Neutral Citation Number: [2018] EWCA Civ 2006

Case No: A2/2017/1514

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE HONOURABLE MRS JUSTICE ANDREWS DBE

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL
Date: 5 September 2018

Before:
SIR BRIAN LEVESON, PRESIDENT OF THE QUEEN'S BENCH DIVISION
SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
and
LORD JUSTICE McCOMBE

B E T W E E N:

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE
Claimant / Respondent

and

EURASIAN NATURAL RESOURCES CORPORATION LIMITED
Defendant / Appellant

and

THE LAW SOCIETY
Intervener

- -

Mr Bankim Thanki QC, Ms Tamara Oppenheimer and Ms Rebecca Loveridge (instructed by Hogan Lovells International LLP) appeared for the Appellant

Mr Jonathan Fisher QC, Mr James Segan and Mr Eesvan Krishnan (instructed by Eversheds Sutherland LLP) appeared for the Respondent

Ms Dinah Rose QC and Mr David Pievsky (instructed by Reed Smith LLP) appeared for the Interveners

Hearing dates: 3rd, 4th and 5th July 2018

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Approved Judgment

Sir Brian Leveson, President of the Queen's Bench Division, Sir Geoffrey Vos, Chancellor of the High Court, and Lord Justice McCombe:

Introduction

1. This appeal raises important issues as to the proper scope of legal professional privilege. The defendant, Eurasian Natural Resources Corporation Limited ("ENRC"), had asserted that certain documents generated during investigations into its activities by its solicitors and forensic accountants (the "Documents") were the subject of legal advice privilege and/or litigation privilege. The Documents related to fraudulent practices allegedly committed in Kazakhstan and Africa, which had been notified to ENRC by a whistle-blower, and included notes made by ENRC's outside solicitors of some 184 interviews (including with its current and former employees). The Director (the "Director") of the Serious Fraud Office (the "SFO") claimed declarations that the Documents were **not** the subject of legal professional privilege. Mrs Justice Andrews essentially granted the declarations sought.

2. ENRC submitted that Andrews J was wrong because she misinterpreted the Court of Appeal's decision in *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No. 5)* [2003] QB 1556 ("*Three Rivers (No. 5)*") as to the kind of documents that could be the subject of legal advice privilege. She ought not to have held that communications with a client for these purposes were only those with an employee who was specifically tasked to seek and obtain legal advice. Instead, the judge ought to have held that, to attract legal advice privilege, all that was necessary was that the employee in question was authorised by the client to provide the information to the company's lawyer. The *ratio decidendi* of *Three Rivers (No. 5)* was that only communications between client and lawyer were privileged. It was not necessary for the Court of Appeal there to decide which representatives of the client could claim privilege, because the client was the Bingham Inquiry Unit, not the Bank of England itself. The *dicta* concerning employees in *Three Rivers (No. 5)* were, therefore, *obiter*. In any event, ENRC submitted that the judge ought to have regarded certain of the Documents as privileged as lawyers' working papers. The SFO submitted in response that, even if *Three Rivers (No. 5)* were to be interpreted as ENRC claimed, it was now well-established that legal advice privilege could only be established where the dominant purpose of the communication was to obtain legal advice, which was not the case here, since the solicitors' primary engagement was to undertake an investigation into the facts.

3. In relation to litigation privilege, ENRC argued that the judge wrongly held that (i) no criminal prosecution was reasonably in contemplation[1] and (ii) none of the Documents was created with the sole or dominant purpose of defending anticipated criminal proceedings. On the facts, the judge was also wrong to hold that the Documents had been created on the understanding that they would be provided to the SFO. The SFO, on the other hand, contended that the judge's conclusions were amply justified on the facts.

4. We will return to these arguments below. It is first necessary to set out some of the factual background, which is important because ENRC ultimately contests the judge's approach to the evidence and contemporaneous documents.

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[1] As opposed to a criminal investigation, which she held was in reasonable contemplation by no later than 11th August 2011 (see paragraph 151 of the judgment).

Factual background

5. ENRC is a company incorporated under the laws of England and Wales. It is part of a multinational group of companies operating in the mining and natural resources sector. It was a public limited company until 14th January 2014, and a FTSE-100 listed company between 2007 and 2013. Until 2009/2010, its principal operations were carried out through a wholly-owned subsidiary, Sokolov-Sarbai Mining Production Association ("SSGPO"), in Kazakhstan. At the same time, it was diversifying its operations through acquisitions of companies operating in various parts of Africa. It is undoubted that ENRC and its subsidiaries operated in countries perceived as being high risk in terms of public sector bribery and corruption (see Gross LJ at paragraphs 4-5 in *R (Soma Oil and Gas Ltd) v. Director of the Serious Fraud Office* [2016] EWHC 2471 (Admin)).

6. The SFO was constituted under section 1(1) of the Criminal Justice Act 1987 ("CJA 1987"). Its functions include the investigation and prosecution of crimes involving serious or complex fraud, domestic and overseas bribery and corruption. Section 1(3) of the CJA 1987 allows the SFO to investigate any suspected offence which appears to the Director on reasonable grounds to involve serious or complex fraud. Section 2(4) allows the Director to require production of any specified documents which appear to him to relate to an investigation he is undertaking, and section 2(9) allows the person under investigation to refuse to disclose documents on the grounds of legal professional privilege.

7. In 2009/2010, ENRC became aware of allegations of criminality on the part of certain African companies that it was seeking to acquire. In particular, its mid-2010 acquisition of a company called Camrose Resources Limited ("Camrose") gave rise to litigation (which has since settled) with a Canadian company, First Quantum Minerals ("FQM"). FQM alleged that a copper mine had been unlawfully appropriated by the government of the African country in question and sold to a company allegedly linked to a friend of that country's President. The buyer had then procured the sale of that company to ENRC as part of the Camrose deal. It was ENRC's recorded view in August 2010 that those allegations were "in large part unsubstantiated, but bearing in mind the low threshold for suspicion it is not possible to discount them completely".

8. On 20th December 2010, ENRC received an email from an apparent whistle-blower alleging corruption and financial wrongdoing within SSGPO (the "whistle-blower email"). Having brought the whistle-blower email to the attention of ENRC's board of directors, ENRC's audit committee engaged DLA Piper UK LLP ("DLA Piper") to investigate the allegations it contained. The investigation was headed by Mr Neil Gerrard ("Mr Gerrard"), who was at the time DLA Piper's head of litigation.

9. On 15th March 2011, ENRC's then general counsel Mr Randal Barker ("Mr Barker") emailed one of the company's non-executive directors, saying:-

> "I think you and the other members of the Audit Committee need to be careful not to be too bullish about regulatory risk, especially … given where we are reputationally post-Camrose (I can sense from GC 100 [an association of 100 large companies' general counsel] meetings with the MoJ and the SFO that we are firmly on the radar and I expect an investigation in due course, which is why I have upgraded our dawn raid procedures recently)."

10. On 8th April 2011, there were media reports that Mr Eric Joyce MP had written to the SFO, asking it to investigate ENRC and whether it had adequate procedures to prevent bribery in connection with its acquisition of Camrose. His essential complaint was that ENRC should have asked more questions about the Camrose deal.

11. On 17th April 2011, ENRC's head of compliance Mr Cary Depel ("Mr Depel") wrote an internal email to colleagues, in which he said "I predict a sh!tstorm and a [SFO] dawn raid … before summer's over … the company's 'books and records' will be a [first] port of call". That email was forwarded to ENRC's chief executive officer, and also to Mr Barker, who commented that Mr Depel was "fundamentally correct – we need to be prepared".

12. Around the same time, ENRC instructed Forensic Risk Alliance ("FRA"), a firm of forensic accountants, to undertake a books and records review. The review, which was led by FRA's co-founder Mr Toby Duthie ("Mr Duthie"), began on 12th May 2011. According to the witness statements of Mr Duthie and ENRC's solicitor Mr Daniel James Spendlove ("Mr Spendlove"), its main purpose was to identify and address issues within ENRC's accounting records that might have exposed the company to liability under bribery and corruption legislation or the Companies Act 2006, and its secondary purpose was compliance-related, namely to assist Jones Day with the legal advice that it was providing to ENRC on its compliance programme. It will be seen that the judge did not accept this evidence, and considered that the review was commissioned primarily for compliance purposes.

13. On 21st April 2011, Mr Gerrard wrote a letter to Mr Barker, in response to a request to provide a written advice "in order to ensure that all possible practical steps are taken to maintain legal professional privilege over documents and communications created in relation to this investigation". That letter, in so far as is relevant and not covered by legal advice privilege, said:-

> "The internal investigation at SSGPO relates to conduct that is potentially criminal in nature. Adversarial proceedings may occur out of the internal investigation and, in our view, both criminal and civil proceedings can be reasonably said to be in contemplation. There is a possibility that this view may be challenged by third parties in the future, but if this is accepted, litigation privilege will apply."

14. On 23rd April 2011, Mr Gerrard left DLA Piper to join Dechert LLP ("Dechert"), and the ENRC investigation transferred with him.

15. By summer 2011, FRA's scope of work had expanded, in that it was now providing support for Dechert's investigations into SSGPO and Africa (including data gathering and hosting) as well as reviewing ENRC's books and records. On 15th July 2011, FRA was formally instructed by Dechert, by means of a letter which said:-

> "… We would remind you that we believe litigation to be in reasonable contemplation and as a result litigation privilege applies to the work we have asked you to undertake. Should you be contacted by any party regarding this matter, we would ask you to assert this position robustly and contact us immediately …".

16. On 9th August 2011, *The Times* published an article referring to the specific allegations that had been made in the whistle-blower email.

17. On 10th August 2011, Mr Keith McCarthy ("Mr McCarthy"), Chief Investigator of the SFO, wrote to Mr Beat Ehrensberger ("Mr Ehrensberger"), who had by this time replaced Mr Barker as ENRC's general counsel. His letter referred to a recent discussion between himself and Mr Richard Alderman ("Mr Alderman"), then the Director, about "recent intelligence & media reports concerning allegations of corruption and wrongdoing by [ENRC]". It urged ENRC to consider carefully the SFO's 21st July 2009 Self-Reporting Guidelines (the "Guidelines") whilst undertaking its internal investigations, and invited Mr Ehrensberger to meet with the SFO further to discuss matters. It also said that Messrs McCarthy and Alderman "would like to discuss with you, at this office, ENRC's governance and compliance programme and its response to the allegations as reported". Mr McCarthy concluded by saying that the SFO was not carrying out a criminal investigation into ENRC at that stage.

18. It is worthwhile interposing some salient aspects of the Guidelines as follows:-

> "Discussions with business and professional advisers have revealed a lot of interest in a system of self reporting cases of overseas corruption to us. We have been asked for any additional guidance we can give with respect to our policies on this and in particular on the benefits to be obtained from self reporting.
>
> As will be seen from this Guide, the benefit to the corporate will be the prospect (in appropriate cases) of a civil rather than a criminal outcome as well as the opportunity to manage, with us, the issues and any publicity proactively. The corporate will be seen to have acted responsibly by the wider community in taking action to remedy what has happened in the past and to have moved on to a new and better corporate culture. …
>
> The term 'corporate' is used in this Guide for convenience. As the context requires, it can refer to the group, a UK company or an overseas subsidiary. It is not to be construed restrictively …
>
> 2. A key question for ***the corporate and its advisers*** will be the timing of an approach to us. We appreciate that a corporate will not want to approach us unless it had decided, following ***advice and a degree of investigation by its professional advisers***, that there is a real issue and that remedial action is necessary. There may also be ***earlier engagement between the advisers and us*** in order to obtain an early indication where appropriate (and subject to a detailed review of the facts) of our approach. We would find that helpful but we appreciate that this is ***for the corporate and its advisers to consider***. We would also take the view that the timing of an approach to the US Department of Justice is also relevant. If the case is also within our jurisdiction we would expect to be notified at the same time as the DoJ.
>
> 3. [The SFO, when contacted about these issues,] will assume that ***the corporate's professional advisers are familiar with this Guide*** and our approach.
>
> 4. Very soon after the self report and the acknowledgement of a problem we will want to establish the following:
> - is the Board of the corporate genuinely committed to resolving the issue and moving to a better corporate culture?
> - is the corporate prepared to work with us on the scope and handling of any additional investigation we consider to be necessary?

- at the end of the investigation (and assuming acknowledgement of a problem) will the corporate be prepared to discuss resolution of the issue on the basis, for example, of restitution through civil recovery, a programme of training and culture change, appropriate action where necessary against individuals and at least in some cases external monitoring in a proportionate manner?
- does the corporate understand that any resolution must satisfy the public interest and must be transparent? This will almost invariably involve a public statement although the terms of this will be discussed and agreed by the corporate and us.
- will the corporate want us, where possible, to work with regulators and criminal enforcement authorities, both in the UK and abroad, in order to reach a global settlement?

5. A very important issue for the corporate will be whether the SFO would be looking for a criminal or a civil outcome. Without knowing the facts, no prosecutor can ever give an unconditional guarantee that there will not be a prosecution of the corporate. Nevertheless, we want to settle self referral cases that satisfy paragraph 4 civilly wherever possible. An exception to this would be if board members of the corporate had engaged personally in the corrupt activities, particularly if they had derived personal benefit from this. In those cases we would, in fact, be likely to commence our own criminal investigation. ***Professional advisers will have a key role here*** because of their knowledge of our approach. We shall look at the public interest in each case. We would in those circumstances be looking for co-operation from the corporate and would be prepared to enter into plea negotiation discussions within the context of the Attorney General's Framework for Plea Negotiations. …

10. Subject to what has been said in paragraphs 8 and 9, the discussions with the SFO will be confidential. Any information received by us will be regarded as information acquired for the purposes of our powers under the Criminal Justice Act 1987 and therefore only to be used in accordance with that Act.

THE INVESTIGATION

11. If both sides are satisfied with the answers to the issues in paragraph 4 above, then we will discuss the scope of any further investigation needed. Wherever possible, ***this investigation will be carried out by the corporate's professional advisers***. This will be at the expense of the corporate. We undertake to look at this in a proportionate manner and to have regard, where appropriate, to the cost to the corporate and the impact on the corporate's business.

12. We appreciate that document recovery and analysis will be a very significant issue in any investigation. Electronic searches will be needed. ***We are able to discuss the methodology for this with the corporate and its advisers*** to ensure that the cost is proportionate to the amount and seriousness of the issues reported. We shall also be prepared to discuss the steps taken by the corporate and its advisers to ensure that material (and, in particular, electronic material) is preserved.

13. We will also want to be involved in regular update discussions concerning the progress of any further investigation. …

What happens if there is no self referral

> 24. Self referral together with action by the corporate to remedy the problem of corruption will reduce the likelihood that we may discover the corruption ourselves through other means. If this happens we would regard the failure to self report as a negative factor. The prospects of a criminal investigation followed by prosecution and a confiscation order are much greater, particularly if the corporate was aware of the problem and had decided not to self report.
>
> 25. Corporates will need to be aware of the length and expense of an investigation by the SFO. … ***Professional advisers will need to advise their corporate clients about the impact of these investigations***. There is also a serious prospect that we will learn about the corruption issue from another agency … We will assume in those circumstances that the corporate has chosen not to self report. The chances of a criminal investigation leading to prosecution are therefore high [emphasis in bold italics added]."

