***Reportable***

**Republic of South Africa**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 16360/2013

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

**A COMPANY**
**AND**
**TWO OTHERS** First, Second and Third Applicants

and

**THE COMMISSIONER FOR THE**
**SOUTH AFRICAN REVENUE SERVICES** Respondent

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**JUDGMENT: DELIVERED: 17 MARCH 2014**

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**BINNS-WARD J:**

[1] This case concerns a claim by the applicants to legal professional privilege; legal advice privilege in particular. Legal advice privilege covers communications between lawyers and their clients whereby legal advice is sought or given.[1] As confirmed by the

[1] *Three Rivers District Council & Ors v. Bank of England* (No. 6) [2004] UKHL 48, [2004] 3 WLR 1274, [2005] 1 AC 610, at para 10 (per Lord Scott of Foscote); also reported in the All England Reports as *Three*

Constitutional Court in *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others*,[2] '[t]he right to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met.'[3] The requirements are (i) the legal advisor must have been acting in a professional capacity at the time; (ii) the advisor must have been consulted in confidence; (iii) the communication must have been made for the purpose of obtaining legal advice; (iv) the advice must not facilitate the commission of a crime or fraud; and (v) the privilege must be claimed.[4] The character of the rule is accepted to be substantive rather than procedural; see *S v Safatsa and Others*[5], adopting a passage in the judgment of Dawson J in *Baker v Campbell*[6] in the High Court of Australia to the effect that '[legal professional] *privilege extends beyond communications made for the purpose of litigation to all communications made for the purpose of giving or receiving advice and this extension of the principle makes it inappropriate to regard the doctrine as a mere rule of evidence. It is a doctrine which is based upon the view that confidentiality is necessary for proper functioning of the legal system and not merely the proper conduct of particular litigation....*'. (The judgments in *Baker v Campbell* provide a compendious and most useful international survey of the pertinent jurisprudence on the history and development of the rule.[7])

[2] The rationale for the privilege has been expressed in various ways and has evolved over the centuries. Thus at one stage the privilege was even considered to be that of the lawyer rather than of the client and, until well into the nineteenth century it applied only in respect of communications in relation to pending or contemplated litigation. In my respectful view the description by Sir Gordon Slynn (as he then was) in *A M & S Europe Ltd v Commission of the European Communities* (*Case 155/79*) [8] would be difficult to better as a modern expression of the ethos underpinning the existence of the rule and the premium that societal values attach to it:

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*Rivers District Council and others v Governor and Company of the Bank of England (No 5)* [2005] 4 All ER 948 (HL).

[2] [2008] ZACC 13; 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC)

[3] *Thint* supra, at para 183.

[4] *Thint* supra, note 124.

[5] 1988 (1) SA 868 (A) at 885-6.

[6] [1983] HCA 39, (1983) 153 CLR 52, (1983) 49 ALR 385. The passage quoted is from para 24 of Dawson J's judgment.

[7] See also Van Niekerk, Van der Merwe and Van Wyk (in collaboration with Barton), *Privilegies in die Bewysreg* (1984) at pp. 28-44 s.v. '*Die Geskiedenis en Grondslae van Regsprofessionele Privilegie*'.

[8] [1983] 1 All ER 705, [1983] QB 878, [1982] ECR 1575, [1983] 3 WLR 17 (at page 732-733 of the All ER report; also quoted by Lord Carswell in *Three Rivers District Council & Ors v. Bank of England* at para 95).

> Whether it is described as the right of the client or the duty of the lawyer, this principle has nothing to do with the protection or privilege of the lawyer. It springs essentially from the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help, and if proceedings begin, for representation; it springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks.

[3] The applicants, which are three companies in a well-known group of companies, have applied for a declaratory order that certain content of two fee notes rendered by their attorneys to the first applicant is properly subject to the claim of legal advice privilege that they have sought to assert as the basis of their refusal to disclose portions of the invoices, when complying with a request by the Commissioner of the South African Revenue Service (SARS) in terms of s 46 of the Tax Administration Act 28 of 2011.[9] Copies of the invoices in question have been supplied to SARS, but the applicants have redacted the content thereof that is subject to the claim of privilege. The application by the companies for declaratory relief has been brought in the context of the Commissioner's insistence on being provided with unexpurgated copies of the documents concerned.[10] It has not been suggested by the

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[9] Section 46 of the Tax Administration Act (as amended) provides:

(*1*) *SARS may, for the purposes of the administration of a tax Act in relation to a taxpayer, whether identified by name or otherwise objectively identifiable, require the taxpayer or another person to, within a reasonable period, submit relevant material (whether orally or in writing) that SARS requires.*

*(2) A senior SARS official may require relevant material in terms of subsection (1) in respect of taxpayers in an objectively identifiable class of taxpayers.*

*(3) A request by SARS for relevant material from a person other than the taxpayer is limited to relevant information related to the records maintained or that should reasonably be maintained by the person in relation to the taxpayer.*

*(4) A person receiving from SARS a request for relevant material under this section must submit the relevant material to SARS at the place and within the time specified in the request.*

*(5) If reasonable grounds for an extension are submitted by the person, SARS may extend the period within which the relevant material must be submitted*

*(6) Relevant material required by SARS under this section must be referred to in the request with reasonable specificity.*

*(7) A senior SARS official may direct that relevant material-*

*(a) be provided under oath or solemn declaration; or*

*(b) if required for purposes of a criminal investigation, be provided under oath or solemn declaration and, if necessary, in accordance with the requirements of section 212 or 236 of the Criminal Procedure Act, 1977.*

*(8) A senior SARS official may request relevant material that a person has available for purposes of revenue estimation.*

The expression '*relevant material*' is specially defined in s 1 of the Act to mean '*any information, document or thing that is foreseeably relevant for tax risk assessment, assessing tax, collecting tax, showing noncompliance with an obligation under a tax Act or showing that a tax offence was committed*'.

[10] In terms of para 2 of the notice of motion the relief sought was worded as follows:

> [A declarator] *that the invoices rendered to the Applicants by their attorneys…, to the extent that such invoices set out the nature of the advice sought by the Applicants from their attorneys and/or the advice given by such attorneys are legally privileged and, as such, the Applicants are not required to disclose them to the Respondent*.

A declaratory order in those terms would have amounted to little more than a statement of law in respect of a principle that in broad terms was common ground between the parties. When this was pointed out, the applicants' counsel submitted a reformulated prayer for relief in the following terms:

Commissioner that the provisions of the Tax Administration Act or any other applicable statutory instrument override a taxpayer's right to claim legal professional privilege. The issue to be determined is thus simply whether the privilege that has been claimed actually subsists.

