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Making Privilege Whole Again: Alternative Facts or a Restatement of Principle?

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On 5 September the Court of Appeal handed down its judgment in the long-awaited, and much discussed, case of *SFO v ENRC*. Justice Andrews' ruling in the lower court, which rejected ENRC's claim to litigation privilege, had prompted a febrile response at the Investigations Bar and wider legal community. On one view it appeared that companies would struggle to successfully claim litigation privilege unless an enforcement action or prosecution were a certainty, or where they were confident of their guilt. The ruling sculpted a significantly emaciated form of litigation privilege, particularly in the context of an internal investigation, and left counsel struggling to find cast-iron answers to difficult questions. At its heart, the ruling seemed unrealistic. It failed to take due consideration of how parties perceive and respond to scrutiny from a prosecuting agency, irrespective of such scrutiny's formal status.

The Court of Appeal reversed the High Court's ruling, reasserting a more flexible, fact-led approach to the assessment of litigation privilege. Whilst the Court's judgment does clarify some areas of principle, it predominantly purports to represent an alternative view of the facts. It is perhaps a curious feature of this matter that two senior courts can arrive at such divergent conclusions about a factual issue, specifically the reasonable contemplation of the parties, based largely on the same evidence. That they have, rather suggests that the fault line is more principled. What was considered "*reasonable* contemplation" of prosecution is arguably the source of the rift. Whilst the focus of the case is ENRC's claim for litigation privilege ultimately its legacy may be as a primer to prompt changes to the scope of legal advice privilege.

Factual background

The facts of this case are broadly well known. In December 2010 ENRC, after receiving a whistleblow alleging corruption within one of its subsidiaries, instructed a law firm to conduct an internal investigation. Matters escalated quickly and by the beginning of 2011 ENRC's Board was being advised of a risk that the SFO would formally intervene and may conduct a dawn raid. On 10 August 2011 the SFO wrote to ENRC. The letter made reference to intelligence and media reports about alleged corruption, before urging ENRC to consider the SFO's Self-Reporting Guidelines carefully. The letter stressed that the SFO was not carrying out a criminal investigation at that stage.

The letter prompted a meeting between ENRC and the SFO, commencing a cooperative dialogue between the parties, which lasted for about 18 months before breaking down. Subsequently, in response to section 2 notices, ENRC asserted that materials connected with its internal enquiries were protected by both litigation privilege and legal advice privilege. Those claims were dismissed by the High Court and ENRC appealed. The Court of Appeal allowed the appeal in part, finding that litigation privilege did apply in the circumstances.

The Court of Appeal's judgment

Litigation privilege: "Reasonable contemplation" in the context of criminal proceedings

The High Court had concluded that ENRC had not been armed with sufficient information to reasonably contemplate criminal litigation. Upper in Justice Andrews' mind was the fact that, given the SFO was merely investigating the case, it had not yet formed a final assessment of whether the weight of the evidence or the public interest warranted charge. Therefore, unless ENRC was sure of its guilt, it could not reasonably have contemplated a prosecution.

The Court of Appeal, in placing less weight on the status of the process, considered that the evidence, including the contemporaneous statements of the parties, did reveal ENRC's contemplation of a prosecution. It determined that the "*sub-text of the relationship between ENRC and the SFO was the possibility, if not the likelihood, of prosecution if the self-reporting process did not result in a civil settlement".* ENRC's formulation of that view was reasonable in the circumstances, not least of all given its receipt of a letter from the SFO mentioning recent intelligence and media reports about corruption, coupled with an admonishment to consider carefully the Self-Reporting Guidelines.

Whilst this aspect of the appeal is characterized as "primarily factual", the judgment reasserts a less rigid, and more realistic, approach than that adopted by Justice Andrews. The judgment dismisses the notion that the investigative stage of a matter is, by its nature, almost incapable of prompting a reasonable contemplation of prosecution. Instead, the stage of the process is one aspect of the factual matrix against which a party's belief, and its reasonableness, is assessed. Moreover, in observing that an international corporation is obviously less capable of being aware of its guilt than an individual, the Court rejected Justice Andrews' focus on the lack of corporate knowledge regarding the alleged misconduct. That a corporation does not know the full facts surrounding potential misconduct, and hence continues its internal enquiries, does not negate the reasonable contemplation of a prosecution.

"Dominant Purpose" in the context of corporate compliance and governance

Whereas the Court's resolution of ENRC's "reasonable contemplation" principally emerged from a review of the facts, its assessment of "dominant purpose" was grounded in a fundamental challenge to Justice Andrews' position on the guiding legal principles. Justice Andrews had rejected the notion that litigation privilege attached equally to material created for the purpose of avoiding or settling contemplated litigation, as it did to resisting or defending it. The Court of Appeal disagreed. The fact that ENRC may have been seeking a civil settlement in order to avoid prosecution did not defeat its privilege claim.

A more difficult issue for the Court concerned ENRC's ostensible dual-purpose when investigating the facts of the alleged misconduct. The SFO's letter of 10 August, whilst impliedly identifying the benefits of self-reporting, also expressed an interest in discussing "*ENRC's governance and compliance programme and its response to the allegations as reported".* In reacting to this letter, ENRC arguably had two purposes. The latter, a prospective review of its governance and compliance programme would not have attracted the protection of litigation privilege. The Court's response to this argument is both practical and sensible. It found that the two purposes were sufficiently interconnected; criminal litigation (and its threat) was the "*stick used to enforce appropriate standards*" of compliance and governance.

Having ironed out those wrinkles, the Court turned to consider whether the facts demonstrated that ENRC's dominant purpose was to resist contemplated criminal litigation, in preference to (as Justice Andrews had found) an intention to disclose the relevant materials to the SFO. In doing so, it took an alternative view of the facts. The Court found no evidence of ENRC's actual commitment to share the materials with the SFO, notwithstanding their cooperative position.

Legal advice privilege- primed for reform

Given the Court's decision on litigation privilege, the question of whether legal advice privilege applied became largely academic. It was also easily dismissed. ENRC's claim hinged on whether communications between its lawyers and its employees attracted legal advice privilege. The Court in the *Three Rivers (No. 5)* case had already found that legal advice privilege would not attach to communications between a company's lawyer and its employee, unless the employee is authorised to seek and receive legal advice and hence can stand in the shoes of the 'client' for the purposes of the lawyer-client relationship. Therefore, the Court of Appeal rightly concluded that the issue was a matter for the Supreme Court alone to resolve.

The state of the law was not however passed over without comment. Sir Brian Leveson, giving judgment for the Court, observed that the current scope of legal advice privilege may not be fit for purpose, particularly in the context of large corporations where information is in the hands of persons who do not have the authority to seek and receive legal advice. The difficulties caused by the restriction in *Three Rivers (No. 5)* are particularly acute for parent companies seeking information from its group entities. The level of protection which a company is afforded through legal advice privilege is a product of its size. That, in the opinion of Lord Justice Leveson, was unfair. It was also undesirable, being "*out of step with the international common law on this issue"*.

Conclusion

By focusing on the contemporaneous evidence of the parties', and by taking a more realistic view of the relationship between a prosecuting authority and a company with concerns about potential criminal conduct, the Court of Appeal has offered a more workable approach to the operation of litigation privilege. The Court clearly took a different perspective of what was "*reasonable* contemplation", informed by a more pragmatic outlook on how companies (and their legal advisors) view the world. The judgment, by reestablishing the status quo will adjust the temperature of the

legal community. Looking forward, the big question will be the viability of the current restraints on legal advice privilege and whether its current scope is unsuitably anachronistic. The answer lies in the Supreme Court.