19. It is worth noting the numerous references in these passages in the Guidelines to the "corporate's" professional advisers. It was plainly envisaged by the Guidelines that the company considering self-reporting to the SFO would be in receipt of professional legal advice, both before and during the process. This, in our judgment, is an important aspect of the factual background.

20. On 19th August 2011, Mr Ehrensberger wrote to the SFO, in response to its 10th August 2011 letter, accepting the SFO's invitation to meet. He said that he was happy to discuss ENRC's governance and compliance programme and its response to the allegations reported in the press, that ENRC understood the merits of self-reporting, and that he looked forward to discussing the topic with the SFO at the meeting.

21. On 22nd September 2011, Jones Day advised ENRC in a memorandum that "[t]here are therefore significant risks inherent in engaging in the voluntary disclosure regime including the loss of privilege and confidentiality in the documents that must be provided to the SFO as part of the process". This was one of several pieces of new evidence admitted by us (without objection) during the hearing.

22. The first meeting between ENRC and the SFO took place on 3rd October 2011. Mr Alderman and Mr McCarthy attended for the SFO. Mr Gerrard of Dechert, Mr Sion Richards ("Mr Richards") of Jones Day and Mr Ehrensberger attended for ENRC. Mr McCarthy's minutes of the meeting recorded that:-

> "INTRODUCTION
>
> …
>
> The SFO could give no assurance that it would not undertake enforcement action and that ENRC should take the matter very seriously.
>
> ENRC COMMENTS
>
> [Mr Ehrensberger] stated that ENRC had taken the letter from SFO very seriously and that the Board were keen to ensure that as a Company they are fully compliant and that governance is properly applied across the group …
>
> …

> A full risk assessment was being pursued, covering a range of different countries that ENRC was involved in. Interviews with staff on "the ground" are being pursued to understand how all aspects of the business work.
>
> The SFO made the point that intelligence and information suggested that the company indicated the production of false statements and paperwork generally.
>
> The SFO stressed that the company needed to show that there was a commitment to get behind the documents and to satisfy the SFO that the company had 'adequate procedures'.
>
> …
>
> The SFO invited [Mr Gerrard] to explain his role. [Mr Gerrard] confirmed that he was appointed by the Audit Committee [of ENRC] as part of their investigative policy …
>
> A forensic analysis is taking place. They were reviewing a number of emails and DPA issues in Kazakhstan. They had been undertaking interviews and [Mr Gerrard] was looking to close enquiries in November. He will report to the company around his findings and the company were concerned about what exactly the SFO were worried about and where its focus was centred.
>
> The SFO confirmed that it would not be advising the company. The company needed to satisfy the SFO that it has adequate procedures and were invited to make a disclosure at its earliest point.
>
> …
>
> The SFO will be proportionate and will need to speak with the company or its advisers on how we will get to the next level, once the Company Board have considered the issues.
>
> CONCLUSION
>
> The SFO made no assurances to the company that it would not take any other enforcement action.
>
> The SFO made it clear that if the company were to make a self-disclosure it would be able to manage its discussion with the US Department of Justice. The company would need to consider how it would deal with any issue that it discovered that may have an impact on its FCPA obligations.
>
> The company representatives were invited to present the position to the Board and to respond to the SFO with recommendations to take the matter forward."

23. It may be noted that ENRC had not at that stage decided that it would self-report under the Guidelines. It was continuing its investigations.

24. On 7th October 2011, Mr McCarthy emailed Mr Alderman saying that he had just spoken to Mr Gerrard, who had said that ENRC (through him) would make a voluntary disclosure the following week. That, in fact, never happened.

25. On 9th November 2011, Mr Ehrensberger wrote to Mr Alderman and Mr McCarthy, informing them that he had met the previous day with ENRC's board of directors to seek their approval to (i) conduct further reviews of ENRC's operations and (ii) engage with the SFO regarding the results of those reviews, and that the board had been entirely supportive of his proposal.

26. On 30th November 2011, ENRC met again with the SFO. The meeting was attended by Mr Ehrensberger, Mr Gerrard of Dechert and Mr Richards of Jones Day for ENRC, and Mr Alderman, case manager Mr Mark Thompson ("Mr Thompson") and case lawyer Ms Hannah von Dadelszen ("Ms von Dadelszen") for the SFO. Ms von Dadelszen's meeting note of the following day recorded that:-

> "… [Mr Gerrard] said that ENRC have literally an army of advisors on bribery act systems and procedures. The tests that have been undertaken on those systems have raised red flags. The company are keen to tackle the issue and be full and frank.
>
> …
>
> It was agreed that [Mr Gerrard] would meet with [Mr Thompson] and [Ms von Dadelszen] in December 2011 to discuss the scope of the review.
>
> [Mr Alderman] appreciated that there were cultural issues within the company's business. Those issues could be discussed. After [the meeting in December 2011] we would then have another meeting to track progress with the red flags.
>
> It was agreed that [Mr Gerrard] is the contact point [with the SFO]. [Mr Gerrard] confirmed that the investigation had been going for some months now. Phase 1 has been a books and records review. This has been done in Africa, the UK and Switzerland. Phase 2 will be a deeper review. FRA will help with that review.
>
> [Mr Gerrard] said the specific work being done in Kazakhstan concerned an allegation from a whistleblower regarding SSGPO (a subsidiary). A large number of people are alleged to be involved. It is a corruption and fraud allegation. [Mr Gerrard] has not seen any substantive evidence confirming the allegations yet …".

27. The third meeting between ENRC and the SFO took place on 20th December 2011, and was attended by Mr Ehrensberger, Mr Gerrard and Mr Richards for ENRC, and Mr Thompson and Ms von Dadelszen for the SFO. By this time, some 20 of Dechert's interviews with ENRC staff had already taken place. Ms von Dadelszen's meeting note of 23rd December 2011 recorded that:-

> "[Mr Ehrensberger] made the following comments:
> - A board meeting was held on 9 December 2011;
> - Anti corruption issues are a real focus of the board;
> - [Mr Ehrensberger] has been given a mandate to disclose [to the SFO] anything he feels appropriate.

> …
>
> Dick Gould [of the SFO ("Mr Gould")] then joined the meeting.
>
> [Mr Gould] advised that timescales are very important and the onus is on the company to supply the relevant information.
>
> [Mr Gerrard] was confident of "having something" within a month or two.
>
> …
>
> [Ms von Dadelszen] said the SFO would want something in writing. Perhaps by the end of February [2012].
>
> [Mr Gerrard] said we have to find out what the issues are first. Can't currently put anything into writing.
>
> [Mr Gould] suggested that the company put together a presentation for the end of February.
>
> [Mr Gerrard] agreed and said a presentation would be fine. Will deal with investigation review, the plan, milestones, interviews and a timetable going forward …".

28. On 5th March 2012, Mr Gerrard and Mr Ehrensberger again met with the SFO. Using a 21-page PowerPoint presentation, Mr Gerrard informed the SFO of the status, current results and future timetable of Dechert's investigations. The presentation concluded that the next meeting between ENRC and the SFO was to be a "progress report" in May 2012.

29. That (fifth) meeting took place on 10th May 2012, and was attended by Mr Mehmet Dalman ("Mr Dalman"), who had recently been appointed Chairman of ENRC, Mr Gerrard, and Messrs Thompson and Gould for the SFO. Mr Thompson's meeting note recorded that Mr Dalman informed the SFO of the ENRC board's commitment to transparency, co-operation and openness, to which end he had taken personal charge of the investigation work. Mr Thompson expressed concern that progress had been slow and that nothing substantive had yet been reported by ENRC to the SFO.

30. In early June 2012, Mr Thompson followed up this concern by requesting a further progress update meeting with ENRC. That meeting took place on 18th June 2012, and was attended by ENRC's deputy general counsel Mr Simon Zinger ("Mr Zinger"), Mr Gerrard, and Messrs Thompson and Gould for the SFO. Mr Thompson's meeting note of the same day recorded that:-

> "[Mr Thompson] said he had concerns because it was the middle of June and no substantive report had been made. If the investigation had stalled or been obstructed this would be regarded very negatively. For a civil settlement to be entertained, it was essential that the investigation findings were disclosed in the near future …
>
> …
>
> [Mr Gould] said that the process had already taken too long and if [Mr Gerrard's] investigation was being restricted in scope then the inevitable

> outcome would be a recommendation that a criminal investigation be commenced by the SFO …
>
> [Mr Gould] also said that ENRC should consider submitting a proposal for the disposal of the case by way of settlement when they finalise their report …
>
> …
>
> [Mr Gerrard] then outlined progress made in respect of the Kazakhstan investigation … [He] said that progress had been good and they had almost finished …
>
> In respect of Africa, [Mr Gerrard] said that progress had been limited … there were problems with the company's fragmented IT architecture …
>
> [Mr Thompson] asked further questions about the progress of the work. [Mr Gerrard] said that he was now reporting to the Special Investigation Committee and that Jones Day were no longer involved. The committee comprises … Mr Dalman, Terence Wilkinson (senior independent director) [("Mr Wilkinson")] and [Mr Ehrensberger]. [Mr Gerrard] is going to suggest that [Mr Zinger] replaces [Mr Ehrensberger].
>
> There was a discussion about the next steps and the timetable to be adopted. [Mr Gerrard] said that he felt that this was still a case where a settlement could sensibly be reached …".

31. On 20th July 2012, there was a further meeting between ENRC (Mr Dalman, Mr Wilkinson, Mr Zinger, Mr Gerrard and Mr Duthie) and the SFO (Messrs Thompson and Gould). Mr Gerrard gave a detailed update on the progress of his investigations, with reference to a 61-page PowerPoint presentation. That presentation set out ENRC's "investigation team", which by this time included Mr Alasdair Simpson ("Mr Simpson") of Addleshaw Goddard LLP ("Addleshaws") as "special advisor" to the Special Investigation Committee. It explained that, in relation to the Kazakhstan investigation, 80 employees had so far been interviewed, and 522,361 electronic documents and 89 lever arch files of hard copy documents reviewed. It also set out the scope and timetable of the Africa investigation, and confirmed that FRA's books and records review was in the final stages. Finally, it emphasised ENRC's "commitment to [a] full and frank process".

32. On 9th October 2012, the SFO withdrew the Guidelines and changed its approach to corporate self-reports. The new guidelines included the statement that "[a]ll supporting evidence including, but not limited to emails, banking evidence and witness accounts, must be provided to the SFO's Intelligence Unit as part of the self-reporting process". The judge described the change (at paragraph 23 of her judgment) as moving "the focus back towards the role of the SFO as a prosecutor, reflecting a policy shift by the incoming Director of the SFO, David Green QC".

33. The next meeting between ENRC and the SFO took place on 28th November 2012, and was attended (amongst others) by Mr Dalman, Mr Gerrard, Mr Duthie, Mr Simpson and Mr Thompson. Mr Gerrard gave a further progress update with the aid of a PowerPoint presentation. That presentation stated ENRC's "commitment to full transparency", that ENRC was "fully committed to 'doing the right thing'", ENRC's "commitment to [a] full and frank process", and that Dechert would "report fully to

the SFO in due course". It concluded by again affirming ENRC's "continued commitment to [a] full and frank process".

34. On 12th December 2012, Dechert wrote a letter to Mr Gould saying that:-

> "As you are aware we have prepared a draft report regarding our investigation into SSGPO, a subsidiary of ENRC.
>
> ENRC entered into a corporate self-report process with the SFO under:
> - *the Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud* dated 18 March 2009; and
> - *the Approach of the Serious Fraud Office to Dealing with Overseas Corruption* dated 21 July 2009.
>
> We note that the SFO restated its approach to corporate self-reports on 9 October 2012 …
>
> Given the restatement, we would like confirmation that ENRC is still part of the corporate self-reporting process prior to Dechert submitting our report on SSGPO. Any report submitted by Dechert to the SFO will be submitted under a limited waiver of legal professional privilege for the purposes of the corporate self report only.
>
> Should an equitable settlement not be reached between the SFO and ENRC, please confirm that it is accepted that the report will not be used by the SFO as evidence of any wrongdoing or in any criminal proceedings against either ENRC, any subsidiary of ENRC or any employee or director of ENRC or its subsidiaries."

That was the first time that ENRC or its advisers had expressly said to the SFO that they considered ENRC to be in a self-reporting process, and also the first mention to the SFO of legal professional privilege. The SFO submitted, in relation to this document, that it was clear at some point between 2011 and 2012 that self-reporting was actually taking place, and that nobody would have dreamt at that stage that ENRC would refuse to disclose its interview notes to the SFO.

35. On 21st January 2013, Mr Patrick Rappo ("Mr Rappo"), the SFO's head of Bribery and Corruption Business Area, replied to Mr Gerrard. He said that the SFO did not consider that ENRC had entered the self-reporting process, because the company had not yet made any report of wrongdoing. In relation to ENRC's claim to privilege and the way in which the SFO intended to use the Dechert report, he said the following:-

> "It is a matter for ENRC and its legal advisers as to which, if any, elements of the reports are covered by [legal professional privilege], and whether they waive any privilege that may attach.
>
> However please be aware that in assessing whether a company has adopted "a genuinely proactive approach" the Guidance on Corporate Prosecutions states that "the prosecutor needs to establish whether sufficient information about the operation of the company in its entirety has been supplied … This will include making witnesses available and disclosure of the details of any internal investigation".

> In light of the fact that we have not seen these reports, no assurances can or will be given … that we accept [they are] subject to [legal professional privilege] …
>
> No assurances can or will be given at this stage as to what use the SFO will make of any report that may be provided to it.
>
> The SFO cannot and will not give any assurance in relation to underlying material, or evidence, upon which the reports are based, or which is provided in support of the reports.
>
> We are concerned at the apparent lack of progress …
>
> Therefore if we do not receive your report on Kazakhstan by close of business on Thursday 31 January 2013, we will have no option but to open a [formal] criminal investigation [under section 1(3) of the CJA 1987] into ENRC's activities there, with a view to the exercise of our investigative powers.
>
> Assuming your report is received, we can agree a timeline for … the report in relation to [the African country]."

36. On 29th January 2013, Mr Dalman responded to Mr Rappo's letter in the following terms:-

> "I am both concerned and disappointed with your letter, in particular, your comments regarding the corporate self-reporting process. Dechert have been engaged to conduct an independent in depth investigation exercise, to which the company has devoted a very substantial amount of management time and resource at all levels, and alongside this we have been engaged in an ongoing programme considering and implementing appropriate remedial actions. The SFO have of course been kept well briefed along the way …
>
> You will be able to gauge the volume of work that has been carried out when you read the draft report dated 12 December 2012 in respect of Kazakhstan (in the form requested in your letter) that we intend to deliver to you on or before 31 January 2013.
>
> In relation to Africa, that extensive investigation is continuing, fully supported by me and the Board … We look forward to engaging with you on the timetable for submission of that report.
>
> It remains our prime objective to reach an equitable settlement … and we want to engage with you to discuss a settlement in relation to Kazakhstan as soon as appropriate."