[4] A brief description of the factual ground is necessary to explain how the issue arose. In the course of an audit of the applicants' tax affairs the Commissioner indicated his requirement that the applicants provide SARS with copies of certain documentation. The requirement included a request for a breakdown of an identified trial balance account in respect of professional fees in the books of one of the applicant companies pertaining to the 2009 year of assessment. In the response given to the Commissioner, the senior tax manager of the second applicant, which was dealing with the Commissioner's requirements on behalf of the other two applicants, gave a breakdown of the fees involved, together with certain 'supporting invoices'. She stated in the relevant portion of the covering letter under which the information was provided: 'We have to date been unable to obtain a copy of the DLA Cliffe Dekker Hofmeyr invoice of Rxxx. We will send this through as soon as we have traced a copy'. (DLA Cliffe Dekker Hofmeyr is a firm of attorneys.[11]) Two tax invoices were in fact involved.

[5] When the feenotes were subsequently traced, the applicants noted (i) that they had been addressed to the first applicant, (ii) that the fees concerned had been raised in respect of legal professional services rendered by the attorneys to the first and third applicants and (iii) that (so it was averred) 'the invoices set out the nature of the advice sought by the first and third applicants'. Privilege was claimed on the basis that 'the nature of the advice sought by the first and third applicants is discernible from the invoices'. The applicants therefore refused, notwithstanding their previous undertaking to provide copies of the documents when they became available, to hand over copies of the fee notes. Their decision was explained in an email to SARS as follows:

> In the response dated 30 August 2013 we note that we will send through the copy of the DLA Cliffe Dekker Hofmeyr invoice as soon as we have traced a copy. We have taken advice on this aspect and note that all communications between attorneys and their clients are legally privileged, including legal invoices. You will note that we did not claim a deduction in respect of these invoices. As such, we will not be providing copies of these legal invoices to you.

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*It is declared that the redacted portions of the invoices annexed to this Order marked 'A' and 'B' are protected from disclosure by reason of legal professional privilege.*

[11] The feenotes concerned had in fact been issued by Hofmeyr, Herbstein & Gihwala Inc., a firm of attorneys that subsequently became part of DLA Cliffe Dekker Hofmeyr.

[6] The respondent responded to the applicants' claim of privilege by stating its inability to accept that the invoices in question (or indeed any lawyer's feenote for that matter) were legally privileged. SARS called on the applicants, should they persist in their stance, to provide it with particulars of their argument in support of their position. It also contended that, even had the invoices been privileged, the privilege would have been waived if the invoice had been made available to the applicants' auditors for the purposes of a financial statement audit. SARS asked the applicants to indicate whether the invoices had been disclosed to the companies' auditors or any other third parties.

[7] The applicants were unable to say with certainty whether the documents had been made available to their auditors, but contended that, even if they had been, the disclosure would have been in confidence for the specific purpose of auditing, and a waiver of privilege would not have been entailed.[12] The applicants reiterated that the basis of their claim of privilege was that the invoices contained 'details of advice sought in confidence from our attorneys'. It was at this stage that the redacted copies of the fee notes were provided to SARS 'in a spirit of co-operation' and purportedly 'without prejudice' to the applicants' right to assert privilege in respect of the whole documents.

[8] SARS refused to accept the redacted fee notes as adequately complying with its demand for information. In an email, dated 12 September 2013, it noted that the applicants had failed to provide any motivation or argument in support of their position. Having considered the disclosed content of the feenotes, SARS asserted that it seemed clear 'that at best such invoices provide a description of the task performed by the advisor and in some cases what documents were reviewed. The detail provided does not in any way constitute advice given by an attorney to a client'. SARS contended that the applicants' position was therefore 'self-evidently unsupportable'. It required the unexpurgated invoices to be furnished to it within 24 hours.

[9] In a letter to SARS, dated 16 September 2013, the applicants reiterated their position in the following terms:

> We confirm that our view is that the legal professional privilege extends to communications between attorneys and clients which are made in confidence for the purpose of obtaining legal advice. The privilege does not only attach to the advice itself. Where the communication is so closely linked to the advice sought that by disclosing the communication the privilege would be undermined, the communication itself does not have to be disclosed.

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[12] Similar contentions about waiver of privilege might conceivably have been raised on the basis of the disclosure to the third applicant of the invoices rendered to the first applicant, but, as that question was not presented, it is unnecessary to consider the position. Similarly, it is unnecessary to go into which of the applicants is able to assert the privilege, as no challenge was raised by the respondent to the standing of any of them.

> As we have previously advised, the invoices in question contain certain narratives which refer specifically to the advice sought, and if disclosed, would undermine the privilege of our communications with our legal advisors. As such, these invoices are privileged. In the spirit of co-operation, we have provided you with the invoices (without conceding that they are not privileged), and redacted only those portions which refer pertinently to confidential advice sought.

[10] The application papers did not give any greater detail as to the basis upon which the alleged privilege was claimed other than that which is apparent from the extracts from the correspondence between the applicants and SARS that have been quoted in the preceding paragraphs. The applicants did not even attach copies of the redacted invoices to their founding affidavit.

[11] It follows that on the founding papers read on their own the court was provided with no basis to examine the assertion of legal advice privilege other than the applicants' say so. Leaving aside the possible effect of their partial disclosure of the documents, the only basis upon which the applicants could have succeeded in obtaining declaratory relief on that approach would be an acceptance by this court of a line of English authority which extends legal professional privilege to the content of solicitors' feenotes as a blanket rule. Whether that authority still holds good, and, if it does, whether this court should apply it, are among the questions to which attention will be given later in this judgment. The point to made, however, is that in general it is not possible to judge whether privilege is validly claimed or not if the context is not provided. This was aptly illustrated in this example given by Lord Scott of Foscote in *Three Rivers District Council & Ors v. Bank of England (No. 6),*[13] at para 42:

> Mr Pollock referred to advice sought from and given by a lawyer as to how to set about joining a private club. He put this forward as an obvious example of a case where legal advice privilege would not be attracted. The reason, Mr Pollock suggested, was that the advice being sought would not relate to the client's legal rights or obligations. I agree that legal advice privilege would not be attracted, not because the advice would necessarily not relate to the client's legal rights or obligations but because the bare bones of Mr Pollock's example had no legal context whatever. If his example were embellished with detail the answer might be different. Suppose the applicant for membership of the club had previously made an unsuccessful application to join the club, believed that his rejection had been inconsistent with the club's admission rules and wanted to make a fresh application with a view to testing the legality of his rejection if he were again to be blackballed. I think Mr Pollock would accept that in those circumstances the communications between the lawyer and the applicant would be protected by legal advice privilege. It would be protected because the communication would have a relevant legal context. It would relate to the legal remedies that might be available if the applicant's application were again unsuccessful.

The difficulty that I have had in the current matter, as I shall explain more fully later, is that the applicants' papers have provided me with virtually nothing by way of relevant legal context. They also did not explain how mere reference in the feenotes to work done or

[13] See note 1, above.

documents considered would 'undermine' the applicants' privilege in respect of the content of communications with their attorneys concerning the seeking and giving of advice.

