrown Ltd* [2011] 4 HKLRD 237 without further elaboration.

³⁹ In accordance with r 13.09 of the HKSE Listing Rules.

On 16 March 2009 a magistrate issued 27 search warrants under s 50(7) of the Police Force Ordinance,⁴⁰ authorising the seizure of:

“...hundreds of thousands of pages of hard copy documents/materials; (b)...a total of 106 computer hard drives (52 removed and 54 clones created from computer servers)... [and] 32 items of computer hardware, including hard drives, computers, laptops and PDAs...”

The plaintiff asserted that all “the surrendered and the Seized Materials”⁴¹ were covered by LPP and that some of the Seized Materials fell outside the scope of the search warrants. Subsequent negotiations between the parties reduced the volume of materials in consideration but, ultimately, the plaintiff issued proceedings seeking the return of the Seized Materials by the second defendant on the grounds that they were subject to LPP.

Citic—the Judgment

Wright J gave two judgments in this matter. The first judgment addressed the applicability of the crime/fraud exception to LPP.⁴² The second judgment, with which this article is concerned, dealt with the parties’ request for a “ruling on a document-by-document basis as to the application of LPP to each document in case I [Wright J] am found to have erred in regard to the application of the crime/fraud exception”.

Litigation Privilege

The learned judge addressed the general principles of LPP and their relevance to the facts of this particular case. With respect to litigation privilege, Wright J gave a brief summary of its development, touching upon such English authorities as *Waugh v British Railways Board*⁴³ and *PriceWaterhouse v BCCI Holdings (Luxembourg) SA*⁴⁴ on the need to satisfy the “dominant purpose” test. The learned judge also accepted

⁴⁰ See <http://www.hklj.hk/eng/hk/legis/ord/232/s50.html>.

⁴¹ The learned judge defined six documents which had been surrendered by the plaintiff to the Securities and Futures Commission as “the Surrendered Material” and the remaining documents and items seized pursuant to search warrants as “the Seized Material”.

⁴² *Citic Pacific Ltd v Secretary for Justice* (unrep., HCMP 767/2010, [2011] HKEC 407). This judgment has since been superseded by that of the Court of Appeal, see [2012] 2 HKLRD 701.

⁴³ [1980] AC 521.

⁴⁴ [1992] BCLC 583.

Moore-Bick J's view in *United States of America v Philip Morris Inc*⁴⁵ that litigation privilege only applies to documents created when litigation is "reasonably in prospect" if it can be demonstrated that such litigation was "a real likelihood rather than a mere possibility".

Wright J noted that only "one letter was received from a disgruntled shareholder optimistically demanding compensation: the demand was rejected and nothing further eventuated" and "the documents do not indicate the dominant purpose of the advice sought as being in regard to litigation". Consequently, the plaintiff was unable to claim litigation privilege over the seized materials. In the circumstances, and on the facts, this is a logical decision.

Legal Advice Privilege—Who Is “the Client”?

Again the learned judge reviewed the leading English authorities, including the House of Lords' decision in *Three Rivers District Council v Bank of England (No 6)*⁴⁶, from which he cited Lord Scott's comments on the underlying purpose for legal advice privilege, which can be summed up as the need to ensure that communications between clients and lawyers, whereby the former seeks the latter's help, cannot be examined by "the police, the executive, business competitors, inquisitive busybodies or anyone else".⁴⁷ Wright J also accepted, without comment, Lord Scott's observation that legal advice is not restricted to "telling the client the law" but also covers advice as to what should "prudently and sensibly be done in the relevant legal context".

Unfortunately, the learned judge also accepted the English Court of Appeal's related judgment in *Three Rivers District Council v Bank of England (No 5)*. In a telling comment, Wright J stated that this decision:

“...despite an unenthusiastic reception by counsel for each party in these proceedings as well as general criticism, remains good law as to the effect on legal advice privilege of the compilation of materials for the purpose of instructing legal advisers by employees of a corporation seeking advice.”