37. On 30th January 2013, Mr Gerrard wrote to Mr Rappo in similar terms, enclosing the draft report on Kazakhstan referred to by Mr Dalman above.

38. On 28th February 2013, Dechert submitted to the SFO its final report on the Kazakhstan investigation, which ran to some 470 pages.

39. On 14th March 2013, Mr Gerrard presented his findings from the Africa investigation to the ENRC board.

40. On 27th March 2013, ENRC terminated Dechert's retainer and engaged Fulcrum Chambers to represent it. On the same day, there was a meeting between ENRC and the SFO, at which the SFO was informed of ENRC's change in legal team, and also of a pending board reshuffle in which several senior personnel were to leave ENRC.

41. On 28th March 2013, the SFO served on Mr Gerrard a notice under section 2A(1) of the CJA 1987, informing him that the Director was determining whether to start an investigation into ENRC, as it appeared that a corruption offence may have taken place, and requiring him to produce documents relevant to that determination by 8th April 2013. A notice of 8th April 2013 extended that deadline to 27th April 2013.

42. On 25th April 2013, the SFO announced that the Director had accepted ENRC for criminal investigation. Accordingly, Mr Gould wrote to Mr Gerrard informing him that the section 2A(1) notice was withdrawn and that a notice under section 2(3) of the CJA 1987 would shortly be served. There followed, between 25th April and 8th October 2013, a series of section 2(3) notices addressed to Mr Gerrard, Mr David Williams QC of Fulcrum Chambers, and Sir Paul Judge who was a non-executive director of ENRC. These notices led to ENRC asserting legal professional privilege in relation to the Documents, and the current dispute ensued.

43. Ultimately, on 2nd February 2016, the SFO issued a Part 8 claim against ENRC for a declaration that documents in four specific categories were not "information or … any document which ENRC would be entitled to refuse to disclose or produce on grounds of legal professional privilege in proceedings in the High Court" within the meaning of section 2(9) of the CJA 1987. The SFO's pleaded case was that neither litigation privilege nor legal advice privilege attached to the documents in the first place, not that any privilege had been waived.

44. After a four-day trial at which oral evidence was called, Andrews J made an order dated 12th May 2017 declaring in the terms sought that the documents in the first, second and fourth categories as described in paragraph 26 of the Particulars of Claim were not privileged.

Andrews J's judgment

45. After her introduction, the judge explained the SFO's self-reporting regime, the Guidelines and the 2012 Guidelines that replaced them. Importantly, she said at paragraph 24 that it was unnecessary to consider whether ENRC was in fact engaged in a self-reporting process, because this would not be inconsistent with ENRC contemplating that there was a real prospect of prosecution.

46. The judge then set out the four categories of Documents as follows:-

> "*Category 1*
>
> 26. This category comprises notes taken by Dechert of the evidence given to them by individuals (including employees and former employees or officers of ENRC and of its subsidiary companies such as SSGPO; their suppliers; and other third parties with whom they had dealings) when asked about the events being investigated. 184 documents have been identified as falling within this category, created in the period from 10 August 2011 to 25 March 2013 …

> 27. 85 individuals were interviewed in respect of the Kazakhstan investigation …
>
> *Category 2*
>
> 29 This category comprises materials generated by [FRA] as part of [the] "books and records" reviews they carried out in London, Zurich, Kazakhstan and Africa … The books and records work started on 12 May 2011 and continued until at least 11 January 2013.
>
> 30 The parties have agreed that the present claim in relation to Category 2 is concerned only with ENRC's claim to litigation privilege in respect of this class of documents, and that ENRC retains the right to claim legal advice privilege in respect of any individual document falling within this category. These proceedings will therefore not determine whether any prospective claim for legal advice privilege in respect of specific documents falling within Category 2 would be justified. …
>
> *Category 3*
>
> 32 This category comprises documents indicating or containing the factual evidence presented by [Mr Gerrard] to ENRC's Nomination and Corporate Governance Committee and/or the ENRC Board on 14 and 15 March 2013. …
>
> *Category 4*
>
> 34 This comprises 17 documents referred to in a letter dated 22 August 2014 sent to the SFO by Fulcrum Chambers …
>
> 35. Of these documents, 9 are said to comprise the FRA reports (or appendices thereto) and therefore litigation privilege is asserted on the same basis as for the Category 2 documents. A further 6 of these documents are said to be e-mails or letters "enclosing copies of the FRA books and records reports, or otherwise relating to FRA's books and records work" … The claim to LPP in respect of these documents will therefore stand or fall with the claim in respect of the Category 2 documents.
>
> 36. The final two documents in Category 4 are e-mail communications between [Mr Ehrensberger] of ENRC and a senior ENRC executive, dated 5 and 6 October 2010, which on ENRC's case "record requests for, and the giving of, legal advice by a qualified lawyer acting in the role of a lawyer, and accordingly are subject to legal advice privilege". Mr Ehrensberger, a qualified Swiss lawyer, was employed by ENRC at that time as its Head of Mergers and Acquisitions. He had previously been its General Counsel, a role which he resumed on 1 July 2011."

47. The judge then dealt briefly with the burden of proof and nature of evidence generally required to establish legal professional privilege. She explained that ENRC was unable to adduce evidence from those whose state of mind was in issue, nor from Mr Gerrard, but said that she had some sympathy for the position in which the company found itself and, in any event, had to make her decision based on the evidence that was available.

48. The judge then considered the law on litigation privilege, noting at paragraph 54 the trend in the authorities strictly confining its ambit. She cited *Bailey v. Beagle Management Pty Ltd* [2001] FCA 185 ("*Bailey v. Beagle*"), a decision of the Federal Court of Australia, in relation to which she said that:-

> "59. … I was referred by Mr Fisher QC, on behalf of the SFO, to [*Bailey v. Beagle*] … The judge, Goldberg J, decided that a document had been brought into existence for the purpose of being given to the opposing party (a trustee) in order to persuade him that a proposed settlement was an appropriate financial settlement. He held that the document was not subject to litigation privilege. He made these observations at para 11:
>
> > "One has to be careful about the use of the phrase 'brought into existence for the purpose of the conduct of the litigation', as a distinction should be drawn between bringing a document into existence for the purpose of conducting litigation by a party on the basis that the document will not be shown to the other party … and a document brought into existence during the course of litigation for the purpose of settling the litigation, which is intended to be shown to the other party. Properly characterised, it is not correct to say that a document is brought into existence for the purpose of conduct of litigation, and so is privileged from production, if it is brought into existence, albeit to try and settle the litigation, but for the purpose of being shown to the other side."
>
> I respectfully agree with and adopt that analysis, which must apply with equal force in a situation such as this, where litigation has not commenced.
>
> 60. As that case illustrates, advice given in connection with the conduct of actual or contemplated litigation may include advice relating to settlement of that litigation once it is in train. The conduct of ongoing proceedings embraces litigation tactics, and must include bringing them to an end by agreement short of trial. It would make no sense to deny litigation privilege to, for example, a report of an actuary or accountant dealing with quantum which is intended to assist solicitors to advise their client whether to accept or reject an offer made under CPR Pt 36.
>
> 61. However, I reject ENRC's submission that by parity of reasoning, litigation privilege extends to third party documents created in order to obtain legal advice as to how best to *avoid* contemplated litigation (even if that entails seeking to settle the dispute before proceedings are issued). There is no authority cited in support of that proposition, and it self-evidently contradicts the underlying rationale for the privilege. Equipping yourself with evidence to enable you to conduct your defence free from the risk that your opponent will discover how you are preparing yourself … is something entirely different from equipping yourself with evidence that you hope may enable you (or your legal advisers) to persuade him not to commence proceedings against you in the first place."

49. The judge then turned to consider the law on legal advice privilege. In relation to how the "client" is defined for this purpose, she said the following:-

> "70. The question of who was the "client" … did not directly arise … in [*Three Rivers (No. 5)*]. However, the judgment of the Court of Appeal

supports the proposition that where the party asserting privilege is a corporate entity, legal advice privilege attaches only to communications between the lawyer and those individuals who are authorised to obtain legal advice on that entity's behalf. Communications between the solicitors and employees or officers of the client, however senior in the corporate hierarchy, who do not fall within that description will not be subject to legal advice privilege.

…

72. Mr Lissack [counsel for ENRC] relied on the way in which the judgment in the *Three Rivers (No. 5)* case was interpreted by the Court of Appeal of Singapore in the case of *Skandinaviska Enskilda Banken AB (Publ) v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR 367 [the "*Enskilda Bank* case"] …

73. … However … [t]he narrower interpretation, consistent with [*Three Rivers (No. 5)*], is that the employee must be authorised to seek/obtain the legal advice that is the reason for the communication … If and to the extent the Singapore court was adopting the wider interpretation, namely, that even if the employee is only authorised to provide the solicitors with information that would equip them to give legal advice to others within the company, that is a communication "for the purpose of obtaining legal advice", that was the proposition which the Court of Appeal expressly rejected.

…

81. In [*In Re RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) ("*RBS*")] … Hildyard J concluded … that the decision in *Three Rivers (No. 5)* was based on principles of general application, which … remain binding law in England and Wales. He said, and I agree, that this was confirmed by the way that the decision was attacked by counsel and analysed by the House of Lords in *Three Rivers (No. 6)* [*Three Rivers District Council and Others v. Governor and Company of the Bank of England (No. 6)* [2004] UKHL 48 ("*Three Rivers (No. 6)*")].

…

86. Mr Lissack submitted that the decision of Hildyard J was wrong and … inconsistent with … the correct interpretation of [*Three Rivers (No. 5)*]. He did not suggest that that case was wrongly decided, only that it was misunderstood. He submitted that if the solicitor is retained … to carry out certain investigations in order to provide the company with legal advice, and that requires him to speak to persons other than the directly instructing body within the company, the substance of his communications with those persons is governed by legal advice privilege.

87. I cannot accept that submission, which in my judgment is both contrary to authority and wrong in principle…

…

90. As Hildyard J succinctly put it at para 64 in [*RBS*], "the fact that an employee may be authorised to communicate with the corporation's lawyer

> does not constitute that employee the client or a recognised emanation of the client". I agree … The information coming from the employee to the lawyer cannot be equated with instructions or information emanating from the client unless he has been tasked by the client with seeking or obtaining the legal advice on the client's behalf.
>
> 91. I would have reached that decision as a matter of principle in the absence of the decision of Hildyard J, but I am fortified in my conclusion by his analysis in [*RBS*] and the conclusion he reaches at para 93 …
>
> …
>
> 93. On the current state of the law, the decision in [*RBS*] is plainly right, and there is no justification for my departing from it. Given the tenor of the authorities, including [*Three Rivers (No. 5)*], if there is to be any change of approach to bring the law in this jurisdiction into line with the more liberal approach adopted in other jurisdictions, it will have to be made by the Supreme Court or by Parliament."

50. Finally on the law, the judge dealt with the principles governing privilege attaching to lawyers' work product, a sub-species of legal advice privilege. She concluded at paragraph 97 that:-

> "97. In my judgment, the approach taken by Warren J [in *Stax Claimants v. Bank of Nova Scotia Channel Islands Ltd* [2007] EWHC 1153 (Ch)] and Hildyard J [in *RBS*] is right, and the protection afforded to lawyers' working papers is justified if, and only if, they would betray the tenor of the legal advice. A verbatim note of what the solicitor was told by a prospective witness is not, without more, a privileged document just because the solicitor has interviewed the witness with a view to using the information that the witness provides as a basis for advising his client. In other words, the client cannot obtain the protection of legal advice privilege over interview notes that would not be privileged if he interviewed the witness himself, or got a third party to do so, simply because he procured his lawyer to interview the witness instead."

51. The judge then dealt with the facts at paragraphs 98-148. It is worth highlighting the following findings of fact that she made.

52. In relation to the period before the SFO contacted ENRC on 10th August 2011, the judge found that:-

> "102. … There is no evidence that in the period from the date of the Camrose acquisition in 2010 to around early April 2011, even whilst the litigation with First Quantum was being fought in the full glare of publicity, anyone at ENRC feared that any such investigation into the African acquisitions would uncover evidence of any behaviour by ENRC that could come anywhere near crossing the threshold for a prosecution to be initiated, still less evidence that such a prosecution was reasonably in contemplation.
>
> …
>
> 104. DLA Piper's role was purely investigatory: their job was to find the facts and report on them to ENRC. The fact that a fact-finding investigation

> was commissioned with a view to ENRC obtaining legal advice on what to do once the facts were known, does not mean that the information provided to the investigators by third parties would be subject to litigation privilege …
>
> 105. … There is no evidence that on receipt of the whistleblower report, the Board anticipated that the SFO would prosecute ENRC or any of its officers (even if what was alleged turned out to have some truth in it). Taken at its highest, the evidence suggests that the Board and the audit committee were concerned about the prospect of a formal SFO *investigation* into the affairs of ENRC and SSGPO if the SFO ever got wind of these allegations.
>
> …
>
> 113. … Mr Spendlove and Mr Duthie refer in their evidence to the provisions of the Companies Act [2006] relating to specific records that must be kept by a company, and to the fact that failure to keep them is a criminal offence. The Head of Compliance was concerned that if inadequacies were found in the books and records, this could be used as a "Trojan horse" to enable the authorities to look more closely at the affairs of ENRC … I am satisfied on the totality of the evidence that the work that FRA was engaged to undertake at that stage was essentially compliance-related; it was designed to ascertain whether there were any such deficiencies, and to report upon them, so that ENRC could put its house in order if necessary.
>
> …
>
> 118. Of course, it was always possible that the internal investigation into the allegations relating to SSGPO would turn up information which, if it ever came to the attention of the SFO, might result in criminal proceedings; but at that stage the investigation had not yet done so, and on the evidence before me, whether it would or not remained a matter of pure speculation. Objectively, criminal proceedings were not even a "distinct possibility", let alone a real prospect—at most, they were one of a range of hypothetical outcomes from a hypothetical future SFO criminal investigation."