[12] The respondent's answering papers explained the context in which SARS's insistence on being furnished with uncensored copies of the fee notes was being pursued. It is unnecessary to go into the detail. Suffice it to say that the Commissioner considered that the content of the invoices might go to confirm that the applicants, or fellow entities in the group of companies of which they were part, had knowledge of the flow of funds involved in certain 'structured finance arrangements' in respect of which SARS had decided to reassess the third applicant's liability for payment of income tax and secondary tax on companies. The relevant detail was set out in two letters of findings addressed by SARS to the third applicant in this connection, dated 15 October 2013 and 28 November 2013, respectively, which served as notices in terms of s 80J(1) of the Income Tax Act 58 of 1962[14] and s 42 of the Tax Administration Act.[15] [16] Copies of the letters were annexed to the respondent's answering affidavits.

[13] The applicants took exception to the disclosure of their confidential information by way of the attachment to the respondent's papers of the aforementioned notices. SARS explained its annexure of the material as having been to deal with what the Commissioner had apprehended to be a contention by the applicants that the content of the invoices was not relevant to the investigation being undertaken by SARS. Lack of relevance would have afforded a separate ground for resisting its disclosure, quite discrete from that of legal professional privilege. Having regard to the tenor of the correspondence exchanged between the parties, which was annexed to the founding papers, and in which the applicants' right to contend that the information sought was irrelevant was reserved, I consider that the respondent's apprehension of the applicants' position in this respect was reasonably formed. The answering papers were handled sensitively to prevent any unwarranted invasion of the applicants' privacy and, by agreement between the parties, the court was requested to hear the application *in camera*, which duly happened. In the event, the applicants did not persist at the hearing with any argument that they were entitled to withhold the invoices, or any of the

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[14] Section 80J(1) of the Income Tax Act provides that:

> *The Commissioner must, prior to determining any liability of a party for tax under section 80B, give the party notice that he or she believes that the provisions of this Part may apply in respect of an arrangement and must set out in the notice his or her reasons therefor.*

Section 80B of the Act regulates the tax consequences of 'impermissible tax avoidance'.

[15] Section 42 of Tax Administration Act obliges SARS to inform a taxpayer of the completion of an audit conducted under the Act.

[16] The application for declaratory relief had been instituted on 4 October 2013, before the notices were given by SARS.

content thereof, for want of relevance. For the purposes of the declaratory relief that they seek in these proceedings the applicants confined the basis of their alleged entitlement to withhold part of the content of the documents to legal advice privilege.

[14] SARS explained in its answering affidavit that it been engaged in an investigation of the tax affairs of the group of which the applicant companies are part for some time. The investigation encompassed a number of aspects including the aforementioned structured finance arrangements and a joint venture with an offshore consortium, which SARS suspects may involve tax base erosion by shifting profits offshore. SARS's investigations in this regard were said to encompass risks relating to employees' tax and aspects pertaining to s 8C of the Income Tax Act (which regulates the taxation of directors and employees on the vesting of equity instruments). The offshore consortium involved was thought to consist of former directors and employees of another company in the group. Insight into the invoices was also required because it was foreseen that they might provide relevant factual information pertinent to the wide-ranging investigation by SARS into the group of companies' tax affairs.

[15] The respondent's answering affidavit set out the following grounds for SARS's refusal to accept the validity of the applicants' claim to privilege:

1. The nature of the documents as invoices: It was contended that invoices are not ordinarily issued in confidence and that the attorneys must have appreciated when they rendered the feenotes that they would be subject to disclosure by the client to the tax authorities because of income and value added tax implications. The respondent stressed that the applicants' initially indicated willingness to make copies of the documents available as soon as they could be located was consistent with SARS's assessment of the non-confidential character of the invoices.
2. The invoices were not issued for the purposes of obtaining or providing legal advice. Their purpose was to state the services provided to the applicants and the remuneration demanded therefor by the attorneys.
3. It would appear, by contextual inference from the disclosed portions of the feenotes, that the redacted information comprises predominantly of the names or descriptions of certain agreements, transactions and documents. It was contended that the mere factual existence of such agreements, transactions and documents, and that the attorneys had worked on or had regard thereto, did not cloak them with privilege. The mere identification of such matters in the

> invoices would not, by itself, convey the nature or substance of any advice that might have been sought or received, so the argument continued.

[16] SARS also contended that, by having unconditionally undertaken to furnish the invoices when they were located, the applicants had waived any privilege that they might have been able to assert in the documents. That contention may be disposed of shortly. There is no merit in it. The nature of the alleged waiver on which the respondent seeks to rely is known as implied or imputed waiver. The test for identifying such waiver is objective, meaning that it must be judged by its outward manifestations; in other words from the perspective of how a reasonable person would view it. It was quite evident that the documents had not been at hand when the undertaking was given and there was no reason for SARS to have understood that the undertaking had been given with knowledge of the detailed content of the documents. In the circumstances SARS could not reasonably have construed the giving of the undertaking as a waiver of the applicants' right to assert privilege in respect of any part of the content of the feenotes when they were found. That is certainly the case if it is assumed, as SARS argued, and as I shall presently hold, that attorneys' feenotes are not *per se* privileged documents.

[17] In their replying affidavit, the applicants argued that it was not the character of the documents as attorneys' feenotes that was determinative of the validity of the applicants' claim to privilege, but whether 'certain of the contents of the disputed invoices are privileged, to the extent that they set out the nature of the advice sought by the Applicants from their attorneys and/or the advice given by those attorneys'. The applicants thus abandoned any claim that have been discerned in their founding papers that the documents were privileged *per se*, and stated their case actually to be that the advice sought by them from their attorneys (which they averred was reflected in the content of the invoices) was privileged by reason of having been sought in confidence from their legal advisers acting in their capacity as such. In that context, the applicants asserted that the fact that the invoices might not have been issued in confidence was irrelevant.

[18] The applicants also indicated their intention to make uncensored copies of the invoices available for inspection by the court at the hearing for purposes of a so-called 'judicial peek'. In this connection the deponent to the applicants' replying affidavit proceeded:

> The Court's perusal of the disputed invoices will, indeed, confirm that the Applicants "*deleted*" [inter alia] *the names or descriptions of certain agreements, transactions and documents from the copies of the disputed invoices it provided*" to the Respondent.

> This deleted information, it is submitted, is privileged because it identifies the subject matter of the advice sought, and the entities in respect of which such advice was sought.

[19] The respondent served a notice on the applicants in terms of uniform rule 35(12) calling for copies of the agreements and documents mentioned in the aforementioned extract from the replying affidavit. The applicants declined to provide the documentation, pointing out that doing so would result in the disclosure of the very matter in respect of which they had claimed privilege.