As readers will recall, it was held in *Three Rivers (No 5)* that the Bank of England's "Bingham Inquiry Unit" was the "client" of the Bank's legal

⁴⁵ [2003] EWHC 3028 (Comm).

⁴⁶ [2005] 1 AC 610.

⁴⁷ *Ibid.*, p 650.

advisers, rather than the Bank itself. Consequently, all other officers and employees of the Bank were regarded as “third parties” and any direct or indirect communications to or from them with the legal advisers were not covered by legal advice privilege. Moreover, documents prepared by the Bank’s other employees (or ex-employees) would not be privileged as they were “no more than raw material on which the BIU, as the client of Freshfields, would thereafter seek advice”. Only direct or indirect communications between a lawyer and client for getting or giving legal advice and documents “evidencing” the substance of the same would be privileged.

Following the logic of *Three Rivers (No 5)*, Wright J determined that the plaintiff’s “Group Legal Department” (GLD), which comprised the Group General Counsel and a secretary, formed the “client” of the plaintiff’s legal advisers. All the plaintiff’s other employees were “third parties” and any communications made with or by them would not be privileged “even if they are intended for submission to the plaintiff’s legal advisers or prepared at the request of the plaintiff or the request of the legal advisers”. The one exception would be the plaintiff’s Board of Directors, who:

“would not fall to be regarded as ‘employees’ or ‘third parties’ in this sense and that communications to/from them would not adversely affect LPP as it is clear that the Group Legal Department acted under their direction.”

The learned judge did not, however, explain the reasons for this departure from *Three Rivers (No 5)*.

Wright J continued by noting that a third-party communication which passes on privileged advice may itself be privileged “because that communication is evidence of the privileged advice within the formulation in *Three Rivers (No 5)*”. Other documents, however, which may have been created or amended in accordance with this advice would not be privileged because “it is the advice which is privileged not the product of the use to which it is put”. Finally, Wright J noted and agreed with Moore-Brick J’s comment in *USA v Philip Morris* that “it is less easy” to hold that all in-house lawyers’ communications with their “company management” are privileged as they will be “involved in aspects of the business that are essentially managerial or administrative”.

The Order

Much of Wright J’s judgment addresses the documents in question. There is a series of schedules of seized materials to which LPP is applied in full, partially or not at all. Interestingly, the learned judge held that board

minutes are not privileged *per se* even if “they have been prepared in draft form and circulated to others including legal advisers”. In such an instance, they are merely “the product of the legal advice rather than the legal advice itself”. If they do contain details of legal advice, this can be properly redacted.

Citic—the Consequences

A Missed Opportunity

This is not the first time that *Three Rivers (No 5)* has come before a Hong Kong court. In *Akai Holdings Ltd v Ernst & Young*,⁴⁸ the CFA had the opportunity to address the *Three Rivers* authorities. As with *Citic*, the case concerned claims for both litigation and legal advice privilege. In the Companies Court, Kwan J dismissed both claims and based her decision for doing so in respect of legal advice privilege on *Three Rivers (No 5)*. The Hong Kong Court of Appeal made no comment on legal advice privilege and followed Kwan J’s view on litigation privilege.

In the CFA, Bokhary PJ reviewed the parties’ arguments and the lower courts’ findings on LPP. Ultimately, however, the CFA reversed the concurrent findings of the CFI and Court of Appeal on the availability of litigation privilege. The learned judge continued:

“So there is no need to decide the issue of legal advice privilege. The circumstances do not preclude a decision by us on the issue. But it is preferable not to decide it since there is no need to do so and we do not have the opinion of the Court of Appeal on it. Suffice it to say this for any future case that requires a decision on a legal advice privilege issue. Legal advice privilege, being a category of legal professional privilege, is of course to be approached in a manner appropriate to a fundamental right.”

This “non-decision” provided Wright J with the opportunity to cement the English Court of Appeal’s erroneous decision in Hong Kong law. As already noted, the learned judge commented that both counsel in *Citic* gave *Three Rivers (No 5)* an “unenthusiastic reception”. We do not, of course, know exactly what form this “unenthusiastic reception” took in the absence of further details. What is also absent from the judgment are any references to *Akai*, the numerous academic analyses of *Three Rivers*

⁴⁸ (2009) 12 HKCFAR 649.