53. Regarding the dialogue between ENRC and the SFO from 10th August 2011 onwards, the judge found that:-

> "129. Between 26 September 2011 and March 2013 there were over 30 meetings and discussions between ENRC and/or Dechert and the SFO, during which Mr Gerrard and Mr Ehrensberger, among others, repeatedly assured the SFO that ENRC was committed to engaging openly with the SFO and giving them its full co-operation, and that they had a mandate from ENRC's Board to do so. There were three major presentations to the SFO in Dechert's offices, on 5 March 2012, 20 July 2012 and 28 November 2012, mainly focusing on Kazakhstan. There is evidence that the report into Kazakhstan was reviewed by Addleshaws for some considerable period before it was submitted to the SFO in December 2012. However, the SFO was never told about the results of Dechert's investigations into ENRC's African acquisitions.
>
> …

> 135. On 9 November 2011 Mr Ehrensberger wrote a letter to the SFO … There is no ambiguity about that letter. The message that it conveys is that ENRC is going to carry out further investigations of its operations (i.e. in addition to the ongoing review of the whistleblower allegations pertaining to Kazakhstan) and share the results of those investigations with the SFO. In context, this could only be a reference to an investigation of the African acquisitions. Mr Ehrensberger was promising the SFO that, when the results of the internal investigation were obtained, ENRC would share them with the SFO and engage fully with the SFO in respect of whatever information emerged. Obviously, there could be no meaningful engagement if the results of the further investigations were not shared. It must have been intended by ENRC, at least at that stage, that whatever Dechert found out from the individuals to whom it spoke in the course of its investigations would be passed on in due course to the SFO, whether or not it evidenced wrongdoing."

54. The judge concluded her factual summary by saying the following, in relation to how she would approach the claim:-

> "147. Although it would be possible, with the benefit of hindsight, to put a less charitable interpretation on ENRC's behaviour during the period of dialogue with the SFO, no evidence has been adduced to support the thesis that ENRC and Mr Gerrard were pretending to engage in the self-reporting process to keep the SFO at bay … I will therefore approach the claim for LPP on the basis that ENRC and Mr Gerrard were acting in good faith throughout, and that they meant what they said when they repeatedly assured the SFO of their willingness to co-operate fully and to share the results of their internal investigations with them.
>
> 148. I will also approach the claim on the basis that ENRC accepted the advice it had been given by Mr Gerrard on 21 April 2011 relating to the Kazakh investigation. However, the fact that a client believes that it has a viable argument that documents generated in the course of an internal fact-finding investigation will be privileged does not mean that they are privileged."

55. Against that background, the judge proceeded to deal with ENRC's claims to litigation privilege (paragraphs 149-176), in which respect her main reasoning and conclusions were as follows:-

> "149. Adopting the test in *United States of America v Philip Morris Inc* [2003] EWHC 3028 (Comm) ["*Philip Morris HC*"], ENRC must establish that, as at 19 August 2011 [which the judge had said at paragraph 131 was "the latest date at which, on ENRC's pleaded case, criminal litigation was reasonably in prospect"], it was "aware of circumstances which rendered litigation between itself and the SFO a real likelihood rather than a mere possibility". In my judgment, the claim for litigation privilege falls at the first hurdle because ENRC is unable to satisfy that test; but even if a prosecution had been reasonably in contemplation, the documents for which litigation privilege is claimed were not created with the dominant purpose of being used in the conduct of such litigation (which expression includes obtaining legal advice pertaining to the conduct of such litigation).

…

151. Whilst I accept that ENRC anticipated that an SFO investigation was imminent, and that such an investigation was reasonably in contemplation by no later than 11 August 2011 when the SFO's letter arrived, that is not enough to make out a claim for litigation privilege. Such an investigation is not adversarial litigation …

160. However, the situation is rather different where the investigation is into suspected criminality. One critical difference between civil proceedings and a criminal prosecution is that there is no inhibition on the commencement of civil proceedings where there is no foundation for them, other than the prospect of sanctions being imposed after the event. A person may well have reasonable grounds to believe they are going to be subjected to a civil suit at the hands of a disgruntled neighbour, or a commercial competitor, even where there is no properly arguable cause of action, or where the evidence that would support the claim has not yet been gathered. Criminal proceedings, on the other hand, cannot be started unless and until the prosecutor is satisfied that there is a sufficient evidential basis for prosecution and the public interest test is also met. Criminal proceedings cannot be reasonably contemplated unless the prospective defendant knows enough about what the investigation is likely to unearth, or has unearthed, to appreciate that it is realistic to expect a prosecutor to be satisfied that it has enough material to stand a good chance of securing a conviction.

161. Of course, a person who knows that he has committed a criminal offence may reasonably anticipate that if certain facts come to light, a prosecution is likely to follow, even if there is no investigation currently underway. Likewise, the state of knowledge of the prospective defendant may be such that, even before the investigation has concluded, it knows that it has, in Mr Lissack's words, "a problem which makes criminal prosecution a real rather than fanciful prospect". The difficulty for ENRC in the present case is that there is no evidence that it was ever aware that it had any such problem, or of anything more tangible than a fear that one might emerge.

…

163. Mr Spendlove's evidence about the contemplation of criminal proceedings amounts to little more than generalised assertions with no substantive evidence to back them up, and that is not good enough. The totality of the evidence establishes that criminal proceedings were not in the reasonable contemplation of ENRC at any material time, and for the avoidance of doubt that includes the whole period of dialogue between ENRC and the SFO …

164. Even if I am wrong about that, and criminal proceedings were in reasonable contemplation at any material time, none of the Disputed Documents was created for the dominant purpose of deployment in, or obtaining legal advice relating to the conduct of, such anticipated criminal proceedings … I am not persuaded that taking legal advice in relation to the conduct of future contemplated criminal litigation was even a subsidiary purpose of the creation of those documents, let alone the dominant purpose. The information was not being gathered to form part of a defence brief.

165. … Mr Spendlove states that it is his understanding that the reason why ENRC instructed DLA Piper and Mr Gerrard to investigate those allegations was "to advise in relation to [a formal SFO] intervention, including a criminal investigation leading to a prosecution by the SFO, and to minimise the risk of this happening". However, the contemporaneous documents established that this is not an accurate reflection of the reasons for DLA's instruction; its role was a fact-finding one …

166. Even if Mr Spendlove's characterisation of the reasons for the instruction of lawyers to carry out the internal investigation into SSGPO had been accurate, (a) what third parties told Dechert about events in Kazakhstan could have little or no bearing on legal advice about how to deal with the SFO, and (b) even if it were relevant, any factual information which would be used as the basis for legal advice concerning how to avoid an SFO investigation into the same matters would not be subject to litigation privilege in any event. Avoidance of a criminal investigation cannot be equated with the conduct of a defence to a criminal prosecution.

…

170. Moreover, documents created with the specific purpose or intention of showing them to the potential adversary in litigation are not subject to litigation privilege …

171. The information generated in respect of the African investigation, and all but a fraction of the information generated in respect of the pre-existing Kazakh investigation, was something that ENRC intended to be shared with the SFO before and at the time when the relevant documents were created, and the dominant purpose for which those documents were created was to enable reports to be prepared to show to the SFO and presentations to be made to the SFO, at a time when the relationship was collaborative rather than adversarial. The contemporaneous documentary evidence in this regard is overwhelming …

172. For all the above reasons, none of the documents in Category 1 or Category 3 satisfies the test for litigation privilege.

173. So far as Category 2 and the FRA documents in Category 4 are concerned, the dominant purpose of the documents generated by FRA was plainly to meet compliance requirements or to obtain accountancy advice on remedial steps as part and parcel of the comprehensive books and records review. There is a wealth of contemporaneous documents pointing towards the conclusion that the books and records review had little or nothing to do with the preparation of a defence to, or obtaining legal advice in respect of, prospective criminal litigation …

174. ENRC contended that it was unsurprising that it would wish to promote (internally and externally) the compliance effect of the review, not least because it would be beneficial for a large corporate to be seen to be taking steps with a beneficial compliance effect. Likewise, it was unsurprising that ENRC would not wish to draw attention to the fact that the review was initiated to enable it to obtain advice and assistance in connection with anticipated SFO action. That point only holds good so far as documents that would be seen by persons outside the ENRC group and its advisers are

> concerned. The absence of *internal* documentation supporting the proposition that the review was designed to generate documents for the purpose of obtaining advice about the defence of anticipated criminal proceedings is less easy to explain, if that really was the dominant purpose of the exercise.
>
> …
>
> 176. … The claim for litigation privilege therefore fails in respect of all the categories of documents for which it is made."

56. The judge then addressed ENRC's claims to legal advice privilege at paragraphs 177-190 as follows:-

> "177. The short answer to the alternative claim for legal advice privilege in respect of documents in Category 1 is that there is no evidence that any of the persons interviewed … were authorised to seek and receive legal advice on behalf of ENRC, and the communications between those individuals and Dechert were not communications in the course of conveying instructions to Dechert on behalf of the corporate client. The evidence gathered by Dechert during its investigations was intended by ENRC to be used to compile presentations to the SFO as part of what it viewed as its engagement in the self-reporting process. If and to the extent that it was also intended by ENRC to take legal advice on the fruits of Dechert's investigations, and that was one purpose of making the interview notes, the documents formed part of the preparatory work of compiling information for the purpose of enabling the corporate client to seek and receive legal advice, and are not privileged.
>
> 178. … A claim for privilege over lawyers' working papers will only succeed if the documents would betray the trend of the legal advice. That cannot be the case here, because on the evidence, the documents are merely notes of what the lawyers were told by the witnesses …
>
> 179. ENRC submitted that because the notes were taken by a lawyer, the process inevitably represented the work of the lawyer's mind and his selection of what should be written down, so that taken as a whole, these matters inevitably gave a clue as to the trend of the advice. I cannot accept that submission, which is contrary to the approach of Bingham LJ [in *Parry v. News Group Newspapers* (1990) 140 NLJ 1719] and has no principled foundation. A similar claim for privilege over documents of this type was made and rejected in [*RBS*], albeit that it appears from the report of that case that the evidence before Hildyard J was of a better quality than the evidence in this case. As he put it, the fact that a selection of information is made is not sufficient to "cloak" the selected information with privilege.
>
> …
>
> 187. … I find that ENRC has made out its claim for privilege over the five Category 3 documents.
>
> 188. That leaves the two remaining documents in Category 4, namely, the October 2010 email exchange in which a senior person within ENRC asked Mr Ehrensberger to read an attached document and let him know what he

> thought, and Mr Ehrensberger did so. It is ENRC's evidence that the e-mails "record requests for and the giving of legal advice by a qualified lawyer acting in the role of a lawyer" on the basis that although he was the head of mergers and acquisitions at the time, "virtually all Mr Ehrensberger's time as Head of Mergers and Acquisitions was spent acting as a lawyer".
>
> 189. However, the contemporaneous documents do not support that characterisation of Mr Ehrensberger's role …
>
> 190. The objective evidence … establishes that Mr Ehrensberger was engaged by ENRC at the time of these communications not as a lawyer but as a "man of business", with the effect that legal advice privilege did not attach to communications of this nature, even if legal advice was being sought and was given in the exchange. Mr Ehrensberger may well have felt that he was acting as a lawyer for most of the time that he was the head of M&A, because M&A work will often have a legal dimension … But that is not good enough for privilege to attach to the emails; at the time of this exchange, his professional duty was not to act as a legal adviser to ENRC. If the person sending the information to Mr Ehrensberger had wanted privileged legal advice he should have sent it to General Counsel. These documents are not privileged."

57. The remainder of the judge's judgment dealt with submissions by ENRC to the effect that she should refuse to exercise her discretion to grant the declaratory relief sought by the SFO. Those submissions were rejected, so that the relief was granted in respect of all the categories of Documents except for Category 3 (paragraphs 191-205).

The issues requiring determination

58. The parties did not agree a clear list of the issues for the court's determination. Mr Bankim Thanki QC, leading counsel for ENRC, put the issues concerning legal advice privilege at the front of his submissions on the Category 1 documents. He sought to persuade the court to address the long-standing academic dispute as to what *Three Rivers (No. 5)* actually decided, and to overrule the judge on the basis that the wider view of the *ratio* of that case was the correct one. We take the view, however, that the judge regarded this case as one primarily about litigation privilege and that is how we should approach the matter.

59. Moreover, whilst we do not under-estimate the importance of the *Three Rivers (No. 5)* question, we do not think that this court should ignore the clear determination of the Court of Appeal in that case. Even if significant parts of that determination are properly to be regarded as carefully considered *obiter dicta* rather than strictly *ratio*, it would be highly undesirable for us to enter into an unseemly disagreement with it, particularly when the House of Lords has already declined in *Three Rivers (No. 6)*, after full argument, to decide the points that Mr Thanki urges us to decide. The House correctly concluded that those points were not strictly raised before it in *Three Rivers (No. 6)*, and noted that it had expressly refused permission to appeal the decision in *Three Rivers (No. 5)*. If the ambit of *Three Rivers (No. 5)* is to be

authoritatively decided differently from the weight of existing opinion, that decision will, in our judgment, have to be made by the Supreme Court rather than this court.

60. On the basis of that introduction, it seems to us that, as matters were eventually argued, the following issues should be addressed in the following order:-

Litigation privilege

i) Issue 1: Was the judge right to determine that, at no stage before all the Documents had been created, criminal legal proceedings against ENRC or its subsidiaries or their employees were reasonably in contemplation?

ii) Issue 2: Was the judge right to determine that none of the Documents was brought into existence for the dominant purpose of resisting contemplated criminal proceedings against ENRC or its subsidiaries or their employees?

iii) Issue 3: In the circumstances, which if any of the Category 1, 2 or 4 documents are protected by litigation privilege?

Legal advice privilege

iv) Issue 4: What did *Three Rivers (No. 5)* actually decide?

v) Issue 5: Does a claim for legal advice privilege require the proponent to show that the information was obtained for the dominant purpose of obtaining legal advice?

vi) Issue 6: Was the judge right to conclude that none of the Documents was protected by legal advice privilege on the basis:

a) that the information they contained was not communicated to ENRC's solicitor by anyone authorised to give or receive legal advice on behalf of ENRC or its subsidiaries?

b) that the information they contained was not communicated to ENRC's solicitor for the purpose of obtaining legal advice, but rather for the purposes of that solicitor's investigation of the facts?

c) that there was overwhelming evidence that ENRC had always intended and/or agreed to share the information they contained with the SFO as part of a self-reporting process?

vii) Issue 7: Are the answers to issue 6 above different if the employees in question are ex-employees at the time that the information is imparted?

viii) Issue 8: Was the judge right to hold that lawyers' working papers are only protected by legal advice privilege if they would betray the tenor of the legal advice?

ix) Issue 9: If not, was the judge right to deny any or all of the Documents the benefit of legal advice privilege as lawyers' working papers?

<u>The basic parameters of legal professional privilege</u>

61. It is important to first set out the basic parameters of legal professional privilege, since some of the extensive argument has rather tried to reinvent the wheel.