[20] The respondent then brought an application for an order compelling the applicants to comply with the notice. That application was served on the day before the main application was to be heard and was moved in the course of the argument of the main application. I shall deal with it presently.

[21] There was no dispute between counsel for the parties when the matter was argued as to the import of the substantive right to legal advice privilege, broadly stated, but they took issue on its ambit. Thus, as mentioned earlier, the respondent contended that the privilege does not extend to the redacted parts of the invoices in issue merely because they contain mention of 'certain agreements, transactions and documents' that may have been referred to, drafted, or effected in the context of communications between the applicants and their attorneys in respect of the seeking or giving of legal advice. That broad agreement as to the conceptual character of legal advice privilege does not exclude scope for quite fundamental differences as to the ambit of attorney-client communications that are included or excluded is illustrated by the jurisprudence. The most relevant cases are all foreign. Indeed, counsel were not able to find any South African judgment that deals in any particularity with the question that presents in the current matter.

[22] The divergence of judicial opinion that was manifest in the English jurisprudence is illustrated in the historical overview undertaken by Taylor LJ in the Court of Appeal's judgment in *Balabel and another v Air India*.[17] The appeal in that matter was against the decision of a single judge overruling a decision made by a master, who had upheld the appellant's claim of privilege in respect of documents of the following sort that had been sought by the respondent in the context of litigation concerning the conclusion of an underlease: (i) communications between the appellant and its solicitors other than those seeking or giving legal advice, (ii) drafts, working papers, attendance notes and memoranda of the appellant's solicitors relating to the proposed new underlease and (iii) internal communications of the appellant other than those seeking advice from their Indian legal

[17] [1988] 2 All ER 246 (CA), [1988] Ch 317.

advisers. The judge in the High Court - taking a different view in principle from that adopted by the master - had ordered disclosure of some of the documentation. In this regard the judge had followed the approach of Scott J (as he then was) in *Galadari's Receivers v Zealcastle Ltd* (6 October 1986) (unreported). It appears from the Appeal Court judgment that the judge in the High Court had concluded as follows:

> The defendants in my judgment are entitled to withhold all communications which seek or convey advice, even though parts of them may contain narratives of facts or other statements which in themselves would not be protected. On the other hand, documents which simply record information or transactions, with or without instructions to carry them into execution, or which record meetings at which the plaintiffs were present, are not privileged.

As Taylor LJ observed,[18] 'On the judge's ruling, a selective exercise was required to withhold only those documents seeking or giving advice and to disclose any which merely recorded information or events or gave instructions. He carried out that exercise and ruled that a number of documents specified in the schedule to his order should be disclosed'.

[23] The approach adopted by Scott J in *Galadari's Receivers* was described by Taylor LJ as follows:

> In that case the defendant wished to enforce a charge they had obtained against Mr Galadari's interest in a property. The legal title to the property was discovered to be vested in a company. The defendants sought disclosure of documents in the possession of Mr Galadari's solicitors to establish his beneficial interest. The scope of the privilege attaching to such documents was contested. Scott J noted the conflict in the authorities and suggested there might be a distinction between cases where discovery was sought from the client rather than the solicitor. He said:
>
> > 'I am therefore satisfied that I ought to approach the present case by applying the principle expressed by Lord Atkin in *Minter v Priest* [1930] AC 558, [1930] All ER Rep 431 rather than by considering whether the broader view of privilege, which might perhaps be relevant in a case like *Greenough v Gaskell* (1833) 1 My & K 98, [1824–34] All ER Rep 767, where only the solicitor was being sued, is still good law. With that principle in mind I must I think look at the documents which are in issue in the case and come to a conclusion whether they can fairly be regarded as a request by Mr Galadari … for legal advice or whether the documents represent the giving of legal advice either to Mr Galadari or to an agent of his. These documents would be privileged. But none of the documents which simply record the transaction which Mr Galadari had instructed his solicitor to implement, or document the putting into effect of the transaction, or the formation of the Swiss company, or which passed between Norton Rose Botterell & Roche [Mr Galadara's solicitors] and the vendor's solicitors on the acquisition of 10 Curzon Place, or the conveyance documents, would, in my view, be documents in respect of which Mr Galadari could claim protection on the grounds of legal professional privilege.'[19]

[24] The Appeal Court held that the approach manifested in the reasoning in the judgment in *Galadari's Receivers* defined the scope of legal advice privilege too narrowly. In that regard Taylor LJ expressed himself as follows:

> ….the purpose and scope of the privilege is … to enable legal advice to be sought and given in confidence. In my judgment, therefore, the test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a

[18] At p. 249 of the All England Report.
[19] At pp. 254-256 of the All England Report.

> specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.
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> …..
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> It may be that applying this test to any series of communications might isolate occasional letters or notes which could not be said to enjoy privilege. But to be disclosable such documents must be not only privilege-free but also material and relevant. Usually a letter which does no more than acknowledge receipt of a document or suggest a date for a meeting will be irrelevant and so non-disclosable. In effect, therefore, the 'purpose of legal advice' test will result in most communications between solicitor and client in, for example, a conveyancing transaction being exempt from disclosure, either because they are privileged or because they are immaterial or irrelevant.
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> …..
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> It follows from this analysis that those dicta in the decided cases which appear to extend privilege without limit to all solicitor and client communication on matters within the ordinary business of a solicitor and referable to that relationship are too wide.
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> ….
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> By contrast, the formulation adopted by [the judge a quo] and quoted earlier in this judgment is in my view too restrictive. It suggests that a communication only enjoys privilege if it specifically seeks or conveys advice. If it does so, it is privileged, notwithstanding it may also contain 'narratives of fact or other statements which in themselves would not be protected'. However, the second half of the judge's formulation implies that all documents recording information or transactions with or without instructions or recording meetings lack privilege if they do not specifically contain or seek advice. The passage cited above from the judgment of Scott J in *Galadari's Receivers v Zealcastle Ltd* is to the same effect. In my judgment that formulation is too narrow. As indicated, whether such documents are privileged or not must depend on whether they are part of that necessary exchange of information whose object is the giving of legal advice as and when appropriate. Accordingly, I agree with the formulation made by the Chief Master in the present case, subject to the additional words which I have placed in brackets. He said:
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> > 'Once solicitors are embarked on a conveyancing transaction they are employed to ensure that the client steers clear of legal difficulties, and communications passing in the handling of that transaction are privileged [if their aim is the obtaining of appropriate legal advice] since the whole handling is experience and legal skill in action and "a document passing during a transaction does not have to incorporate a specific piece of legal advice to obtain that privilege.'

