PRIVILEGE AND *ENRC*: TWO THINGS WE NOW KNOW, AND TWO WE STILL DON'T

The Court of Appeal has clarified some important and controversial aspects of privilege, in particular that legal proceedings can be reasonably in contemplation at a far earlier stage than the prosecuting authorities might like. But, despite pointing the law in the right direction, the Court of Appeal has left other fundamental issues for the Supreme Court to sort out, most notably who within a corporation is the lawyer's client.

Key issues

- The threat of a criminal investigation can trigger litigation privilege, even if further work is required to find the facts
- A desire to be a good citizen does not prevent the dominant purpose of work being litigation
- Who is a lawyer's client in a corporate context remains a real issue

Privilege – the ability to consult lawyers in unassailable confidence – is recognised as a right of constitutional importance. If we expect people to comply with the law, they must be able to tell their lawyers the whole truth so that their lawyers can help them to do so. A fear that what is said to lawyers will later be revealed to and used by others would frustrate this aim.

But the effect of this right is to keep away from opponents, civil and criminal, just the kind of material they most want to see: what a party is telling its lawyers. So the boundaries of privilege are under constant pressure. Two recent first instance decisions (*RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) and *Director of the Serious Fraud Office v Eurasian Natural Resources Ltd* [2017] EWHC 1017 (QB)) pulled in those boundaries to a serious extent, causing considerable concern within the legal profession.

The Court of Appeal ([2018] EWCA Civ 2006) has now overturned the first instance decision in *ENRC*, placing the law on a firmer and more coherent footing. The Court felt unable to resolve all the points argued before it because of the hierarchical nature of the court structure. But it indicated that, had it felt free to do so, it would have given the decisions that the legal profession wanted. The erosion of the concept of privilege displayed by the two first instance decisions has been replaced by a recognition of the importance of privilege, of the need to avoid artificial constraints on its scope and of the need to reflect corporate reality. Not perhaps a new dawn, but certainly a clearing of the storm clouds.

WHAT IS PRIVILEGE?

Privilege comes in two main forms:

- Legal advice privilege, which applies to confidential communications between lawyers and their clients for the purpose of legal advice. This purpose is to be construed broadly: it is not merely telling the client the

law but includes advice as to what should prudently and sensibly be done in the relevant legal context.

- Litigation privilege, which applies to communications between lawyers or their clients and third parties for the sole or dominant purpose of obtaining information and advice in connection with litigation that is ongoing or in reasonable contemplation. The litigation must be adversarial rather than inquisitorial.

Litigation privilege, unlike legal advice privilege, applies to communications with third parties, not just with the client, provided that litigation is reasonably in contemplation. As a result, ascertaining the point at which litigation is reasonably in contemplation is important, and leads to the first thing we now know about privilege as a result of the Court of Appeal's decision in *ENRC*.

THE FIRST THING WE NOW KNOW: LITIGATION IN CONTEMPLATION

ENRC involved a company that received from a whistle-blower allegations of internal corruption. The company launched an investigation into the allegations, which involved its lawyers interviewing over a period of a couple of years numerous employees, ex-employees and others about the allegations. There was also extensive contact with the Serious Fraud Office regarding the possibility of the company self-reporting any criminal activities it found, with a view to the persuading the SFO to take civil proceedings rather than a criminal prosecution. Relations with the SFO ultimately broke down, and the SFO demanded copies of the lawyers' interview notes. These, said the SFO, reflected communications with third parties and so could only be subject to litigation privilege, but, the SFO went on, litigation was not reasonably in contemplation at the time the interviews took place.

The Court of Appeal recognised that the point at which litigation is reasonably in contemplation is a matter of fact in each case, but it took the rare step of reversing the first instance judge on the facts of this case as well as on the law. It considered that litigation was reasonably in contemplation at least by the time the company instructed its lawyers to carry out the investigation, even though this was before the SFO had expressed any overt interest to the company in the matter. The context of the investigation was the risk, and fear, of prosecution, and the fact that the company did not at the outset know what the investigation would reveal did not prevent litigation from being reasonably in contemplation. An individual will know whether he or she has committed a crime; a company may be uncertain and therefore need to investigate, but that doesn't mean that "the writing may not clearly be on the wall". The allegations in *ENRC* were undoubtedly serious enough to have attracted muralists. The company suffered considerable press and Parliamentary interest, which eventually led the SFO itself to "invite" the company in for a discussion about self-reporting.

The Court of Appeal didn't go as far as saying that the decision to set up an internal investigation was in itself sufficient to show that litigation was reasonably in contemplation, but its judgment indicates that if there are serious allegations, whether by a whistle-blower or someone else, then it may well be that litigation is sufficiently in contemplation for privilege to apply. This is a sensible policy approach because anything else could result in companies being reluctant to investigate potential problems for fear of what they might later be forced to reveal to the authorities. It is better for all if a company can investigate in confidence and then to make an informed decision as to what

needs to be reported and what remedial measures need to be taken rather than for it to proceed in the dark out of concern for what switching on the lights might reveal.