62. In *Regina v. Central Criminal Court Ex parte Francis & Francis* [1989] 1 AC 346,[2] the House of Lords approved the principle that the various statutory definitions of legal professional privilege accurately reflected the common law. The parties agreed that the definition in section 10(1) of the Police and Criminal Evidence Act 1984 provided an appropriate example of this definition, as follows:-

> "(1) Subject to subsection (2) below, in this Act *"items subject to legal privilege"* means—
> (a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;
> (b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings …"

63. The House of Lords in *Three Rivers (No. 6)* dealt with the submission that no fundamental distinction should be drawn between communications in connection with litigation and other communications (see Lord Carswell at paragraph 103). The House rejected that contention, accepting instead that "the cases establish[ed] that, so far from legal advice privilege being an outgrowth and extension of litigation privilege, legal professional privilege is a single integral privilege, whose sub-heads are legal advice privilege and litigation privilege, and that it is litigation privilege which is restricted to proceedings in a court of law in the manner which the authorities show" (Lord Carswell at paragraph 105), and "there is substantial force in the Law Society's submissions, and a well-founded case has been made out for the retention of legal advice privilege in its present form" (paragraph 106). Legal advice privilege and litigation privilege, therefore, have different characteristics.

64. The requirements for litigation privilege were as stated by Lord Carswell in *Three Rivers (No. 6)* at paragraph 102 as follows:-

> "communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied:
> (a) litigation must be in progress or in contemplation;
> (b) the communications must have been made for the sole or dominant purpose of conducting that litigation;
> (c) the litigation must be adversarial, not investigative or inquisitorial."

65. The elements of legal advice privilege, which was first recognised in *Greenough v. Gaskell* (1833) 1 My & K 98, are also set out in Lord Carswell's speech in *Three Rivers (No. 6)* at paragraph 111 as follows:

> "… After examining the authorities in detail, Taylor LJ said, at p 330 [in *Balabel v Air India* [1988] Ch 317 ("*Balabel*")]:

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[2] See Lord Goff at pages 392G-393C and 395D-E, and Lord Griffiths at pages 384H-385A. Lord Brandon agreed with the outcome proposed by Lords Goff and Griffiths, but did not mention the point about the statute reflecting the common law.

> "Although originally confined to advice regarding litigation, the privilege was extended to non-litigious business. Nevertheless, despite that extension, the purpose and scope of the privilege is still 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 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 ... 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. A letter from the client containing information may end with such words as 'please advise me what I should do'. But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context."

In a later passage, at pp 331-332, relied upon by the Court of Appeal [2004] QB 916 as support for its conclusions Taylor LJ stated:

> "It follows from this analysis that those dicta in the decided cases which appear to extend privilege without limit to all solicitor and client communications upon matters within the ordinary business of a solicitor and referable to that relationship are too wide. It may be that the broad terms used in the earlier cases reflect the restricted range of solicitors' activities at the time. Their role then would have been confined for the most part to that of lawyer and would not have extended to business adviser or man of affairs. To speak therefore of matters 'within the ordinary business of a solicitor' would in practice usually have meant the giving of advice and assistance of a specifically legal nature. But the range of assistance given by solicitors to their clients and of activities carried out on their behalf has greatly broadened in recent times and is still developing. Hence the need to re-examine the scope of legal professional privilege and keep it within justifiable bounds."

I agree with the view expressed by Colman J in *Nederlandse Reassurantie Groep Holding NV v Bacon & Woodrow Holding* [1995] 1 All ER 976, 982 that the statement of the law in [*Balabel*] does not disturb or modify the principle affirmed in *Minter v Priest* [1929] 1 KB 655, 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."

66. Whilst none of these definitions is actually determinative of the issues in this case, stating them at the outset avoids the need for the wide-ranging review of the authorities that was undertaken in argument. At this level, at least, these definitions carry the authoritative weight of the House of Lords in the most recent case on the subject of legal professional privilege. There is no need for us to re-examine whether they are accurate. They may be taken to be so.

A brief resumé of *Three Rivers (No. 5)* and *Three Rivers (No. 6)*

Three Rivers (No. 5)

67. The background to the *Three Rivers* litigation is well known. Following the collapse of the Bank of Credit and Commerce International SA ("BCCI"), a private non-statutory inquiry was set up on behalf of the Chancellor of the Exchequer and the Bank of England (the "Bank"). The purpose of the inquiry, which was led by Bingham LJ, was "to inquire into the supervision of BCCI under the Banking Acts; to consider whether the action taken by all the UK authorities was appropriate and timely; and to make recommendations". The Bank's communication with the inquiry was through three officials known as the Bingham Inquiry Unit (the "BIU"), who instructed external solicitors, Freshfields Bruckhaus Deringer LLP ("Freshfields"), to advise on the preparation and presentation of the Bank's evidence and submissions.

68. The claimants in the litigation, the liquidators and creditors of BCCI, had sued the Bank for misfeasance in public office with respect to its supervision of BCCI. During disclosure, the Bank had claimed legal advice privilege in relation to numerous documents that had been sent to Freshfields. The Bank was unable to claim litigation privilege because the inquiry was not adversarial. The issue in *Three Rivers (No. 5)* arose from the fact that many of those documents had been prepared not by the BIU but by other employees of the Bank. The claimants maintained that such documents did not fall within the ambit of legal advice privilege, and the Court of Appeal agreed, overturning the first instance decision of Tomlinson J.

69. The Court of Appeal was considering four categories of documents as follows:-

    i) Documents prepared by Bank employees, which were intended to be sent to and were in fact sent to Freshfields;

    ii) Documents prepared by Bank employees with the dominant purpose of the Bank's obtaining legal advice but not, in fact, sent to Freshfields;

    iii) Documents prepared by Bank employees, without the dominant purpose of obtaining legal advice, but in fact sent to Freshfields; and

    iv) Documents prepared by ex-employees of the Bank.

70. The competing arguments of the parties were summarised by Longmore LJ at paragraphs 4-5 of the judgment of the court. The claimants said that the BIU was the client of Freshfields (rather than the Bank), and submitted that documents prepared by the Bank's employees or ex-employees, whether prepared for submission to or at the direction of Freshfields or not, did not attract legal advice privilege "as being no more than raw material on which the BIU would, thereafter, seek advice". The claimants said that "only communications between solicitor and client, and evidence of the content of such communications" were privileged, and "[p]reparatory materials

obtained before such communications, even if prepared for the dominant purpose of being shown to a client's solicitor, even if prepared at the solicitor's request and even if subsequently sent to the solicitor, did not come within the privilege".

71. On the other hand, the Bank submitted that "as a matter of general principle, any document prepared with the dominant purpose of obtaining the solicitor's advice upon it came within the ambit of the privilege, whether or not it was actually communicated to the solicitor". It will be observed that neither side's arguments, as explained by the court, focussed on what was meant by the term "client" for the purposes of legal advice privilege.

72. Longmore LJ made a detailed analysis of the history of legal professional privilege by reference to the 19th century cases. It is not necessary to track that history in this judgment. It suffices to say that he concluded with a detailed reference to the Court of Appeal's decision in *Wheeler v. Le Marchant* (1881) 17 Ch D 675 ("*Wheeler v. Le Marchant*"), which he said was "a case of legal advice privilege", and that "[i]n that context it was held that documents obtained from a third party to be shown to a solicitor for his advice did not fall within the privilege …".

73. Longmore LJ cited finally the following passage from Cotton LJ's judgment in *Wheeler v. Le Marchant* at pages 684-685:-

> "It is said that as communications between a client and his legal advisers for the purpose of obtaining legal advice are privileged, therefore any communication between the representatives of the client and the solicitor must be also privileged. That is a fallacious use of the word 'representatives'. If the representative is a person employed as an agent on the part of the client to obtain the legal advice of the solicitor, of course he stands in exactly the same position as the client as regards protection, and his communications with the solicitor stand in the same position as the communications of his principal with the solicitor. But these persons were not representatives in that sense. They were representatives in this sense, that they were employed on behalf of the clients, the defendants, to do certain work, but that work was not the communicating with the solicitor to obtain legal advice. So their communications cannot be protected on the ground that they are communications between the client by his representatives and the solicitor. In fact, the contention of the [Banks] comes to this, that all communications between a solicitor and a third person in the course of his advising his client are to be protected. It was conceded there was no case that went that length, and the question is whether, in order fully to develop the principle with all its reasonable consequences, we ought to protect such documents. Hitherto such communications have only been protected when they have been in contemplation of some litigation, or for the purpose of giving advice or obtaining evidence with reference to it. And that is reasonable, because then the solicitor is preparing for the defence or for bringing the action, and all communications he makes for that purpose, and the communications made to him for the purpose of giving him the information, are, in fact, the brief in the action, and ought to be protected. But here we are asked to extend the principle to a very different class of cases, and it is not necessary, in order to enable persons freely to communicate with their solicitors and obtain their legal advice, that any privilege should be extended to communications such as these".

74. Longmore LJ concluded from that passage that:-

> "Here Cotton LJ, unlike in his judgment in [*Southwark and Vauxhall Water Co v Quick* (1878) 3 QBD 315 ("Southwark")], considers each of the two categories of legal professional privilege and decides in terms that the documents in question do not fall within the first category because they are not communications between solicitor and client and not within the second category because litigation is not contemplated. This case thus makes clear that legal advice privilege does not extend to documents obtained from third parties to be shown to a solicitor for advice".

75. He then recorded that the Bank had submitted that "communications from an employee are different", because "a corporation can only act through its employees". Longmore LJ accepted that that was true but did not think that the argument could enable the Bank to succeed. We interpose that this is precisely the argument that Mr Thanki adopted before us in this case. Longmore LJ then supported his conclusion at the end of paragraph 18 by saying that:-

> "… the passage cited from *Anderson's case* (1876) 2 Ch D 644 ["*Anderson*"] shows that information from an employee stands in the same position as information from an independent agent. It may, moreover, be a mere matter of chance whether a solicitor, in a legal advice privilege case, gets his information from an employee or an agent or other third party. It may also be problematical, in some cases, to decide whether any given individual is an employee or an agent and undesirable that the presence or absence of privilege should depend upon the answer".

76. The relevant passages from the Court of Appeal's judgments in *Anderson* were those he had cited at paragraph 14, after which he had commented as follows:-

> "These two citations show that information given by an employee to an employer or fellow-employee, or information given by an agent to a principal, stands in the same condition as matters known to the client and does not, of itself, attract privilege in the first of Mellish LJ's two categories. This is so even though, on the facts, it is intended that it be shown to a solicitor".

77. It seems, therefore, that Longmore LJ was fully aware that the distinction between legal advice and litigation privilege had not been elucidated in *Anderson*, but nonetheless concluded that the holding that employees "stood in the same condition" as agents was relevant to the Bank's argument that employees should be treated differently from them. It seems to us that this line of reasoning was essential to Longmore LJ's decision and is not one from which we should depart even if, on one analysis, it can be argued to be *obiter*.

78. We should also say that we do not think that Longmore LJ intended, in the above passage in paragraph 18, to refer to the part of the judgment in *Anderson* that he had mentioned in paragraph 15 when dealing with Brett LJ's judgment in So*uthwark*. At pages 320-321 in *Southwark*, Brett LJ had paraphrased what James LJ had said in *Anderson*, read together with what Mellish LJ had said in *Anderson*, as "if a party seeks to inspect a document which comes into existence merely as the materials for the brief, or that which is equivalent to the brief, then the document cannot be seen, for it is privileged". But that was not, we think, the part to which Longmore LJ was referring when he said that the passage from *Anderson* supported his holding. Indeed, he expressly said at the end of paragraph 15 that the 'rule' identified and addressed by

Brett LJ was concerned with litigation privilege, not legal advice privilege, and was therefore irrelevant to the question before him.

79. Longmore LJ's first conclusion on legal advice privilege is at paragraph 21 as follows:-

> "We, therefore, conclude that the 19th century authorities established that legal advice privilege was a well-established category of legal professional privilege, but that such privilege could not be claimed for documents other than those passing between the client and his legal advisers and evidence of the contents of such communications. …"

80. Longmore LJ then rejected the Bank's subsidiary argument that the principles emanating from the 19th century cases had been varied in the more recent decisions, before concluding at paragraph 31 that:-

> "We therefore conclude that the Bank is not entitled to privilege in any of the four categories itemised at the beginning of this judgment. Mr Stadlen asked what the position would be if the Governor himself had noted down what he remembered in relation to the supervision of BCCI with the intention of giving it to the BIU for transmission to Freshfields. No privilege has been claimed for any such specific document but, as it seems to us, Mr Pollock [counsel for the claimants] was right to say that on the evidence before the court, the BIU, which was established to deal with inquiries and to seek and receive Freshfields' advice, is for the purpose of this application, the client rather than any single officer however eminent he or she may be. It follows that no separate consideration need be given to the position of ex-employees who are, obviously, in no better position for the purpose of any claim to privilege".

81. We can fully accept that the Court of Appeal ***could*** have decided *Three Rivers (No. 5)* on the simple basis that Freshfields' client was the BIU (not the Bank), and the documents had been prepared by the Bank (not the BIU), so that the position of the particular Bank employee who had prepared them was irrelevant to the question of legal advice privilege. We do not, however, think that, fairly read, that was the Court of Appeal's reasoning. As we have explained, it seems to us that Longmore LJ reasoned that, because agents and employees, on authority, stood in the same position in relation to legal professional privilege, once it was established that only communications between the lawyer and the client, and not between the lawyer and an agent of the client, could attract legal advice privilege, communications between a lawyer and an employee of the client (other than employees specifically tasked with seeking and receiving legal advice) could also not be privileged. As we have said, we are not sure that it is necessary for us to determine whether this reasoning was the *ratio decidendi*, but if that did have to be decided, we would hold that it was.

Three Rivers (No. 6)

82. *Three Rivers (No. 6)* concerned a distinct disclosure application from that in issue in *Three Rivers (No. 5).* It was ***not*** an appeal against the Court of Appeal's decision in *Three Rivers (No. 5)* and, as we have said, the Bank had been refused permission for such an appeal by the House of Lords. Nonetheless, the Bank urged the House to reconsider *Three Rivers (No. 5)* when it argued *Three Rivers (No. 6).* The House unanimously declined that invitation.

83. Lord Scott said the following:-

> "20. … The Bank plainly believe that the Court of Appeal order in *Three Rivers (No 5)* went too far. But the Bank's petition for leave to appeal was refused and this is not an appeal against that order. Moreover the Bank has discharged the disclosure obligation required by that order. However, the narrow scope allowed by the Court of Appeal in the judgment now under appeal to "legal advice" has heightened the concerns of many about the approach to legal advice privilege inherent in the first Court of Appeal judgment. This explains in part the applications for leave to intervene in this appeal made by the Attorney General, by the Law Society and by the Bar Council. Each has been given leave to intervene …
>
> 21. The written submissions from the interveners … make clear their concern that [*Three Rivers (No. 5)*] may have gone too far in treating communications between Freshfields and employees of the Bank, other than the BIU, as being for privilege purposes communications between Freshfields and third parties. Your Lordships have been invited to clarify the approach that should be adopted to determine whether a communication between an employee and his or her employer's lawyers should be treated for legal advice privilege purposes as a communication between the lawyers and their client. This is of particular importance for corporate clients, who can only communicate through employees or officers.
>
> 22. The employee/client point does not, however, arise as an issue on this appeal … The point is, therefore, so far as the current litigation between the claimants and the Bank is concerned, strictly moot. Nothing turns on it. None the less your Lordships have been asked to express a view on the point. I will return to it.
>
> …
>
> 46. One of the matters debated at the Court of Appeal hearing that led to the *Three Rivers (No. 5)* judgment … was whether, or which, communications between Freshfields and the Bank employees or ex-employees, or officers or ex-officers, could qualify for legal advice privilege … This is not an issue which arises for decision on this appeal but, for reasons which I have explained (see paras 20 and 21), submissions have been made to your Lordships on the issue and your Lordships have been invited to express views on them. I think your Lordships should decline the invitation for a number of reasons.
>
> 47. First, the issue is a difficult one with different views, leading to diametrically opposed conclusions, being eminently arguable. Second, there is a dearth of domestic authority … Third, whatever views your Lordships may express, and with whatever unanimity, the views will not constitute precedent binding on the lower courts. The guiding precedent on the issue will continue to be … *Three Rivers (No. 5)*. Fourth, if and when the issue does come before the House (or a new Supreme Court) the panel of five who sit on the case may or may not share the views of your Lordships, or a majority of your Lordships, sitting on this appeal. Fifth, and finally, this House, represented by an Appeal Committee of three, refused leave to appeal against the *Three Rivers (No. 5)* judgment.