[25] It appears to be accepted that the judgment of the Court of Appeal in *Balabel* correctly expresses the scope of legal advice privilege in English law. The House of Lords decision in *Three Rivers District Council (No.6)* supra,[20] confirmed that the concept of what falls within the expression 'legal advice' for the purposes of legal advice privilege goes not only to advice on the law, but also, as pointed out by Taylor LJ in *Balabel*, 'advice as to what should prudently and sensibly be done in the relevant legal context', including advice as to how a client's position or case should best be presented.

[26] It is suggested in Thanki (ed), *The Law of Privilege* Second Edition (Oxford), at 2.111 -2.112, with reference to a passage in the opinion of Lord Carswell in *Three Rivers District Council (No.6)*, that the House of Lords applied a 'somewhat broader' definition of the ambit of legal advice privilege than that stated in *Balabel*. I do not share that view. On my reading

[20] See note 1, above.

of the passage in question[21] it amounts to no more than an affirmation that *Balabel*, properly read, does not derogate from the point made in *Minter v Priest* [1930] AC 558 that the privilege extends to all attorney-client communications directly related to the seeking or giving of such advice. However, Thanki's conclusion that the effect of the cases is that the English law is currently correctly stated as follows:

> …if there is a legal context, privilege attaches to *all* communications between lawyer and client, provided that they are:
>
> - directly related to the performance of the lawyer's professional duties as legal adviser to the client and
> - made for the purpose of obtaining legal advice and assistance.
>
> (emphasis in the original)

appears to me to be correct on either reading of the judgments. Subject to the other requirements of legal professional privilege mentioned at the outset of this judgment,[22] which also apply in English law, this accords with our own law, as stated in, amongst others, *S v Kearney*[23] and *Lane and Another NNO v Magistrate, Wynberg*.[24]

[27] The authorities just discussed go to the identification of documents that are susceptible to legal professional privilege, and not directedly to the question that presents in the current case, which concerns the assertion of privilege in respect of covered up parts of an otherwise unprivileged document that has been disclosed. If a document is privileged disclosure of part of it may constitute an implied or imputed waiver of the whole. It is therefore appropriate to consider whether a lawyers' feenote qualifies by its nature and as a general rule as a privileged document.

[28] As mentioned, there is a line of English authority that holds that solicitors' feenotes are privileged.[25] Indeed, in *International Business Machines Corp and another v Phoenix International (Computers) Ltd*,[26] Aldous J remarked, concerning feenotes that had been discovered erroneously, '*IBM do not dispute that the bills are documents for which privilege*

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[21] The passage in question (which is the last sentence in para 111 of the judgment) reads:

> 'I agree with the view expressed by Colman J in *Nederlandse Reassurantie Groep Holding NV v Bacon & Woodrow Holding* [1995] 1 All ER 976 at 982 that the statement of the law in *Balabel v Air India* does not disturb or modify the principle affirmed in *Minter v Priest*, that all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, notwithstanding that they do not contain advice on matters of law or construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client.'

[22] In para 1.

[23] 1964 (2) SA 495 (A) at 499E.

[24] 1997 (2) SA 869 (C) at 879G-H.

[25] See e.g. *Chant v Brown* (1852) 9 Hare 790, *Turton v Barber* (1874) LR 17 Eq 329 and *Dickinson (t/a John Dickinson Equipment Finance) v Rushmer (t/a FJ Associates)* [2002] 1 Costs LR 128 (Ch.D).

[26] [1995] 1 All ER 413 (Ch D).

*could have been claimed and that any solicitor would realise that*'[27] and '(t)*he reasonable solicitor would have been in no doubt that the legal bills were privileged documents*'.[28] Whether the approach taken in England up to now is well-founded in principle has, however, been questioned. The issue is treated of in Chap 2 of Thanki op cit supra, at 2.129 -2.130, s.v. '*Practical examples and difficult areas*' in a section entitled '*What Constitutes Legal Advice or Assistance*', as follows:

> It seems that in English law, lawyers' feenotes have generally been regarded as privileged. However, *Ainsworth v Wilding* [[1900] 2 Ch 315] is an authority going the other way, where the court held that the defendant could cover up parts of the bill which described work undertaken so as not to reveal the advice given but other sections which revealed what had happened in the judge's chambers were not privileged. This decision is more in keeping with the law in New Zealand where it has been held that feenotes are not privileged by their nature, although they may contain passages in respect of which privilege can properly be claimed.
> It is suggested that feenotes should not automatically be regarded as privileged in their entirety in the light of *Three Rivers 6*: they are undoubtedly confidential communications between lawyer and client, but it is difficult to say that they are directly related to the *performance* of the retainer by the lawyer. Of course the contents of most feenotes, although no doubt of great interest to the opposing party, will be utterly irrelevant to any dispute between them and therefore will not be subject to disclosure on the grounds of relevance. But if feenotes do contain relevant information, they should only be privileged to the extent that entries in them constitute secondary evidence of privileged communications. Irrelevant, but no doubt confidential, entries can of course be redacted.
> (footnotes omitted)

See also Malek et al (ed) *Phipson on Evidence* 18th ed. (2013) at 23-57:

> It is suggested that a blanket rule [that lawyers' feenotes are privileged] is neither necessary nor consistent with modern principles of privilege. The way in which bills are submitted is a matter of practice and will vary with time and there is no reason why the court should be hidebound by old authorities. If a bill of costs does not reveal anything as to the contents of the communications between lawyer and client, why should it attract privilege?

I would venture that if the question were to be pertinently revisited by the English courts, it is probable that it would be answered consistently with the opinion expressed in the passages just quoted from the two aforementioned leading textbooks.

[29] The New Zealand authority cited in the aforegoing passage from Thanki op cit in support of his statement of the law in New Zealand is *Kupe Group v Seamar Holdings*[29]. In that matter Master Kennedy-Grant merely followed his earlier judgment in *Re Merit Finance and Investment Group Ltd*,[30] where, in dealing with a contention by counsel that solicitors' statements were not a character of document that 'qua category attract privilege', he held:

> …and the fact that the contents of solicitors' statements and/or bills of costs, on the one hand, and their trust account records, on the other hand, may disclose the terms of privileged communications, do not (*sic*), in my opinion, make the distinction between communications and other acts unworkable. (It should be remembered that, in reality, speech is an act.) The essential question in any consideration of whether or not a document is privileged is, was it brought into existence for the purpose of "getting or

[27] At p. 419.
[28] At p. 424.
[29] [1993] 3 NZLR 209
[30] [1993] 1 NZLR 152.