(No 5) or any non-English authorities on the subject. Had the learned judge been directed to any of these, the outcome of *Citic* might have been a little different.

“Good Law”—How?

Wright J stated that *Three Rivers (No 5)* was “good law” on legal advice privilege. Is this true or, as many believe, is it “bad” law?

The crucial passage in the Court of Appeal’s judgment was as follows:

“Mr Stadlen [Counsel for the Bank] 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 [Counsel for the Creditors] 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.”

Bankim Thanki QC, who appeared on the Bank’s behalf, has suggested⁴⁹ that the Court of Appeal conflated two separate issues when dealing with this question from his opposing counsel:

- 1 Who is the client?
- 2 Where the client is a corporation (or other legal person), who is authorised to communicate with its lawyers?

Unfortunately, the passage above does not give a clear answer to these two questions. Indeed, as Mr Thanki points out,⁵⁰ the Court of Appeal’s judgment “is almost devoid of analysis” on the definition of who or what is a client in the legal advice context. Moreover, a perusal of the Court of Appeal’s judgment reveals that its decision on the identity of the client seems to rest, in large part, upon *Anderson v Bank of British Columbia*.⁵¹ This 19th-century decision concerned a threat of litigation against an English bank in respect of an account at its Oregon branch and communications between the London manager and the branch manager

⁴⁹ Thanki. B *The Law of Privilege* (OUP, 2nd ed 2011) para 2.11.

⁵⁰ *Ibid.*, para 2.12.

⁵¹ (1875–76) LR 2 Ch D 644.

in Oregon in respect of that account, and which limits the rights of an agent to claim privilege on behalf of his principal.

Both the correctness of the decision in *Anderson* and its subsequent use in *Three Rivers (No 5)* were questioned by counsel for the Law Society (as an intervener) before the House of Lords in *Three Rivers (No 6)*. Indeed, counsel went so far as to submit that “*Anderson* is an insecure foundation for the Court of Appeal’s novel proposition” and argued that, when a solicitor is retained by a company, the company is the solicitor’s “client”. They were not alone in doing so at the time and many others have criticised *Three Rivers (No 5)* in the years since the judgment was handed down.⁵² Suffice to say, *Anderson* makes no mention of the various statutory, common law and regulatory provisions governing the relationship between lawyers and their clients in the early 21st century and is also silent on same issues with regards to the operation of modern companies (or public bodies). Counsel for the Bank, the Bar Council (another intervener), the Law Society and the Attorney General all submitted before their Lordships that the approach in *Balabel v Air India*⁵³ was to be preferred to that in *Three Rivers (No 5)*. Some also referred to the US case of *Upjohn Co v United States*⁵⁴ in support of their submissions. Sadly, their Lordships demurred.⁵⁵

There are many serious questions raised by *Three Rivers (No 5)*, including:

- If the BIU was the “client”, was the Court of Appeal suggesting that Freshfields should bill its three members rather than the Bank?

⁵² See *Hollander on Documentary Evidence* (9th edn, 2006) para 13.010 and para 13.012; *Passmore on Privilege* (2nd edn, 2006) para 2.029, para 2.035 and para 2.037; Seymour, J, “Legal Advice Privilege and Presentational Advice” (2005) 64(1) *CLJ*; and Andrews, N, “Legal Advice Privilege’s Broad Protection – the House of Lords in *Three Rivers (No.6)*” (2005) 24 *CJQ* 185. [1988] Ch 317.

⁵⁴ 449 US 383 (1981).

⁵⁵ Lord Scott gave five reasons for their Lordships’ refusal to comment: “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* 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”.