> 48. For all these reasons I think your Lordships should refrain from expressing views on the issue. Nothing that I have said should be construed either as approval or disapproval of the Court of Appeal's ruling on the issue in *Three Rivers (No. 5)*. The issue simply does not arise on this appeal."

84. Lord Carswell said the following on the same point:-

> 72. The court [in *Three Rivers (No 5)*] accepted that Freshfields' client was the BIU … but its conclusions did not turn so much on the identity of the authors of the documents in question as on the more general point that in the court's view legal advice privilege, as distinct from litigation privilege, was restricted to communications between a client and his legal advisers, to documents evidencing such communications, and to documents that were intended to be such communications even if they were not in fact communicated. None of the four categories of documents concerned in the appeal came within that description and accordingly they were not covered by privilege. It rejected the Bank's argument that communications from an employee were so covered, even though it recognised that a corporation can only act through its employees.
>
> …
>
> 118. … Mr Sumption [counsel for the Bank] urged that we should express an opinion on the correctness of the decision of the Court of Appeal in *Three Rivers (No 5)* … which he submitted raised important issues about privilege which should be resolved. The Court of Appeal in that case found against the Bank and your Lordships refused the Bank's petition for leave to appeal. Disclosure of large numbers of documents has been made in accordance with the order of the Court of Appeal and Mr Sumption gave an undertaking on behalf of the Bank that, if the House were to rule that the decision of the Court of Appeal was incorrect, the documents already disclosed will continue to be admissible in the present action and no point will be taken about the judge having seen them. I should be reluctant, in the absence of a very pressing need, to express an opinion on issues which are not before the House—even though we permitted some argument on them to be put before us—the more so when leave to appeal was refused. For that reason, and for those given by my noble and learned friend Lord Scott of Foscote in discussing this issue, I do not propose to express any opinion on it. Having said that, I am not to be taken to have approved of the decision in *Three Rivers (No 5)*, and I would reserve my position on its correctness."

85. Lord Rodger specifically agreed with Lord Scott's approach to the *Three Rivers (No. 5)* issue at paragraph 49, as did Baroness Hale at paragraph 63, whilst Lord Brown expressed general agreement with the speeches of Lords Scott and Carswell at paragraph 122.

The litigation privilege issues

Issue 1: Was the judge right to determine that, at no stage before all the Documents had been created, criminal legal proceedings against ENRC or its subsidiaries or their employees were reasonably in contemplation?

86. This issue was not addressed extensively in oral argument by either side, but ENRC handed in a detailed note on the evidence relating to litigation privilege in the course of the first day of its submissions. We have considered that note, both parties' written submissions, and the materials that the parties referred to, in detail. ENRC's main challenge to the judge's conclusion was that she placed too little weight on the evidence of Mr Spendlove. Mr Spendlove had said, for example, at paragraph 66 of his first statement that Messrs Gerhard Ammann and Dalman had "confirmed to him that DLA Piper's advice that criminal proceedings could be reasonably said to be in contemplation as at 21 April 2011 reflected their understanding of the effect of the often repeated advice that had been given by Mr Gerrard up to that point, namely that there was a real and serious risk of law enforcement and/or regulatory intervention, including criminal prosecution". This view was, according to Mr Thanki, consistent with all the contemporaneous documents and, in particular, Mr Gerrard's 21st April 2011 letter to Mr Barker.

87. In addition to its factual arguments, ENRC contended that:-

i) The judge wrongly failed to hold that the SFO investigation, which she had correctly found was under way by no later than 11th August 2011, was properly to be regarded as adversarial litigation (see, for example, *Tesco v. Office of Fair Trading* [2012] CAT 6 at paragraph 44, and *Re L (A Minor)* [1997] 1 AC 16 at pages 26-27).

ii) The judge misunderstood that, once an SFO criminal investigation was reasonably in contemplation, so was a criminal prosecution (see Brooke LJ at paragraph 66 in *United States of America v. Philip Morris* [2004] EWCA Civ 330 ("*Philip Morris CA*"), Millett J at pages 454a-b in *Plummers v. Debenhams* [1986] BCLC 447, and *Westminster International BV v. Dornoch* [2009] EWCA Civ 1323 ("*Dornoch*") per Etherton LJ at paragraphs 25-31).

iii) Even though a party anticipating litigation may need to establish further facts before it can say with certainty that proceedings are likely, that does not prevent that party satisfying the test that litigation is a real prospect (*Dornoch supra*, and *Axa Seguros v. Allianz Insurance plc* [2011] EWHC 268 (Comm) at paragraph 43 per Christopher Clarke J).

iv) The judge's distinction between criminal and civil proceedings failed to take account of the authorities already mentioned and the fact that the Guidelines show that a party may have a reasonable fear of prosecution even if it does not yet have concrete evidence of its own wrongdoing.

88. This aspect of the appeal is, in our judgment, primarily factual, but the judge did not see ENRC's witnesses cross-examined. In these circumstances, it seems to us that the Court of Appeal could, in theory at least, be in as good a position as the judge to evaluate the facts (see *Assicurazioni Generali SpA v. Arab Insurance Group (Practice Note)* [2002] EWCA Civ 1642 per Clarke LJ at paragraphs 14-16, and *Datec Electronic Holdings Ltd v. UPS Ltd* [2007] UKHL 23 per Lord Mance at paragraphs 45-50).

89. We have taken full account also of the recent *dicta* of this court in paragraph 29 of Sales LJ's judgment in *Smech Properties Ltd v. Runnymede BC* [2016] EWCA Civ 42, [2016] J.P.L. 677 approved in *Regina (Bowen) v. Secretary of State for Justice* [2017] EWCA Civ 2181, [2018] 1 W.L.R. 2170 at paragraphs 70-73 per McCombe LJ. Sales LJ said this:-

> "… Where an appeal is to proceed, like this one, by way of a review of the judgment below rather than a re-hearing, it will often be appropriate for this court to give weight to the assessment of the facts made by the judge below, even where that assessment has been made on the basis of written evidence which is also available to this court. The weight to be given to the judge's own assessment will vary depending on the circumstances of each particular case, the nature of the finding or factual assessment which has been made and the nature and range of evidential materials bearing upon it. Often a judge will make a factual assessment by taking into account expressly or implicitly a range of written evidence and making an overall evaluation of what it shows. Even if this court might disagree if it approached the matter afresh for itself on a re-hearing, it does not follow that the judge lacked legitimate and proper grounds for making her own assessment and hence it does not follow that it can be said that her decision was "wrong"."

90. We certainly accept that the judge undertook a careful and detailed evaluation of the documents and what the witnesses had said. Her view, in essence, was that it was rather different to say that an SFO prosecution was in the reasonable contemplation of the defendant than to say that civil proceedings were in reasonable contemplation of a potential defendant. She relied on the need for the SFO to conclude that there was a sufficient evidential basis for prosecution and that the public interest test was met, and thought that ENRC had not even turned its mind to what might be discovered. Whilst she acknowledged what Mr Spendlove had said, she did not think that it was sufficient since it amounted to little more than a generalised assertion. She was certainly influenced by the fact that ENRC had no corporate knowledge of any of the matters alleged in advance of a detailed investigation. The SFO supported the judge's factual conclusions and contended that she had applied the correct legal principles.

91. After careful consideration, we have reached the conclusion that the judge was wrong to conclude that a criminal prosecution was not reasonably in prospect once the SFO had written its letter of 10th August 2011. This is, we think, a case where this Court has actually had both the time and the ability to give it as good an opportunity of examining the evidence as was available to the judge.

92. The contemporaneous documents do not, as the judge suggested, show that ENRC failed at the first hurdle of showing that, as at 19th August 2011, it was "aware of circumstances which rendered litigation between itself and the SFO a real likelihood rather than a mere possibility" (adopting the test in *Philip Morris HC*). Those documents demonstrate, we think, the reverse. We refer to the following points in particular:-

i) In December 2010, ENRC received the whistle-blower email alleging corruption and financial wrongdoing within SSGPO and appointed DLA Piper to investigate the allegations.

ii) By March 2011, ENRC's general counsel had made clear that he thought from his GC100 contacts that ENRC was firmly on the SFO's radar and that he expected an investigation in due course, which was why he had "upgraded [ENRC's] dawn raid procedures".

iii) In April 2011, ENRC's head of compliance predicted an "SFO dawn raid … before summer's over".

iv) In April 2011, Mr Gerrard wrote to Mr Barker saying that the "internal investigation at SSGPO [related] to conduct that is potentially criminal in nature" and that "[a]dversarial proceedings might occur out of the internal investigation and, in our view, both criminal and civil proceedings can be reasonably said to be in contemplation".

v) When the SFO finally wrote to ENRC on 10th August 2011, it said that the SFO was not carrying out a criminal investigation at that stage, but asked that ENRC consider the Guidelines carefully.

vi) The Guidelines expressly said that: "no prosecutor can ever give an unconditional guarantee that there will not be a prosecution"; "professional advisers will have a key role"; any information received by the SFO would be for the purposes of its powers under the CJA 1987; wherever possible, the investigation would be carried out by the "corporate's" own professional advisers; and participation in the self-reporting process would increase "the prospect (in appropriate cases) of a civil rather than a criminal outcome" by reducing the likelihood that the SFO would discover corruption itself .

vii) On 22nd September 2011, Jones Day advised ENRC that, if it engaged in the voluntary disclosure regime, it would lose privilege in relation to the documents that it provided to the SFO. What is notable about this memorandum is the assumption at that time that legal professional privilege would otherwise attach to those documents.

viii) At the first meeting between ENRC and the SFO on 3rd October 2011, the SFO said that could give no assurance that it would not prosecute.

ix) On 18th June 2012, the SFO met ENRC and expressed concern at the absence of a report, saying that "[i]f the investigation had stalled or been obstructed this would be regarded very negatively. For a civil settlement to be entertained, it was essential that the investigation findings were disclosed in the near future".

x) On 12th December 2012, Dechert wrote to the SFO mentioning legal professional privilege and asking for confirmation that "if an equitable settlement [were not] reached between the SFO and ENRC, … that it [was] accepted that the report [would] not be used by the SFO as evidence of any wrongdoing or in any criminal proceedings against either ENRC, any subsidiary of ENRC or any employee or director of ENRC or its subsidiaries". The reply gave no such assurances.

93. In these circumstances, it seems to us that the whole 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. This sub-text was supported by Mr Spendlove's evidence. Whilst that evidence was hearsay, it was not suggested that he was being untruthful. His statement that Messrs Ammann and Dalman had told him that DLA Piper had advised that criminal proceedings could be reasonably said to be in contemplation as at 21st April 2011 was supported by the documents we have mentioned before and after that date. That view, Mr Spendlove said, had reflected their understanding of the effect of the oft-repeated advice of Mr Gerrard to the effect that "there was a real and serious risk of law enforcement and/or regulatory intervention, including criminal prosecution". We do not think it was open to the judge to disregard that evidence, as she appears to have done.

94. Andrews J may have been justified in thinking that the process was at an early stage triggered simply by the whistle-blower email and the press allegations relating to Camrose, but that did not mean that the SFO was not taking a serious and concerted interest in ENRC's activities in Kazakhstan and Africa.

95. We accept also that Mr Gerrard's view was not conclusive, and he may have wanted to create a situation where legal professional privilege covered what he was doing, but that again does not mean that a criminal prosecution was not actually in contemplation.

96. As regards ENRC's first legal point under this heading, 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 principles set out in the Guidelines), and legal advisers 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. Secondly, we do not think that Etherton LJ's *dicta* in *Dornoch* lead inevitably to the conclusion that once an SFO criminal investigation is reasonably in contemplation, so too is a criminal prosecution. As Etherton LJ concluded at paragraph 36 of *Dornoch*: "[e]ach case turns on its own facts and will be judged in the light of the facts as a whole. Neither a statement on behalf of the insurer as to its state of mind, nor the mere fact of retaining solicitors, will separately or together necessarily be sufficient to satisfy the requirements for litigation privilege". Here, however, the documents and evidence pointed clearly towards the contemplation of a prosecution if the self-reporting process did not succeed in averting it.

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. In the present case, the uncertainty was a function of ENRC not having the information required to evaluate the whistle-blower email or the Camrose issues. An individual suspected of a crime will, of course, know whether he has committed it. An international corporation will be in a different position, but the fact that there is uncertainty does not mean that, in colloquial terms, the writing may not be clearly written on the wall. We think the judge was wrong to regard the uncertainty as pointing against a real likelihood of a prosecution. The reasoning in paragraphs 162-163 of her judgment could not outweigh the clear indications of a likely prosecution contained in the documents to which we have referred.

99. The judge's distinction between civil and criminal proceedings was, in our judgment, illusory. Of course, civil proceedings are sometimes brought without foundation, but here there was no suggestion that the threat of criminal prosecution was anything other than extremely serious. We are conscious, in this connection, of two matters in particular. First, the Bribery Act 2010 was not actually in force at the relevant time, and secondly, that difficulties may arise in prosecutions in respect of conduct undertaken overseas. Despite these factors, 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. These conclusions are not, we think, invalidated by the Court of Appeal Criminal Division's decision in *R (for and on behalf of the Health and Safety Executive) v. Paul Jukes* [2018] Lloyd's Rep FC 157. In that case, the defendant had signed a statement shortly after a fatal industrial accident accepting that he was responsible for the company's health and safety. The Court of Appeal (Flaux LJ, Nicola Davies J and HHJ Bidder QC) upheld the judge's decision that the statement was not covered by litigation privilege, because criminal proceedings were not in contemplation, and any privilege would anyway have attached to the company, which had not asserted it. The Court did approve paragraphs 160-161 of Andrews J's judgment, but did so having decided that no adversarial litigation was in progress when the statement was made to the company, because matters were still at an investigatory stage. That was a decision on the facts, where the defendant had not been interviewed by the Health and Safety Executive and the police until 16 months after the statement. The approval of Andrews J's approach was, in our view, *obiter*. 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.