> giving confidential legal advice or assistance"?: 13 *Halsbury's Laws of England* (4th ed) para 74 and *R v Uljee* [1982] 1 NZLR 561 at p 570.
> I accordingly accept Ms Olsen's third submission that solicitors' statements and/or bills of costs and trust account records do not, as categories of document, attract legal professional privilege. A particular document or part of a particular document may attract legal professional privilege as a communication made for the purpose of getting or giving confidential legal advice or assistance. If there are any such documents among those of which production is sought, or any such passages in any such documents, then the claim of legal professional privilege must be made in relation to the particular documents or passages.[31]

It is evident from the judgment in *Re Merit Finance*, however, that, certainly as of 1993, the state of authority in New Zealand was divided, with some judgments following the line taken in English cases such as *Chant v Brown* and *Turton v Barber*.[32] In my judgment the position as stated in *Re Merit Finance* accords with the description of the ambit of legal advice privilege that may be distilled from the line of English authority exemplified by the judgments in *Minter v Priest*, *Balabel* and *Three Rivers (6)*, mentioned earlier.

[30] Thus, as our law in point has historically been premised on the English law, it seems to me that applying the reasoning in the three last-mentioned English judgments in a principled manner in the local context would impel the conclusion that attorneys' feenotes are not amenable to any blanket rule that would characterise them as privileged communications *per se*. Feenotes are not created for the purpose of the giving of advice and are not ordinarily of a character that would justify it being said of them that they were directly related to the performance of the attorney's professional duties as legal adviser to the client. They are rather communications by a lawyer to his or her client for the purpose of obtaining payment for professional services rendered; they relate to recoupment for the performance of professional mandates already completed, rather than to the execution of the mandates themselves. They thus do not form part of the 'continuum of communications' postulated in Taylor LJ's judgment in *Balabel*. For that reason the English judgments that appear to clothe lawyers' feenotes with privilege as a blanket rule should not be followed in my view. The abandonment by the applicants of their initial claim of blanket rule privilege in respect of the invoices as lawyers' feenotes was therefore well advised. (The reason why I have dealt with this aspect at some length is that my finding on the question of waiver[33] might well have been different if the feenotes fell to be regarded as a category of privileged documents *per se*.)

[31] It is, however, readily conceivable, if not probable in fact, that attorneys' fee notes might contain references to legal advice sought and given in the course of a narration of the services in respect of which the fees have been raised. It is indeed references of that sort that

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[31] At pp. 158-9.
[32] See note 25, above.
[33] See para [16], above.

are in issue in the current matter. In my judgment, mere reference to advice sought or given does not equate to disclosure of the substance of the advice. Disclosure by reference in a document which is not itself privileged of the mere fact that advice has been sought on a question or that it has been given therefore does not give rise to any privilege. It is the actual communications between the client and the lawyer involved in the seeking and giving of the advice - identifiable as such within the broad and generous parameters referred to in cases like *Balabel* and *Three Rivers 6* – or references in other documents that would disclose their content or from which their content might be inferred that are the matter in respect of which legal advice privilege may be claimed. That does not include the content of a document which merely records, without disclosing their substance, that such communications have occurred. Thus, if the feenote refers to the advice only in terms that describe that it was given, without disclosing its substance, I do not consider that the mere reference would be sufficient to invest the relevant content of an otherwise unprivileged document or communication with legal advice privilege.[34] The position would be different, of course, if the feenote set out the substance of the advice, or contained sufficient particularity of its substance to constitute secondary evidence of the substance of the advice.

[32] My views in this regard find support, I think, in the judgment of Richards J in the Chancery Division in *Financial Services Compensation Scheme Ltd. v Abbey National Treasury Services Plc*,[35] which, like the current matter, was a case in which a party had asserted legal advice privilege in respect of redacted portions of two disclosed documents. Mr Justice Richards was called upon to decide whether the redactions had been justifiably

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[34] Cf. the following statement by the US Court of Appeals (Ninth Circuit) in *Clarke v American Commerce National Bank* 974 F. 2d 127 (9th Cir. 1992) concerning legal professional privilege in respect of the content of lawyers' feenotes:

> 'Not all communications between attorney and client are privileged. Our decisions have recognized that the identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege. See e.g *Tomay*, 840 F. 2d at 1426; *In re Grand Jury Witness (Salas and Waxman)* 695 F. 2d 359, 361-62 (9th Cir. 1982); *Hodge and Zweig* 548 F. 2d at 1353; *United States v Cromer* 483 F. 2d 99, 101-02 (9th Cir. 1973). However, correspondence, bills, ledgers, statements, and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the privilege. *Salas*, 695 F. 2d at 362. The burden of establishing that the attorney-client privilege applies to the documents in question rests with the party asserting the privilege. *Tomay*, 840 F. 2d at 1426.'

Counsel for SARS also referred me to the opinions of the Supreme Court of New Hampshire in *Hampton Police Association, Inc. v Town of Hampton* 20 A. 3d 994 (2011), 162 NH 7 (which contains a comprehensive review of other US authority) and of the Supreme Court of Pennsylvania Middle District in *Levy v Senate of Pennsylvania* 65 A. 3d 361 ( 2013), which are to the same effect as the passage quoted from *Clarke*.

[35] [2007] EWHC 2868 (Ch). The judgment is accessible at http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2007/2868.html .

made. The party claiming privilege had explained one of the redactions in issue that pertained to a question no. 5 on a questionnaire form as follows:

> As for question 5, this question does not specifically identify the narrow question on which the legal department has advised, although it does give an indication of material considered by the legal department. Nevertheless, I believe that if unredacted, question 5 would enable both the nature of the advice given by the legal department, and the substance of that advice, to be inferred, and that this would be the case irrespective of whether the answer to question 5 is also unredacted.

The learned judge dealt with this aspect of the case at para 16-18 of the judgment as follows:

16. …..Mr Railton QC for [the party claiming privilege] submitted that if the substance of the advice could be inferred from the redacted passage, it was a passage which "evidenced" the substance of the advice for the purposes of the test set out in *Three Rivers DC v Bank of England (No.5)* [[2003] EWCA Civ 474; [2003] QB 1556] or "revealed" it (see *The Good Luck* [*Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The "Good Luck")* [1992] 2 Lloyds Rep. 540 (QB)]). He relied on *Thanki: The Law of Privilege* at paras 2.54 – 2.57 and particularly:
    > "The most obvious of the categories of documents which are not, strictly speaking, actual communications are those documents which constitute secondary evidence of privileged communications."