- Was the Court suggesting that those three staff would be personally liable, as Freshfields’ “client” for those—doubtless not inconsiderable—fees?
- If the Governor of the Bank, as a “third party”, asked Freshfields for a report on their work, would the firm have to refuse or ask the BIU members for permission to disclose what would be confidential client information to the BIU’s own superior?⁵⁶
- Did the Court of Appeal believe that only the BIU could take action against Freshfields in the SDT or the courts if the firm breached its professional duties?
- If so, how would such a claim be brought given that the BIU was neither a corporate entity, nor a partnership but merely a committee formed of three Bank employees?
- Was the Court of Appeal suggesting that the BIU was the “client” for some purposes and not for others? If so, on what basis did it draw this distinction?⁵⁷
- What would happen if one or more or all of the BIU left their employment, with or without being replaced, at the Bank?

The Court of Appeal gave no answers to these questions, nor does Wright J address them in the context of the plaintiffs and the GLD in *Citic*. Some may suggest that neither the Court of Appeal nor Wright J should be expected to answer these questions given that their judgments consider the definition of “client” in a specific context, namely the scope of LPP. The problem is that LPP arises from the very nature of the solicitor-client relationship—the identity of the client is not multiple choice exercise, in which the answer depends upon the context in which the question is raised.

At the risk of stating the obvious, that solicitor-client relationship lies at the heart of the common law system, the conduct of solicitors in England and Wales is governed by the Solicitors Regulatory Authority (SRA) Code of Conduct, of which Principle 4 requires solicitors to “act in the best interests of each client”.⁵⁸ Similarly, Rule 2(c) of the Hong Kong Solicitors’ Practice Rules stresses a solicitor’s “duty to act in the

⁵⁶ Interestingly, the Governor’s Private Secretary was a member of the BIU so presumably, the Governor could ask him. That does, however, raise the question of whether the Private Secretary could answer that question without his BIU colleagues’ agreement. Mr Thanki described the proposition that the BIU was Freshfields’ client whilst the Governor was not as “decidedly odd”.

⁵⁷ Some observers have suggested that the Court of Appeal didn’t define the BIU as Freshfields’ “client” but the language of the judgment appears unambiguous.

⁵⁸ See <http://www.sra.org.uk/solicitors/handbook/code/content.page>.

best interests of his client”.⁵⁹ That the English Court of Appeal could create confusion over the nature of this duty and to whom it is owed undermines the contention that *Three Rivers (No 5)* is “good law”.

Finally, as already noted, Wright J did not follow *Three Rivers (No 5)* in respect of the role of the Board of Directors. Instead, the learned judge said that they “would not fall to be regarded as ‘employees’ or ‘third parties’” without explaining what he meant by this. It is a clear departure from *Three Rivers (No 5)* whereby the Governor of the Bank of England was considered to be a “third party”. It may make practical sense but it is not “good law” if *Three Rivers (No 5)* is also “good law”.

“Good Law”—Where?

As Wright J noted, in *Three Rivers (No 6)* the House of Lords declined to express a view on the Court of Appeal’s interpretation of “client” in *Three Rivers (No 5)*, with Lord Scott stating that “The guiding precedent on the issue will continue to be the Court of Appeal judgment in *Three Rivers (No 5)*”. Consequently, it is true enough to say that *Three Rivers (No 5)* represents the state of the law in England and Wales. Until Wright J’s judgment in *Citic*, however, the same could not necessarily be said of Hong Kong.

In *Solicitor (24/07) v Law Society of Hong Kong*,⁶⁰ after reiterating the continued persuasive effect of Privy Council and House of Lords decisions, Li CJ remarked:

“At the end of the day, the courts in Hong Kong must decide for themselves what is appropriate for our own jurisdiction.”

The former Chief Justice added that, as far as the CFA is concerned, equal respect should be accorded to decisions of, say, the Federal Court of Australia or the Supreme Court of Canada as to decisions of the Privy Council or House of Lords. This expansive approach is also consistent with the Chief Justice’s remarks:

“Compared to many common law jurisdictions, Hong Kong is a relatively small jurisdiction. It is of great benefit to the Hong Kong courts to examine comparative jurisprudence in seeking the appropriate solution for the problems which come before them.”