101. In these circumstances, we would allow ENRC's appeal against the judge's finding that, at no stage before all the Documents had been created, criminal legal proceedings against ENRC or its subsidiaries or their employees were reasonably in its contemplation. It seems to us that ENRC was right to say that they were in reasonable contemplation when it initiated its investigation in April 2011, and certainly by the time it received the SFO's August 2011 letter.

Issue 2: Was the judge right to determine that none of the Documents was brought into existence for the dominant purpose of resisting contemplated criminal proceedings against ENRC or its subsidiaries or their employees?

102. Andrews J began her treatment of this issue at paragraph 59 by approving Goldberg J's dictum in *Bailey v. Beagle*. That, as it seems to us, was the wrong starting point. The fact that solicitors prepare a document with the ultimate intention of showing that document to the opposing party does not, in our judgment, automatically deprive the preparatory legal work that they have undertaken of litigation privilege. We can imagine many circumstances where solicitors may spend much time fine-tuning a response to a claim in order to give their client the best chance of reaching an early settlement. The discussions surrounding the drafting of such a letter would be as much covered by litigation privilege as any other work done in preparing to defend the claim. We doubt, therefore, the correctness of the legal principles that the judge stated at paragraph 61 of her judgment, and the way that she applied them at paragraphs 168-171. 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.

103. It was common ground that the test to be adopted in relation to documents prepared for reasons which only included (but were not limited to) the conduct of litigation is that identified by the House of Lords in *Waugh v British Railways Board* [1980] AC 520 ("*Waugh*"). The document over which privilege was asserted was a report prepared by officers of the British Railways Board (the "board") into a fatal railway accident, it being clear, on the facts, that the report had been prepared for two

purposes of equal importance (namely railway safety and litigation), and also that such reports were required to be prepared after all accidents, regardless of whether litigation was contemplated (see the judgment of Lord Wilberforce at pages 530B-531A). In a judgment with which the other members of the House agreed in terms or in substance, he identified the test to be adopted (at page 533) in these terms:

> "It appears to me that unless the purpose of submission to the legal adviser in view of litigation is at least the dominant purpose for which the relevant document was prepared, the reasons which require privilege to be extended to it cannot apply."

104. That test has been applied in the subsequent decisions in this area of the law. Thus in *Re Highgrade Traders* [1984] BCLC 151 ("*Highgrade*"), it was made clear that the exercise of determining dominant purpose in each case is a determination of fact, and that the court must take a realistic, indeed commercial, view of the facts. That case concerned reports commissioned by the insurers into the cause of a fire, where arson by an officer of the insured was suspected. The court concluded that the reports had not been commissioned as a matter of academic interest. Oliver LJ (with whom Robert Goff LJ agreed) explained (at pages 173-174):-

> "What, then, was the purpose of the reports? The learned judge found a duality of purpose because, he said, the insurers wanted not only to obtain the advice of their solicitors, but also wanted to ascertain the cause of the fire. Now, for my part, I find these two quite inseparable. The insurers were not seeking the cause of the fire as a matter of academic interest in spontaneous combustion. Their purpose in instigating the enquiries can only be determined by asking why they needed to find out the cause of the fire. And the only reason that can be ascribed to them is that of ascertaining whether, as they suspected, it had been fraudulently started by the insured. It was entirely clear that, if the claim was persisted in and if it was resisted, litigation would inevitably follow. The claim had been made and there was no indication that it was not going to be pressed, particularly after Mr MR's acquittal. It is, as it seems to me, entirely unrealistic to attribute to the insurers an intention to make up their minds independently of the advice, which they received from their solicitors, that the claim should or should not be resisted. Whether they paid or not depended on the legal advice which they received, and the reports were prepared in order to enable that advice to be given. The advice given would necessarily determine their decision and would also necessarily determine whether the anticipated litigation would or would not take place. The learned judge (I have already quoted this passage from his judgment) said ([1983] BCLC 137 at 148):
>
> > 'In my view, the reports were commissioned for two purposes: (a) to enable Phoenix to make up its mind about whether to resist the insurance claim on the ground that the fire was or was probably caused by the insured and (b) to place evidence of the cause of the fire in the hands of the solicitors if the reports should suggest with some probability that the fire was caused by the insured.'
>
> He seems here, as I read his judgment, at this point to have been of the opinion that *Waugh* established that it was only if the documents were brought into existence for the dominant purpose of actually being used as evidence in the anticipated proceedings that privilege could attach and that

> the purpose of taking advice on whether or not to litigate (which is, in substance, what the decision to resist the claim amounted to) was some separate purpose which did not qualify for privilege. That, in my judgment, is to confine litigation privilege within too narrow bounds and it reproduces what I believe to be the fallacy inherent in the note in the Supreme Court Practice to which I have referred. No doubt the purpose was 'dual' in the sense that the documents might well serve both to inform the solicitors and as proofs of evidence if proceedings materialised. But, in my judgment, the learned judge failed to appreciate that the former purpose was itself one which would cause the privilege to attach."

105. Similarly, in *Bilta (UK) Limited (in liquidation) v. Royal Bank of Scotland* [2017] EWHC 3535 (Ch) ("*Bilta*"), the Chancellor concluded that RBS was not spending large sums on legal fees for the primary purpose of dissuading HMRC from issuing an assessment against it, if that could even properly be regarded as a purpose distinct from the litigation purpose.

106. In the course of argument, the SFO suggested that there was a tension between the decision in *Highgrade* and the House of Lords' decision in *Waugh*, and that the latter should be followed here. We do not accept that the decisions are irreconcilable: they follow an identical principle, reaching different conclusions for fact specific reasons. The House of Lords specifically concluded that the fatal accident report over which privilege was asserted had been prepared for two purposes of equal importance only one of which concerned litigation whereas in *Highgrade*, as Oliver LJ explained at pages 174-175 of his judgment:-

> "The instant case is not, in my judgment, on all fours … with [*Waugh*]. In … [*Waugh*] the documents in question would, in any event, have had to be produced for the Board's internal purposes in connection with railway safety. Those seem to me to be quite different circumstances from those of the instant case where there was no purpose for bringing the documents into being other than that of obtaining the professional legal advice which would lead to a decision whether or not to litigate …
>
> … it seems incontrovertible on the facts of this case that the insurers had very early and very justifiably formed the view that litigation was probable and that Mr Speyer's further advice would be required to enable them to present their solicitors with the full material required to enable them to give proper advice on the insurers' future conduct in relation to the claim.
>
> For my part, therefore, I would hold that the specific documents sought by the liquidator are, in the circumstances of this case, the subject matter of privilege. I emphasise the words 'in the circumstances of this case' for it is, I think, clear from [*Waugh*] that, whenever the question arises, the court is concerned to determine the actual intention of the party claiming privilege and, where it discerns a duality of purpose, to determine what is the dominant purpose."

107. The facts of this case lie between *Waugh* on the one hand and *Highgrade* and *Bilta* on the other. In the former there was an express finding of dual purpose. In the latter two cases, it is difficult to see what the alternative purpose was. In relation to *Highgrade*, the only real interest for the insurers was in ascertaining whether potential proceedings under the fire policy could successfully be defended; in the latter, HMRC

had made it clear that they were pursuing the tax and the company had to determine the extent to which such proceedings could be defended.

108. The position in this case is not quite as clear cut. The SFO's letter of 10th August 2011 urged careful consideration of its Guidelines, impliedly identifying the benefits of self-reporting, but also said expressly that it wanted to discuss "ENRC's governance and compliance programme and its response to the allegations as reported". We have already decided that a criminal investigation and a potential prosecution was reasonably in the contemplation of ENRC at the time that it commissioned DLA Piper's investigation. ENRC had been advised by its solicitors to that effect, even if it could reasonably be suggested that the solicitors had put the risk at a higher level than could, perhaps, have been justified objectively. In these circumstances, the issue becomes whether it would have been reasonable to regard ENRC's dominant purpose as being to investigate the facts to see what had happened and deal with compliance and governance or to defend those proceedings. Andrews J held that it was the former.

109. In our judgment, in this case, the answer can be achieved by unpacking the words 'compliance' and 'governance'. 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 also. 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 whistle-blower allegations must be brought into the zone where the dominant purpose may be to prevent or deal with litigation.

110. In the period which has elapsed since the decision of Andrews J, proceedings have been pursued by ENRC against Dechert and, with the consent of the parties, the pleadings have been made available to the court. In those circumstances, the SFO submitted that the conclusion as to dominant purpose is inconsistent with the content of Dechert's Defence in the proceedings. The SFO relied in particular on the following paragraphs:-

> "9. ENRC originally instructed [DLA Piper] … and subsequently Dechert … to investigate allegations of wrongdoing at ENRC's subsidiary, SSGPO, in Kazakhstan. That investigation had nothing to do with the SFO, but was initiated by ENRC's Audit Committee for corporate governance reasons …
>
> 10. The need to investigate serious wrongdoing by the management of ENRC and its subsidiaries remained a key motivation for retaining the Defendants independent of the self-reporting process with the SFO …
>
> 83. … (2) … The risk of UK criminal investigations or proceedings was not a material factor in ENRC's decision to instruct Dechert to investigate the Kazakhstan Allegations …".

111. Those paragraphs do not alter the true factual position for three reasons. First, pleadings filed in a separate action by a party that did not give evidence in these proceedings are of limited value to this court even if, which is by no means clear, they should properly be admitted bearing in mind the criteria for the admission of further evidence. Secondly, the views of Dechert on dominant purpose can never be conclusive as to the true motivations of the relevant individuals at ENRC, with which this court is concerned. Finally, and most importantly, even if litigation was not the

dominant purpose of the investigation at its very inception, it is clear from the evidence that it swiftly became the dominant purpose. We have already observed under issue 1 that, in April 2011 (some three months before the first Category 1 document was created), Dechert advised ENRC that "both criminal and civil proceedings can be reasonably said to be in contemplation" so that documents arising out of the investigation were covered by litigation privilege, and that, in September 2011 (shortly after the first Category 1 document was created), Jones Day advised the company that privilege would be lost if those documents were shared with the SFO under the voluntary disclosure regime. Mr Spendlove's evidence, which as we have said has never been suggested to be untruthful, is that ENRC took that advice on board.

112. We turn now to the judge's conclusion at paragraph 171 that there was overwhelming evidence that the Category 1 documents were created for the specific purpose of being shown to the SFO. We disagree with this important conclusion. In our judgment, looking fairly at the documentation as a whole, one can see that ENRC never actually agreed to disclose the materials it created in the course of its investigation to the SFO. It certainly gave the SFO repeated indications that it would make "full and frank disclosure" and that it would produce its eventual report to the SFO. But it never actually committed to producing its interviews and intermediate work product to the SFO. That was part of what frustrated the SFO and ultimately led to the breakdown of the self-reporting process. It suffices to take a few examples from the chronology set out above:-

i) The Guidelines themselves, which the SFO sent to ENRC at the outset, gave the clear impression that the self-reporting "corporate" would be in receipt of professional legal advice, both before and during the process.

ii) On 7th October 2011, four days after the first meeting between ENRC and the SFO, an internal SFO email recorded that Mr Gerrard had said that ENRC would make a voluntary disclosure the following week. In fact, it never did so.

iii) The note of the second meeting between the SFO and ENRC on 30th November 2011 recorded that ENRC was "keen to tackle the issue and be full and frank". This frankness never totally materialised.

iv) The note of the third meeting between ENRC and the SFO on 20th December 2011 recorded that Mr Ehrensberger had been "been given a mandate to disclose [to the SFO] anything he feels appropriate". Again, this did not happen.

v) At the fifth meeting on 10th May 2012, Mr Dalman informed the SFO of the ENRC board's commitment to transparency, co-operation and openness, but the SFO expressed concern that progress had been slow and that nothing substantive had yet been reported by ENRC to the SFO.

vi) The note of the 18th June 2012 meeting recorded the SFO as saying that "[f]or a civil settlement to be entertained, it was essential that the investigation findings were disclosed in the near future". It does not appear that, at least at that stage, even the SFO was expecting voluntary disclosure of all Dechert's work product.

vii) The PowerPoint presentations of 20th July 2012 and 28th November 2012 gave the SFO detailed updates on the progress of the interviews and investigations, and confirmed ENRC's "commitment to [a] full and frank process", but did not actually disclose either concrete results or statements of any sort.

viii) On 12th December 2012, Dechert wrote to the SFO suggesting for the first time that it was engaged in a self-reporting process pursuant to the Guidelines, and asking, given the withdrawal of the Guidelines on 9th October 2012, for "confirmation that ENRC is still part of the corporate self-reporting process prior to Dechert submitting our report on SSGPO". ENRC also said that: "[a]ny report submitted by Dechert to the SFO will be submitted under a limited waiver of legal professional privilege for the purposes of the corporate self report only". Whilst it is true, as the SFO submitted, that one could conclude from this document that self-reporting had begun at some stage between August 2011 and December 2012, in fact, Dechert and ENRC had promised nothing in relation to the interview notes and lawyers' work product. Moreover, after this stage, Dechert was expressly asserting legal professional privilege, and even the 28th February 2013 disclosure of Dechert's report on the Kazakhstan investigation was the subject of a specific waiver of legal professional privilege.

113. In these circumstances, we conclude that, not only was a criminal prosecution reasonably in ENRC's contemplation, but the judge ought also to have determined that the Category 1 documents were brought into existence for the dominant purpose of resisting or avoiding those (or some other) proceedings.

114. The same can be said of the FRA documents in Categories 2 and 4. The books and records review was commissioned at around the same time as the Dechert investigation, and FRA's work formed part of that investigation from, at the latest, 15th July 2011 (when FRA was formally instructed by Dechert). The judge's conclusion that the dominant purpose of the review was compliance and remediation (which itself might have been intended to avoid or deal with litigation) sits uncomfortably with that background, and is also in stark contrast to the evidence of Messrs Duthie and Spendlove. In our judgment, the judge failed to adequately explain at paragraphs 173-176 why she rejected that evidence. She did not specify any of the "wealth of contemporaneous documents" that she said supported her conclusion. She seemed to rely mainly on the absence of contemporaneous evidence pointing in the opposite direction, even though ENRC's submission, which she recorded at paragraph 174,[3] provided a plausible explanation for the absence of such evidence. In those circumstances, her conclusion cannot stand.

115. For the avoidance of doubt, nothing in this analysis should be taken to impact adversely on the operation of the scheme set out in Schedule 17 of the Crime and Courts Act 2013 in relation to deferred prosecution agreements ("DPA") or the circumstances in which the court is asked to approve a DPA pursuant to section 45 of that Act. The Act achieved Royal Assent on the same day that the SFO here determined to commence a criminal investigation and therefore was not necessarily the focus of the earlier discussions with ENRC but the purpose of the scheme (overseen by the court) has been to develop a mechanism whereby companies are encouraged to self-report, accept a negotiated penalty for breaches of the law

[3] See paragraph 55 above.

identified and to undertake monitored governance and compliance reviews. The benefit is to avoid both the cost and non-penal consequences of conviction.

