

# ENRC Decision

**Speakers:**

Colin Passmore, Senior Partner  
Patrick Boylan, Partner  
Adam Brown, Managing Associate

**Resources:**

<http://www.simmons-simmons.com/en/Passmore-on-Privilege-blog>

13 September 2018

# ENRC -v- SFO

## 1. Legal advice privilege

- CoA's narrow interpretation of *Three Rivers (No 5)* [81 and 23];
- CoA's desire to depart from it for a wider scope [127];
  - But, with an ex-employee exception [139]
- But matter left for the Supreme Court ... [130]

## 2. Consequences

- Where litigation privilege unavailable then:
- Still considerable risks for company interviewing employees;
- Especially as *RBS* and *ENRC* still stand re note taking [141];

## 3. Note: dominant purpose not needed for LAP [132]

# ENRC -v- SFO

## Litigation privilege: plenty of good news – but fact specific

- CoA clear that from an early stage [86-98]:
  - Following WB corruption allegations
  - MP writes to SFO to express concern re ENRC
  - Rumour re SFO interest in ENRC affairs
  - Lawyers instructed who warned of risk of criminal proceedings
  - SFO letter referring to guidelines and role of legal advisers
  - Later hearsay evidence from ENRC adviser that criminal proceedings understood to be in contemplation in April 2011
  
- That criminal proceedings reasonably in contemplation

# ENRC -v- SFO

## Other Issues:

### 1. Reports and dominant purpose

- HL in *Waugh* [1980] AC 520 established the dominant purpose test.
- In *Waugh* a report was prepared into a fatal accident. Two purposes of equal importance: railway safety and litigation. Accordingly, dominant purpose test not satisfied.
- High Court conclusion in respect of all the documents at issue (including interview notes and a books and records review) was that the dominant purpose behind their creation was to investigate the facts and deal with compliance and governance.

# ENRC -v- SFO

## Other Issues:

### 2. Reports and dominant purpose (continued)

- Court of Appeal noted that the SFO said expressly that it wanted to discuss ENRC's governance and compliance programme [108].
- Position closer to that in *Re Highgrade Traders* [1984] BCLC 151, in which it was held that “there was no purpose for bringing the documents into being other than that of obtaining the professional legal advice”.
- **Compliance investigation** [109]: “Although a reputable company will wish to ensure high ethical standards in the conduct of its business for its own sake, it is undeniable that the stick used to enforce appropriate standards is the criminal law and in some measure the civil law. Thus, where there is a clear threat of a criminal investigation, even at one remove from the specific risks posed by the SFO should it start an investigation, the reason for the investigation of whistleblower allegations must be brought into the zone where the dominant purpose may be to prevent or deal with litigation.”
- CA concluded that dominant purpose was to assist in the litigation.

# ENRC -v- SFO

## Other Issues:

### 3. Reports and dominant purpose (continued)

- No policy to create the reports.
- The CA [118 & 103] noted that in *Waugh* there was a board policy requiring it to investigate all accidents. That policy “was a distinct purpose that prevented the possible litigation being the dominant purpose”.
- Worth noting in the context of written procedures post-whistleblowing or other events.

# ENRC -v- SFO

## Observations on reasonable contemplation (1):

[96]: *“We are not sure that every SFO manifestation of concern would properly be regarded as adversarial litigation, but when the SFO specifically makes clear to the company the prospect of its criminal prosecution (over and above the general principle set out in the guidelines), and legal advisors are engaged to deal with that situation, as in the present case, there is a clear ground for contending that criminal prosecution is in reasonable contemplation.”*

[97]: *“Each case turns on its own facts” and it does not “inevitably” follow “that once an SFO criminal investigation is reasonably in contemplation, so too is a criminal prosecution” ... “In this case, the documents and evidence pointed clearly towards the contemplation of a prosecution if the self-reporting process did not succeed in averting it”*

# ENRC -v- SFO

## Observations on reasonable contemplation (2):

[98]: *“Thirdly, whilst a party anticipating possible prosecution will often need to make further investigations before it can say with certainty that proceedings are likely, that uncertainty, in our judgment, does not in itself prevent proceedings being in reasonable contemplation.”*

# ENRC -v- SFO

## Observations on reasonable contemplation (3):

[99]: *“The judge’s distinction between civil and criminal proceedings was, in our judgment, illusory. ... ENRC was actually being told in this case that, if it did not cooperate and allow its professional advisers to undertake an investigation, prosecution would be even more likely. It would be wrong for it to be thought that, in a criminal context, a potential defendant is likely to be denied the benefit of litigation privilege when he asks his solicitor to investigate the circumstances of any alleged offence.”*

[100] *“For the reasons we have given, Andrews J was not right to suggest a general principle that litigation privilege cannot attach until either a defendant knows the full details of what is likely to be unearthed or a decision to prosecute has been taken. The fact that a formal investigation has not commenced will be one part of the factual matrix, but will not necessarily be determinative.”*

# ENRC -v- SFO

## Other Issues:

### 1. Documents prepared to be sent to opponent

- High Court ruling on documents prepared for settlement or to avoid litigation raised considerable concerns:

“If a document is created with the express purpose of showing it to the prospective adversary ... (such as, for example, a position statement prepared for the purposes of a mediation) it cannot be subject to litigation privilege”.

- Distinction drawn with report of an accountant dealing with quantum in order to advise on settlement.
- However, third party documents created to obtain legal advice as to how best to avoid contemplated litigation (even if in the context of a settlement discussion) not covered by litigation privilege.

# ENRC -v- SFO

## Other Issues:

### 2. Documents prepared to be sent to opponent (continued)

- Court of Appeal

- Trenchant criticism of the judge [102]:

  - “We doubt, therefore, the correctness of the legal principles that the judge stated”.

- There are many circumstances where solicitors fine tune responses to a claim in order to give their client the best chance of reaching an early settlement – discussions around the drafting of such letters covered by litigation privilege.

- “In both the civil and the criminal context, legal advice given so as to head off, avoid or even settle reasonably contemplated proceedings is as much protected by litigation privilege as advice given for the purpose of resisting or defending such contemplated proceedings”.

### 3. Privilege and DPAs

[simmons-simmons.com](http://simmons-simmons.com)  
[elexica.com](http://elexica.com)