⁵⁹ See http://www.hklawsoc.org.hk/pub_e/professionalguide/volume1/default.asp?cap=1.1.1.

⁶⁰ (2008) 11 HKCFAR 117.

In *China Field Ltd v Appeal Tribunal (Buildings) (No 2)*,⁶¹ the CFA returned to this subject. Lord Millett NPJ commented:

“The jurisdiction to ascertain, declare and develop the common law of Hong Kong formerly exercisable by the Privy Council is now exercisable by this Court [i.e. the CFA]. It will continue to respect and have regard to decisions of the English courts, but it will decline to adopt them not only when it considers their reasoning to be unsound or contrary to principle or unsuitable for the circumstances of Hong Kong, but also when it considers that the law of Hong Kong should be developed on different lines.”

Hence, it can be argued that *Three Rivers (No 5)* was not “good law” in Hong Kong until Wright J applied it in *Citic*, given that Kwan J’s decision in *Akai* was rendered otiose by the CFA, even if Bokhary PJ declined to comment on her application of *Three Rivers (No 5)*. It is to be hoped that, if and when the Hong Kong Court of Appeal looks at *Citic*, it may take into account the many criticisms of *Three Rivers (No 5)* and the former Chief Justice’s view in *Solicitor (24/07)* that “the courts in Hong Kong must decide for themselves”.

“Good Law”—an Alternative View

Bokhary PJ observed in *Akai* that *Three Rivers (No 5)* was “expressly rejected” by the Federal Court of Australia in *Pratt Holdings Pty Ltd v Commissioner of Taxation*⁶² and in *Kennedy v Wallace*.⁶³ Neither case was discussed in detail in the *Akai* judgment nor are they even cited in *Citic*. They are, however, worthy of consideration.

Kennedy concerned a search warrant that was executed at the appellant’s home by the Australia Federal Police (assisted by officers of Australian Securities and Investments Commission (ASIC)) in November 2003. A number of items were seized including some handwritten aide-memoire over which the appellant claimed LPP. At the hearing before the primary judge,⁶⁴ the claim for LPP failed because the appellant failed to establish that the dominant purpose for making the notes was to obtain legal advice. He also failed to establish a “necessary connection” between the

⁶¹ (2009) 12 HKCFAR 342.

⁶² (2004) 136 FCR 357, [2004] FCAFC 122.

⁶³ (2004) 142 FCR 185, [2004] FCAFC 337.

⁶⁴ Cases are heard at first instance by single “primary” judges. Appeals are heard by the “Full Court” comprising three Judges, the only avenue of appeal from which lies to the High Court of Australia.

notes and “the administration of justice and the proper functioning of the legal system in Australia”. Gyles J concluded that the appellant’s meeting with his legal adviser was “not for a purpose that would entitle the notes prepared before the meeting to the protection of legal professional privilege”.⁶⁵

On appeal, the full court agreed with the primary judge’s first finding that the appellant had not demonstrated that the dominant purpose for the creation of the notes was to obtain legal advice. Despite that, the full court also discussed the wider issues raised by the case at some length. Of particular interest are the full court’s comments on whether legal advice privilege attaches to an “uncommunicated” personal note,⁶⁶ such as the appellant’s aide-memoire. The second respondent’s submission was that these are not privileged if one seeks legal advice privilege rather than litigation privilege, and it relied upon *Three Rivers (No 5)* in doing so. Allsop J did not agree, commenting:

“I do not think that *Three Rivers (No 5)* in the Court of Appeal, to the extent it refused to recognise legal professional advice privilege on documents prepared with the dominant purpose of obtaining legal advice, but not constituting the communication, reflects the law in Australia. For the reasons expressed below, I do not understand the law in Australia to deny privilege to a document made with the dominant purpose of obtaining legal advice on the basis that the document does not amount to the communication.”

The learned judge added:

“Advice cannot be given without communication. But that does not mean that no privilege attaches to any document created for the purpose of obtaining the advice (engaging in the communication) until and unless the document is used as part of a communication. That appears to me to undermine the privilege and detract from the protection of the communication itself.”