    Mr Railton submitted that a document from which the advice could be inferred constituted secondary evidence of the advice.
17. Save as mentioned below, none of the authorities to which I was referred deal with the case of a document which, rather than stating the substance of advice, is a document from which it is said the advice can be inferred. Two considerations lead me to the view that, unless perhaps the inference is obvious and inevitable in which case the document is in substance a statement of the advice or communication, privilege does not attach to such documents. First, it is the communication between the client and lawyer which is privileged either in its original form or in a summarised or paraphrased form. A document which does not contain the communication in any form contains nothing to which privilege attaches. Mr Railton's submission that a document from which the substance of the communication may be inferred "evidences" the privileged communication treats "evidences" as carrying its fact-finding meaning of "providing an evidential basis". I do not think that this is the sense in which the word is used in *Three Rivers DC v Bank of England (No. 5)* and other authorities. It is used, I believe, in the narrower sense, consistent with *The Good Luck* and other cases, of reproducing, summarising or paraphrasing the communication.
18. The second consideration is that inference is usually a matter of subjective judgment. Save in very clear cases, views may differ as to whether the inference can be made. A claim to privilege should not, in my judgment, depend on a subjective assessment of this sort. It would, as Sir Sidney Kentridge QC appearing for the Law Society in *Three Rivers DC v Bank of England (No.6)* submitted in relation to the issue on that appeal, introduce "an unwelcome element of subjective uncertainty": 2005 AC 610 at 630. There are in any case many documents which are clearly not privileged but from which the substance of legal advice may be inferred. A common example is a minute of a board meeting recording the directors' decision on a particular matter.

[33] The authority that Richards J singled out, by way of an exception, in the opening phrase of paragraph 17 of his judgment was the judgment of Finn J in the Federal Court of Australia in *Pratt Holdings Pty Ltd v Commissioners of Taxation* (2004) 207 ALR, in particular para 20 thereof, which was quoted in the first edition of Thanki, *The Law of Privilege* at para 2.57 as follows:

> The second principle which is more directly tied to the protection of communications is that the privilege extends to any document prepared by a lawyer or client from which there might be inferred the nature of the advice sought or given. Examples include communications between the various legal advisers of the client, draft pleadings, draft correspondence with the client or the other party, and bills of costs: *Propend Finance*, at CLR 569; ALR 597-8.

The Chancery Division judge remarked (at para 19) of this passage from the Australian authority that he did not 'consider that this provides a basis generally for a claim for privilege in any document from which legal advice may be inferred. Its restricted application is apparent from the examples given'. (The learned judge's reference to 'the examples given', including bills of costs, falls to be understood in the context of the prevailing acceptance in English jurisprudence of the notion that solicitors' feenotes are privileged *per se* – something which I have already found to be misconceived in principle.)

[34] Thus, in a case in which parts of a feenote set out the substance of the privileged communications in respect of the seeking or giving of legal advice, or contain sufficient particularity of their substance to constitute secondary evidence thereof, those parts, but not the document as a whole, would be amenable to the privilege. The privilege should be asserted in such cases in precisely the manner that the applicants have sought to do in the current matter – that is by redacting the information so as to disclose those parts of the document that are not subject to the privilege and covering up those that are.

[35] Whether such an approach could properly be adopted was controversial in England until comparatively recently, but it obtained unequivocal endorsement –albeit obiter - from the Court of Appeal (per Hoffmann LJ) in *GE Capital Corporate Finance v Bankers Trust Company*.[36] *GE Capital* concerned the non-disclosure of allegedly irrelevant material, as distinct from matter that was alleged to be the subject of legal professional privilege. But notwithstanding the nature of the case, the *dicta* of Hoffmann LJ in the cited passage were expressly directed at how documents that were 'partly privileged' should be treated for discovery purposes. Mr Justice Rix subsequently followed *GE Capital* in *The "Sagheera"*,[37] which was a case in which the plaintiffs asserted privilege by covering up parts of communications between themselves and their agents that directly or indirectly revealed the dates, provenance, authorship, or content of privileged material, or information or comment on the same.

[36] In *The "Sagheera"*,[38] Rix J remarked that 'there might be difficult borderline decisions' to be made when privilege was claimed in respect of the covering up of parts of documents 'which do not reproduce or comment on contents of otherwise privileged material, but merely and perhaps only indirectly refer to or reveal "the dates, provenance [? or]

[36] [1995] 1 WLR 172 (CA), [1995] 2 All ER 993 (at 996 *in fine* - 997 All ER).
[37] *Hellenic Mutual War Risks Association (Bermuda) Ltd and General Contractors Importing and Services Enterprises v Harrison (The "Sagheera")* [1997] 1 Lloyd's Rep. 160 (QB).
[38] Note 37 above, at p.171.

authorship" of such material'. The test, in my view, however, is whether, upon an objective assessment, in the sense postulated by Richards J in *Financial Services Compensation Scheme*,[39] the references disclose the content, and not just the existence, of the privileged material. Approached in that manner, the scope for difficulty is not so evident.

[37] It is now time, applying the principles just rehearsed, to address the current application. As mentioned earlier, there is virtually no detail provided in the founding papers substantiating why the covered up portions of the invoices should be declared to be amenable to the assertion of legal advice privilege. The basis upon which I am invited to determine the question is by taking what is sometimes called a 'judicial peek' at the covered up portions; that is by looking privately at the redacted parts of the invoices. It is a practice that has on occasion been adopted in our courts in circumstances in which the judge considers it necessary to privately inspect allegedly privileged documents to make a just decision of a matter in dispute.[40] Historically, the need sometimes arose in the context of the determination of interlocutory disputes about the right of one party to inspect discovered documents in respect of which the other party had claimed privilege. It entails the judge looking at material that is not available to the party against whom the alleged right of non-disclosure is asserted. That self-evidently puts the party that is kept in the dark, as it were, at a disadvantage and it limits the assistance that a court is ordinarily able to derive for the purposes of deciding contentious questions from argument addressed to it by parties who are equally equipped.

[38] Statutory provision is made for the practice in s 80(1) of the Promotion of Access to Information Act 2 of 2000. That provision enjoyed attention in the quite recent litigation between the President and M&G Media Ltd, which wended its way from the High Court via the Supreme Court of Appeal to the Constitutional Court. In the Appeal Court judgment, Nugent JA commented generally on the concept of taking a judicial peek, noting that while the practice might properly be availed of in appropriate circumstances, it was nevertheless important to consider that courts 'earn the trust of the public by conducting their business openly and with reasons for their decisions' and that therefore 'a court should be hesitant to become a party to secrecy with its potential to dissipate that accumulated store of trust'.[41]

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[39] Note 35 above.

[40] See e.g. *Lenz Township Co (Pty Ltd) v Munnick* 1959 (4) SA 567 (T) at 574G-H; *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 260B; *South African Football Union and Others v President of the Republic of South Africa and Others* 1998 (4) SA 296 (T) at 300H-302 and *Mohamed v President of the Republic of South Africa* 2001 (2) SA 1145 (C) at 1150J-1151A.

[41] See *President of the Republic of South Africa v M&G Media Ltd* 2011 (2) SA 1 (SCA), 2011 (4) BCLR 363, at para 52.