THE SECOND THING WE NOW KNOW: THE DOMINANT PURPOSE

Litigation privilege only applies if the dominant purpose of the investigation is the conduct of litigation. The SFO argued that the dominant purpose of the investigation in *ENRC* was to find the facts for corporate compliance and governance reasons, not for the conduct of litigation.

The Court of Appeal rejected this. A reputable company will want to ensure that it has the highest ethical standards in the conduct of its business for its own sake, but the stick used to enforce those standards is the criminal and/or civil law. The clear threat of criminal investigation and prosecution meant that litigation was to be treated as at least the dominant purpose of the investigation. The Court's refusal artificially to pick apart motives for an investigation is realistic. Being a good citizen is a proper end in itself, but allowing that aim to jeopardise privilege would have conferred a perverse incentive: the less a company cared about ethics, the more likely its claim to litigation privilege would have been to succeed.

The Court of Appeal also rejected the first instance judge's conclusion that litigation privilege could not attach to documents prepared with the intention of being shown to the other side, whether prosecuting authorities or civil opponents, or which were aimed at avoiding litigation. Privilege will not attach to a document actually handed over to the other side, but prior drafts will be privileged. Similarly, advice given to head off, avoid or settle reasonably contemplated proceedings are covered by privilege as much as advice for the purpose of resisting or defending the proceedings.

THE FIRST THING WE DON'T KNOW: WHO IS A LAWYER'S CLIENT?

Litigation privilege applies to communications with third parties, but it requires litigation to be reasonably in contemplation; legal advice privilege does not require litigation, but it only applies to communications between lawyer and client. If litigation is not reasonably in contemplation, that begs the question of who is the lawyer's client in a corporate context: is it everyone within the corporation with information relevant to the matter in question, or is it only those charged with seeking legal advice? If the latter, interviews with those on the ground would be treated as communications with third parties, and thus outside the scope of legal advice privilege.

The Court felt bound by prior Court of Appeal authority (*Three Rivers District Council v Bank of England (No 5)* [2003] QB 1556) to hold that legal advice privilege only attaches to communications between lawyers and those within a corporation charged with seeking legal advice. The Court of Appeal is bound by its own decisions, which only the Supreme Court can reverse.

But the Court said that, if it had been open to it to depart from *Three Rivers (No 5)*, it would have been in favour of doing so. It recognised that large corporations, as much as small, need to seek and obtain legal advice without fear of intrusion. The information required for this advice will commonly be in the hands of people other than those responsible for obtaining legal advice,

"If a multi-national corporation cannot ask its lawyers to obtain the information it needs to advise the corporation from the corporation's employees with relevant first-hand knowledge under the protection of privilege, that corporation will be in a less advantageous position than a smaller entity seeking such advice."
(Court of Appeal, *ENRC*, para [127])

and the law should not place large corporations at a disadvantage in this respect.

The Court did as much as it could to point the law in the right direction on this point, but it will take the Supreme Court to confirm this route. Until then, the problem created by *Three Rivers (No 5)* of identifying the "client" within a corporation for the purposes of legal advice privilege remains. This does not mean that legal advice cannot be safely shared within a corporation – the doctrines of limited waiver and, so far as different, common interest allow privileged advice to be shared without loss of privilege – but any conversations outside the charmed circle of those responsible for obtaining legal advice may not be privileged even if for the purpose of obtaining relevant information. This raises important and difficult issues, particularly in an investigatory context, of how tightly the "client" should be defined: too tightly, and it might result in a loss of privilege that might otherwise have been available; too loosely, and it may be rejected as disingenuous.

The Court did observe that an ex-employee was always to be equated with a third party for legal advice privilege purposes, but that again is a question for the Supreme Court. If a person holds the company's information, why should the status of a discussion with that person be different the day before he or she leaves the company's employment than if it takes place the day after?

THE SECOND THING WE DON'T KNOW: DOMINANT PURPOSE IN LEGAL ADVICE PRIVILEGE

Some judicial dicta suggest that legal advice privilege only applies if the dominant purpose of the communication is the provision of legal advice in the same way that the conduct of litigation must be the dominant purpose if litigation privilege is to apply. The Court of Appeal declined to answer this point (it was unnecessary for its decision), but observed that it was hard to see why this additional qualification was necessary, regarding it as tautologous. Again, the Court sought to point the law of privilege in the right direction, but it has left uncertainty.

CONCLUSION

The Court of Appeal reversed the first instance decision in *ENRC* largely because it considered that litigation was reasonably in contemplation at a far earlier stage than the first instance judge had done. This leaves the law in a far more satisfactory state than the judgment below had done. Companies will in many cases be able to investigate alleged wrong-doing in the expectation that privilege will apply because litigation is reasonably in contemplation – provided, of course, that the facts support this.

The focus on litigation privilege meant that the Court of Appeal did not need to decide the legal advice privilege points that would otherwise have arisen. The Court did, however, support a contemporary approach to legal advice privilege, but it will take the Supreme Court to deliver that approach. And who knows when a case on privilege will be sufficiently important to reach the Supreme Court.

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