In England, according to *Three Rivers (No 5)*, only actual (or intended) lawyer-client communications and documents “evidencing” such communications are privileged. In Australia, the privilege appears to be wider, given that it covers a client’s “documents created for the purpose

⁶⁵ The trial judge found as a matter of fact that the underlying purpose of the applicant’s meeting with his legal adviser was to take all available steps to keep his business dealings secret from ASIC.

⁶⁶ “Uncommunicated” in that it did not form a communication to a legal adviser.

of obtaining...advice". It is worth bearing in mind that, in *Balabel*, the English Court of Appeal accepted that a lawyer's working papers are privileged. It would appear correct that, provided that they are created for the purpose of obtaining legal advice, a client's working papers should be similarly protected. Hence, *Kennedy* is to be preferred to *Three Rivers (No 5)*.

In *Pratt Holdings*, the appellant company sought legal advice relating to its proposed refinancing and reconstruction programme. Its lawyers suggested that it obtain a valuation of its assets from an independent accounting firm so that they could provide the appropriate advice. As a consequence, the appellant acquired the same in order to receive the aforementioned legal advice. It was the accountants' report—plus associated notes and correspondence—over which the appellant sought legal advice privilege.

The primary judge held that the accountants were not a representative or agent of the appellant for the purpose of obtaining legal advice. Hence, even if the communications between them were confidential and made for the dominant purpose of obtaining legal advice, they were not privileged. Such a view would be in accordance with *Three Rivers (No 5)*. The appellant sought to overturn this decision on the basis that the correct position was that a communication is privileged provided both the dominant purpose criterion is satisfied and the communication is confidential. The appellant added that the existence of litigation was irrelevant. Finally, it submitted that the fact that a communication was made by an agent of the client was irrelevant provided it was made "at the direction or with the authority of the client who holds the requisite purpose". These views would not, clearly, be in accordance with *Three Rivers (No 5)*.

The full court addressed the underlying principles of LPP and, in particular, reflected on the different approach taken by the English and Australian courts towards litigation privilege and legal advice privilege. Stone J noted that in *Eso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia*⁶⁷ it was held that for LPP to apply it was necessary only for the documents to have been created for the dominant purpose of obtaining legal advice, with no distinction between advice and litigation privilege. Stone J added that, in contrast, in *Three Rivers (No 6)* in the Court of Appeal⁶⁸ Lord Phillips of Worth Matravers MR remarked "The justification for litigation privilege is

⁶⁷ (1999) 201 CLR 49, [1999] HCA 67.

⁶⁸ [2004] QB 916.

readily understood. Where, however, litigation is not anticipated it is not easy to see why communications with a solicitor should be privileged”.

Demonstrating a deep understanding of LPP and great subtlety, Stone J added:

“There is a single rationale in Australia for legal professional privilege: the rationale applies to litigation privilege and to legal advice privilege. However, it does not follow from accepting a single rationale that the distinct categories of litigation and advice privilege should no longer be recognised. A single rationale or policy may well be manifested in distinct situations and categorising those situations differently may be a useful analytic device, allowing the formulation of more specific rules to assist in implementing the rationale.”

The learned judge added, however, that this did not necessarily mean that all communications between legal adviser and client will be privileged. What was important was to ensure that the principle of full and frank disclosure between clients and lawyers which underlies LPP was “not sabotaged by rigid adherence to form that does not reflect the practical realities surrounding the application of privilege”.

As to the accountants’ report, Stone J noted that the “complexity of present day commerce” and the “increasing volume, complexity and technicality in the law” meant that clients needed to obtain the advice of non-legal experts when “formulating a request for legal advice”. The learned judge concluded:

“The coherent rationale for legal professional privilege developed by the High Court does not lend itself to artificial distinction between situations where that [non-legal] expert assistance is provided by an agent or alter ego of the client and where it is provided by a third party. Nor, in my view, should the availability of privilege depend on whether the expert opinion is delivered to the lawyer directly by the expert or by the client. Provided that the dominant purpose requirement is met I see no reason why privilege should not extend to the communication by the expert to the client.”