Those remarks were endorsed in the judgment of the Constitutional Court,[42] which noted, in the context of a review of international jurisprudence, in particular that of Canada and the United States of America, that a judicial peek (or as it is referred to in North America, 'in camera review') should be undertaken only 'as a last resort', or 'where absolutely necessary'.[43]

[39] I draw attention to these considerations because I consider that a party in the position of the applicant in the current case should be astute to present its case in a manner directed as far as possible to avoid the necessity of the matter having to be decided on the basis of a secret inspection, or at the very least to minimise the one-sided effect of any private judicial inspection that might nevertheless remain necessary. In the current case that could have been done by providing a far more detailed contextual explanation in its founding papers of the bases for the non-disclosure of the allegedly privileged information. A party that asserts legal professional privilege should generally be able to provide a rational justification for its claim without needing to disclose the content or substance of the matter in respect of which the privilege is claimed.[44] Failing such justification, there is nothing before court but the claim to privilege itself; the means for testing its validity is absent if resort is not had to the mechanism of judicial peeking, which, as has been noted, a court should generally be hesitant to undertake. Indeed, had SARS's counsel not agreed to my taking a judicial peek in the current case I might well have declined to do so – despite the fact that the application could not be determined without it - on the grounds of the applicant's failure to provide sufficient contextual justification of its claim to legal advice privilege in its founding papers.

[40] The need for a party seeking to invoke the court's endorsement of the validity of its claim to privilege in a case like this to provide sufficient contextual material with which a court and the opposing party can meaningfully engage was indeed underscored by my experience when, after the matter had been argued, I took up the invitation to privately inspect the redacted material. The covered up portions, as expected, contained numerous references to documents, including documents in the course of being drafted, and to a certain entity. The mere references did not, however, set out the substance of any request for legal advice or the content of any advice given. They also did not, either on their own, or when read in the context of the documents as a whole, afford any material that I could identify as

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[42] *President of the Republic of South Africa v M&G Media Ltd* 2012 (2) SA 50 (CC)

[43] At para 39.

[44] In *In re Grand Jury Witness (Salas and Waxman)* 695 F. 2d 359, 361-62 (9th Cir. 1982) the US Court of Appeals (9th Circuit) noted that blanket assertions of privilege (that is without the provision of an explanation of how the information concerned fits within the privilege) are "extremely disfavored".

providing secondary evidence by which the content of the privileged communications that occurred in the course of the work being billed for could be inferred. So, for example, the mere mention of a drafting exercise, without any indication of the considerations that informed it, does not, by itself, afford secondary evidence of the substance of the privileged communications between attorney and client. The draft deed itself would no doubt be a privileged document, but that does not render another document (brought into being outside the 'continuum of communications' described in *Balabel*) that merely suggests its existence, without disclosing its content, similarly privileged. The applicants have either misconceived the nature and ambit of their legal advice privilege, or their failure to provide the context in which they contend for it has made its basis impossible to recognise in most of the redacted material. In the result I have found myself unable to grant the declaratory relief sought by the applicant in respect of any redaction where it has not been sufficiently clear to me on a reading of the invoices as a whole that it discloses – either directly, or inferentially - the substance, as distinct from the mere occurrence, of a communication in the continuum of communications entailed between the applicants and their attorneys in the seeking or giving of advice.

[41] I have been able to identify only three of the redacted passages as qualifying for the assertion of legal advice privilege. All three passages appear in tax invoice no. 6047890, dated 31 July 2008. In each of those instances I consider that the information contained in the feenote is such that the character of the advice sought by the client may be inferred, in the sense of conveying not only that advice was sought, but also the substance of the client's evident concern in an identifiable legal context. The three passages concerned are: (i) the redacted feenote item dated 21/04/2008 that appears immediately below the item, also dated 21/04/2008, which reads '*Perused the tracked sale of shares agreement (tracked by Peter). Accepted the changes and emailed the clients a copy for their perusal and comments.*'; (ii) the partially redacted feenote item, dated either 21/04/2008 or 22/04/2008 (it is impossible to tell which of the dates is applicable because of a partial obliteration of the type print apparently caused by a paper punch), which commences with the words '*Telephone call received from Werner and Barry to discuss the….*' and (iii) the redacted portion of the first of the feenote items dated 23/04/2008, which commences with the words '*Peruse and Consider…*'.

[42] It remains to deal with the respondent's application in terms of rule 35(12) read with rule 30A. There is some merit, I think, in the applicants' contention that compliance with the respondent's notice in terms of the subrule would negate the very object of the main

application. They would be obliged to disclose documents the very identity of which they had asserted had been privileged. More pertinently, however, inspection of the documents was plainly not sought for the purposes of the main application. Were the court to have upheld the respondent's interlocutory application, the documents would have been made available for inspection only after the parties had argued the application in the main proceedings. The purpose of rule 35(12) is to give a party access to documentation for potential use in the pending proceedings, not for some extraneous purpose. That purpose could not be fulfilled by requiring the applicants to disclose the documents after argument of the main application. The interlocutory application was misconceived in my view, and therefore, to the extent that remains necessary, it will be dismissed. It was of little more than nuisance value in the overall conspectus of the matter and does not warrant a discrete costs order.

[43] The applicants have enjoyed a measure of success, albeit that relief is not being afforded in respect of the vast majority of the redactions in respect of which they purported to assert privilege. By the same token, however, the respondent could also be said to have been substantively successful because SARS's contentions on the ambit of the privilege have essentially been upheld and applied in the determination of the case. In the circumstances I consider that it would be just that each party bear its own costs.

[44] The following orders are made:

1. The application by the respondent to compel compliance by the applicants with the notice given in terms of rule 35(12) is dismissed.
2. It is declared that the following portions of the applicants' attorneys' tax invoice no. 6047890, dated 31 July 2008, are protected from disclosure by reason of legal advice privilege:
   (i) the redacted feenote item dated 21/04/2008 that appears immediately below the item, also dated 21/04/2008, which reads '*Perused the tracked sale of shares agreement (tracked by Peter). Accepted the changes and emailed the clients a copy for their perusal and comments.*';
   (ii) the partially redacted feenote item, dated 21/04/2008 or 22/04/2008, which commences with the words '*Telephone call received from Werner and Barry to discuss the….*'; and
   (iii) the redacted portion of the first of the feenote items dated 23/04/2008, which commences with the words '*Peruse and Consider…*'.

3. Save as provided in terms of paragraph 2, the application is otherwise dismissed.

4. Each party is to bear its own costs.

**A.G. BINNS-WARD**

**Judge of the High Court**

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| **Date of hearing:** | **13 February 2014** |
| **Date of Judgment** | **17 March 2014** |
| | |
| **Before:** | **Binns-Ward J** |
| | |
| **Applicants' counsel:** | **M.J. Fitzgerald S.C.** |
| | **A.M. Smalberger** |
| **Applicants' attorneys** | **Cliffe Dekker Hofmeyr Inc** |
| | **Cape Town** |
| | |
| **Respondent's counsel:** | **A.R. Sholto-Douglas S.C.** |
| | **M. Blumberg** |
| | |
| **Respondent's attorneys:** | **State Attorney** |
| | **Cape Town** |