Clearly, this view goes far beyond that expressed in *Three Rivers (No 5)* and it is, therefore, hardly surprising that the English Court of Appeal’s views found little traction in Australia.⁶⁹ It is also possible that, given that

⁶⁹ In *Skandinaviska Epskilda Banken AB (Publ) v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] SGCA 9, the Singapore Court of Appeal preferred the *Pratt* approach to that in *Three Rivers (No 5)*.

it is based upon and expresses the “single rationale” for LPP in Australia, it may go too far for the Hong Kong courts. It is, nevertheless, suggested that the Hong Kong courts should pay attention to Allsop J’s and Stone J’s analyses when they next consider the status of LPP generally and *Three Rivers (No 5)* in particular.

Finally, if the Australian approach is too much of a departure from current Hong Kong practice, the Court of Appeal need only to look at the US authority of *Upjohn* when considering how to deal with *Citic*. The judgment concerned the status of questionnaires and interview notes created during a US company’s internal investigation into potentially dubious payments made to non-US government officials. The company’s lawyers prepared the questionnaire which was sent to its overseas managers, who were to send their replies to the company’s General Counsel and to treat the entire process as “highly confidential”. The General Counsel and external lawyers also conducted interviews with various company employees, including those who had relied to the questionnaire.

The US Internal Revenue Service (IRS) sought disclosure of the questionnaires, replies and interview records and the company contended that they were subject to attorney-client privilege. The US Court of Appeals for the Sixth Circuit held that these documents were not privileged insofar as they were created by persons who were not responsible for directing the company’s actions in response to legal advice—referred to as the “control group”. The similarity in singling out a “control group” in *Upjohn*, the BIU in *Three Rivers (No 5)* and GLD in *Citic* is quite striking.

The US Supreme Court overturned the Court of Appeals’ decision. Rehnquist J, delivering the opinion, indicated that the “control group” approach was inimical to encouraging full and frank communications between lawyers and their corporate clients. In particular:

“In the case of the individual client the provider of information and the person who acts on the lawyer’s advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group... who will possess the information needed by the corporation’s lawyers.”

Albeit the Supreme Court did not lay down a test, Burger CJ added:

“A communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel [in giving legal advice to the management].”

As already noted, in *Three Rivers (No 6)*, the Law Society argued that a company—and not some sub-set of its officers or employees—should be treated as its solicitor’s “client”. This answers the first of the two “conflated” issues identified by Thanki above. It is suggested that Burger CJ has answered the second question. It is regrettable that the House of Lords failed to address these two issues or accept the Law Society’s or Burger CJ’s answers in *Three Rivers (No 6)*. It is hoped that the Hong Kong Court of Appeal will take a different approach—namely, the one outlined in the conclusion below—if and when it considers *Citic*.

Conclusion

Both *Toeca* and *Citic* demonstrate the dangers of accepting English authorities or practices at face value. McWalters J’s judgment in *Toeca* amounts to little more than a restatement of *Peruvian Guano* (and, oddly, a rallying call for activist judges) whilst Wright J’s judgment in *Citic* is little more than a blanket acceptance of *Three Rivers (No 5)*. Whilst it has been argued here that the former is confused, it does at least address the issues relating to the nature of discovery. Sadly, and with respect, the latter does not do the same with respect to the nature of LPP.

Peruvian Guano style discovery has been discarded in many other common law jurisdictions, including that of its origin, for good reasons. As Lord Woolf and many others have pointed out time and time again, it is expensive, time-consuming and often fails to serve its purpose because of the overly broad nature of the *Peruvian Guano* test. Moreover, satellite litigation, such as *Toeca* itself, over the scope and conduct of discovery has, does and will continue to waste litigants’ time and money unless and until the process is properly controlled. It is, of course, difficult to blame McWalters J too much for simply restating the traditional approach towards discovery given the fact that it has been retained within the RHC and it is not with the learned judge’s power to challenge the contents of the RHC. It is, however, justifiable to blame the judiciary for failing to provide proper guidelines for the conduct of discovery, including electronic discovery, under the auspices of Practice Direction 5.2 or O 24 r 15A. It is also justifiable to blame the wider legal community for retaining discovery, rather than replacing it with CPR-style disclosure, following the CJR.

In respect of the former deficiency, rather than Practice Direction 5.2 para 5 simply exhorting the parties to “proceed with discovery” and attempt to agree on the manner and scope of the same “with a view to achieving economies in respect of discovery”, it could direct parties to carry out this process by reference to a disclosure schedule and list of

issues. Such a process was suggested by the English Commercial Court Working Party on Long Trials,⁷⁰ whose report contains both a sample “list of issues” and “disclosure schedule”. Whilst any reformed Practice Direction 5.2 need not to go into the detail expressed in the Working Party’s report and need not to be applied to low-value cases, even a simplified list of issues⁷¹ and “discovery schedule” would enable the parties and the court to focus on what documents or classes of document should be discovered and why they should be discovered. This would not detract from the continuing application of *Peruvian Guano* but it could, at the very least, save time and costs. Such lists of issues and discovery schedules could also assist the courts at CMCs, not least in laying down the way in which orders limiting discovery under O 24 r 15A could be made.

In respect of the latter deficiency, it is perhaps naive to expect and foolhardy to advocate the abolition of *Peruvian Guano* in Hong Kong so soon after it was retained in the CJR. Such a reform would require the participation of the LegCo, at a time when its members seem to have other things on their minds, and the support of the legal profession, which was singly lacking during the CJR consultation process. Nevertheless, the introduction of something akin to CPR-style disclosure would bring Hong Kong into line with many of its common law cousins, with whom it is competing as a “dispute resolution hub”.⁷²

The problems created by *Citic* are potentially even greater than those created by *Toeca* but are easier to remedy insofar as *Citic* is not an expression of the RHC but a judicial interpretation of the doctrine of LPP. Consequently, there is no need to amend any Practice Directions or the RHC. All that the Court of Appeal needs to do is hold that, for the purpose of legal advice privilege, any communication between an officer or employee of a corporate client and its legal adviser will be privileged if:

- it was made for the purpose of obtaining legal advice for the corporate client; and

⁷⁰ See <http://www.judiciary.gov.uk/publications-and-reports/reports/civil/commercial-court/long-trials-working-party-report>.

⁷¹ For example, the list of issues in a simple contract claim would, broadly, be (1) the form of the contract; (2) the material terms; (3) the breach; and (4) the recoverable losses. The discovery schedule would focus on what documents, if any, related to the material facts in relation to these issues, eg if, under (1) the contract was oral, are there any quotations or notes relating to it?

⁷² By contrast, the Hong Kong government and judiciary have shown no such reticence towards discarding old practices in their promotion of mediation in the jurisdiction. Indeed the Mediation Ordinance passed by the LegCo in 2012 was advocated as a measure to “set out the platform for the development of mediation in Hong Kong and represents a significant milestone in the promotion of mediation” by the Secretary for Justice at its first reading.

- that officer or employee was authorised to communicate (directly or indirectly) with the legal adviser.

Such a clear and simple decision would reflect practical realities; the understanding of the law in England and Hong Kong with respect to LPP prior to *Three Rivers (No 5)*; and the law in other common law jurisdictions such as Australia. There are, of course, those who argue that corporate clients should not be entitled to LPP to the same extent as natural legal persons⁷³ but such an approach should not be adopted in Hong Kong by “stealth”. Instead, to paraphrase Lord Millett in *China Fields*, the Hong Kong courts should only follow non-Hong Kong practices or decisions if they are sound or in accordance with principle or suitable and should reject them if unsound or contrary to principle or unsuitable for the territory or if Hong Kong law “should be developed on different lines”. Both *Toeca* and *Citic* embody practices and reflect decisions which fall within the latter category.

⁷³ Higgins. A, “Legal Advice Privilege and its Relevance to Corporations” (2010) 73(3) *Mod L Rev* 371.