116. It is, however, obviously in the public interest that companies should be prepared to investigate allegations from whistle blowers or investigative journalists, prior to going to a prosecutor such as the SFO, without losing the benefit of legal professional privilege for the work product and consequences of their investigation. Were they to do so, the temptation might well be not to investigate at all, for fear of being forced to reveal what had been uncovered whatever might be agreed (or not agreed) with a prosecuting authority. The remedy for the SFO is not to allow prevarication and delay (which might be said to have occurred in this case) to prevent a timeous investigation, when it becomes clear that the company is not wholeheartedly reporting its own conduct and making appropriate waivers of privilege. Whether the fact that an investigation has been formally commenced should ultimately deprive a prosecutor of the opportunity of agreeing a DPA will be for the prosecutor to decide in the light of all the circumstances.

117. In any event, to determine whether a DPA is in the interests of justice, and whether the terms of the particular DPA are fair, reasonable and proportionate, the court must examine the company's conduct and the extent to which it cooperated with the SFO. Such an examination will consider whether the company was willing to waive any privilege attaching to documents produced during internal investigations, so that it could share those documents with the SFO (see, for example, *Serious Fraud Office v. Rolls-Royce plc* [2017] Lloyd's Rep FC 249 at paragraphs 19-21, 35-39 and 121). Had the court been asked to approve a DPA between ENRC and the SFO, the company's failure to make good on its promises to be full and frank would undoubtedly have counted against it. All this, however, is quite different from the question that actually arises, namely whether the Documents were covered by privilege in the first place.

118. Finally in this connection, it is worth summarising what seems to have gone wrong with the judge's consideration of the question of dominant purpose. First, she started with Goldberg J's *dictum* that documents prepared for the purpose of settling or avoiding a claim are not created for the dominant purpose of defending litigation. That was, in our view, an error of law. Secondly, she did not properly understand the way in which *Waugh* and *Highgrade* are to be understood. The policy of the board in *Waugh* requiring it to investigate all accidents was a distinct purpose that prevented the possible litigation being the dominant purpose. The need to identify the cause of the fire in *Highgrade* or to investigate the existence of corruption in this case was just a subset of the defence of contemplated legal proceedings. Thirdly, the judge misinterpreted the contemporaneous material, thinking wrongly that it showed that ENRC always intended or agreed to share the core material they obtained from their interviews and investigations with the SFO (as opposed to any report they ultimately prepared). Instead, the material clearly demonstrates that no such formal agreement was ever made. ENRC certainly led the SFO to believe it might in the future waive privilege in such material, but it never actually did so. It was noteworthy that the SFO never even contended for a waiver of privilege.

119. For these reasons, we have concluded that the judge ought to have concluded that the Documents were brought into existence for the dominant purpose of resisting or avoiding contemplated criminal proceedings against ENRC or its subsidiaries or their employees.

Issue 3: In the circumstances, which if any of the Category 1, 2 or 4 documents are protected by litigation privilege?

120. In our judgment, applying the basic principles already adumbrated, all the interviews undertaken by Dechert were covered by litigation privilege. That seems to us to have been the SFO's own understanding from the Guidelines and its discussions with ENRC between August 2011 and March 2013. Whilst the SFO several times reserved its position, its own Guidelines made clear its expectation that the company's lawyers would be undertaking an investigation and would then report to the SFO. The repeated requests for full and frank disclosure seem to me to have been a plea for that privilege to be waived.

121. We do not see that the books and records review is in a different position. It was part of ENRC's fact-finding process at a time when criminal prosecution was in reasonable contemplation, and was also undertaken for the dominant purpose of resisting or avoiding that prosecution. Litigation privilege is also claimed for most of the documents in Category 4. With the exception of the two October 2010 emails exchanged with Mr Ehrensberger (for which litigation privilege is not claimed), it is accepted that these documents follow the approach taken to Category 2.

122. Accordingly, in our judgment, the Category 1, 2 and 4 documents (with the exception of the two emails we have mentioned) are, contrary to the judge's decision, covered by litigation privilege.

The legal advice privilege issues

Issue 4: What did *Three Rivers (No. 5)* actually decide?

123. Our conclusions under issues 1 to 3 make the question of legal advice privilege far less important. Since, however, the matter has been fully argued and the Law Society intervened to assist the court, we will say briefly how we would have determined these matters. As will be apparent from what we have already said, we would have determined that *Three Rivers (No. 5)* decided that communications between an employee of a corporation and the corporation's lawyers could not attract legal advice privilege unless that employee was tasked with seeking and receiving such advice on behalf of the client, as the BIU was in *Three Rivers (No. 5)*.

124. In this context, we were much pressed with the argument that, if *Three Rivers (No. 5)* actually decided what we have decided it did, it was wrong. As we have already said, this is a question that, in our judgment, can only be determined by the Supreme Court. In deference, however, to Mr Thanki's and Ms Dinah Rose QC's arguments, we can say that we can see much force in what they submitted.

125. First, we do not think that a meticulous analysis of the 19th century authorities should be determinative, because, in our judgment, those cases were decided when the distinction between litigation privilege and legal advice privilege was very much in its infancy. It is more important that a principled analysis of the purpose of legal advice privilege should be undertaken. Lord Scott in *Three Rivers (No. 6)* set out the parameters as follows at paragraphs 28-30:-

> "28. So I must now come to policy. Why is it that the law has afforded this special privilege to communications between lawyers and their clients that it has denied to all other confidential communications? In relation to all other

> confidential communications, whether between doctor and patient, accountant and client, husband and wife, parent and child, priest and penitent, the common law recognises the confidentiality of the communication, will protect the confidentiality up to a point, but declines to allow the communication the absolute protection allowed to communications between lawyer and client giving or seeking legal advice. In relation to all these other confidential communications the law requires the public interest in the preservation of confidences and the private interest of the parties in maintaining the confidentiality of their communications to be balanced against the administration of justice reasons for requiring disclosure of the confidential material. There is a strong public interest that in criminal cases the innocent should be acquitted and the guilty convicted, that in civil cases the claimant should succeed if he is entitled to do so and should fail if he is not, that every trial should be a fair trial and that to provide the best chance of these desiderata being achieved all relevant material should be available to be taken into account. These are the administration of justice reasons to be placed in the balance. They will usually prevail. …
>
> 30. The second sentence of the cited passage [from *Three Rivers (No. 6)* in the Court of Appeal] does, however, pose a question of great relevance to this appeal. It questions the justification for legal advice privilege where the legal advice has no connection with adversarial litigation. A number of cases in our own jurisdiction and in other common law jurisdictions have sought to answer the question. In *R v Derby Magistrates' Court, Ex p B* [1996] AC 487, Lord Taylor of Gosforth CJ said, at pp 507, 508:
>
> > "In [*Balabel*] the basic principle justifying legal professional privilege was again said to be that a client should be able to obtain legal advice in confidence. The principle which runs through all these cases ... is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent ... once any exception to the general rule is allowed, the client's confidence is necessarily lost."
>
> In *R (Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2003] 1 AC 563, 607, para 7 Lord Hoffmann referred to legal professional privilege as "a necessary corollary of the right of any person to obtain skilled advice about the law" and continued:
>
> > "Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice.""

126. Lord Scott also referred to passages to a similar effect in *B v. Auckland District Law Society* [2003] 2 AC 736 at paragraph 47 per Lord Millett, in *Upjohn Co v. United States* (1981) 449 US 383 per Justice Rehnquist in the US Supreme Court, in *Jones v. Smith* [1999] 1 SCR 455 per the Supreme Court of Canada at pages 474-475, in *Baker v. Campbell* (1983) 153 CLR 52 per Murphy J and Wilson J in the High Court of Australia at pages 89 and 95 respectively, in *Commissioner of Inland Revenue v. West-Walker* [1954] NZLR 191, and in *A M & S Europe Ltd v. Commission of the European Communities* (Case 155/79) [1983] QB 878 at page 913 per Advocate

General Slynn. He then concluded his section on the rationale for legal advice privilege with the following at paragraph 34:-

> "None of these judicial dicta tie the justification for legal advice privilege to the conduct of litigation. They recognise that in the complex world in which we live there are a multitude of reasons why individuals, whether humble or powerful, or corporations, whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognise that the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest; they recognise that in order for the advice to bring about that desirable result it is essential that the full and complete facts are placed before the lawyers who are to give it; and they recognise that unless the clients can be assured that what they tell their lawyers will not be disclosed by the lawyers without their (the clients') consent, there will be cases in which the requisite candour will be absent. It is obviously true that in very many cases clients would have no inhibitions in providing their lawyers with all the facts and information the lawyers might need whether or not there were the absolute assurance of non-disclosure that the present law of privilege provides. But the dicta to which I have referred all have in common the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else (see also paras 15.8 to 15.10 of *Zuckerman's Civil Procedure* (2003) where the author refers to the rationale underlying legal advice privilege as "the rule of law rationale"). I, for my part, subscribe to this idea. It justifies, in my opinion, the retention of legal advice privilege in our law, notwithstanding that as a result cases may sometimes have to be decided in ignorance of relevant probative material."

127. This last passage makes clear that large corporations need, as much as small corporations and individuals, to seek and obtain legal advice without fear of intrusion. If legal advice privilege is confined to communications passing between the lawyer and the "client" (in the sense of the instructing individual or those employees of a company authorised to seek and receive legal advice on its behalf), this presents no problem for individuals and many small businesses, since the information about the case will normally be obtained by the lawyer from the individual or board members of the small corporation. That was the position in most of the 19th century cases. In the modern world, however, we have to cater for legal advice sought by large national corporations and indeed multinational ones. In such cases, the information upon which legal advice is sought is unlikely to be in the hands of the main board or those it appoints to seek and receive legal advice. If a multi-national corporation cannot ask its lawyers to obtain the information it needs to advise that corporation from the corporation's employees with relevant first-hand knowledge under the protection of legal advice privilege, that corporation will be in a less advantageous position than a smaller entity seeking such advice. In our view, at least, whatever the rule is, it should be equally applicable to all clients, whatever their size or reach. Moreover, it is not always an answer to say that the relevant subsidiary can seek the necessary legal advice and, therefore, ask its own lawyers to secure the necessary information

with the protection of legal advice privilege. In a case such as the present, there may be issues between group companies that make it desirable for the parent company to be able to procure the information necessary to obtain its own legal advice.

128. We were referred specifically in this connection to a decision of the Singapore Court of Appeal in the *Enskilda Bank* case, where Andrew Phang Boon Leong JA held at paragraphs 41-42 that the *ratio* of *Three Rivers (No. 5)* was that only the BIU was authorised to communicate with the bank's lawyers, and that "since a company can only act through its employees, communications made by [authorised employees] would be communications "made on behalf of the client", and can attract legal advice privilege". In addition, in *Citic Pacific Ltd v. Secretary for Justice* [2016] 1 HKC 157, the Hong Kong Court of Appeal (Lam VP, Barma JA and Poon J) concluded that a dominant purpose test in legal advice privilege was to be preferred to the narrow definition of the "client" adopted in *Three Rivers (No. 5)* (see paragraphs 39-56 in the judgment of the court, and paragraphs 53-55 in the context of large corporations).

129. Finally in this connection, it seems to us, as Ms Rose submitted on behalf of the Law Society, that English law is out of step with the international common law on this issue. It is undoubtedly desirable for the common law in different countries to remain aligned so far as its development is not specifically affected by different commercial or cultural environments in those countries. In this regard, legal professional privilege is a classic example of an area where one might expect to see commonality between the laws of common law countries, particularly when so many multinational companies operate across borders and have subsidiaries in numerous common law countries.

130. If, therefore, it had been open to us to depart from *Three Rivers (No. 5)*, we would have been in favour of doing so. For the reasons we have given, however, we do not think that it is open to us, so it is a matter that will have to be considered again by the Supreme Court in this or an appropriate future case.

Issue 5: Does a claim for legal advice privilege require the proponent to show that the information was obtained for the dominant purpose of obtaining legal advice?

131. The SFO submitted that it should in any event be held that, if information passed to a company's lawyers by employees who were not authorised to seek and receive legal advice could be the subject of legal advice privilege, a further qualification should be added, namely that the information must be shown to have been obtained for the dominant purpose of obtaining legal advice. This, submitted Mr James Segan for the SFO, was established by a line of cases including, for example, *The Sagheera* [1997] 1 Lloyd's Rep 160 per Rix J at page 168, *Three Rivers (No. 5)* [2003] CP Rep 34 at first instance per Tomlinson J at paragraphs 20, 21, 26 and 30, and *Philip Morris CA* per Brooke LJ at paragraphs 43 and 77.

132. In the light of the approach that we have adopted thus far to legal advice privilege, it would not be appropriate to reach any final conclusion on this submission. In our judgment, however, it is hard to see why the suggested additional qualification is necessary, when the privilege can, by definition, only be claimed when legal advice is being sought or given. It is one thing to say that litigation privilege can only be claimed where the communication is created for the dominant purpose of the litigation, but entirely another to say that legal advice privilege can only be claimed where the communication is created for the dominant purpose of seeking legal advice. The second is tautologous.

Issue 6(a): Was the judge right to conclude that none of the Documents was protected by legal advice privilege on the basis that the information they contained was not communicated to ENRC's solicitor by anyone authorised to give or receive legal advice on behalf of ENRC or its subsidiaries?

133. If legal advice privilege were all that could have been claimed, the judge would, in our view, have been right to follow *Three Rivers (No. 5)* and decide that the Category 1 documents were not protected by legal advice privilege. Those documents did not contain information that was communicated to ENRC's solicitor by anyone authorised to seek or receive legal advice on behalf of ENRC or its subsidiaries. The same applies to the two emails of October 2010 in Category 4 that were exchanged with Mr Ehrensberger at a time when he was not ENRC's general counsel, and when he was acting, as the judge said, as a man of business. Legal advice privilege was not claimed in relation to the FRA documents in Categories 2 and 4 (although ENRC retained the right to claim legal advice privilege in respect of any individual FRA document as the judge said at paragraph 30).

134. We have already explained why we would have reached a different conclusion on the Category 1 documents, were this court not bound by *Three Rivers (No. 5)*.

Issue 6(b): Was the judge right to conclude that none of the Documents was protected by legal advice privilege on the basis that the information they contained was not communicated to ENRC's solicitor for the purpose of obtaining legal advice, but rather for the purposes of that solicitor's investigation of the facts?

135. The judge rejected this aspect of the claim to legal advice privilege on the ground that "[t]he evidence gathered by Dechert during its investigations was intended by ENRC to be used to compile presentations to the SFO as part of what it viewed as its engagement in the self-reporting process" and "the documents formed part of the preparatory work of compiling information for the purpose of enabling the corporate client to seek and receive legal advice, and are not privileged".

136. For the reasons that we have already given under issue 2 above, we are of the clear view that the dominant purpose of the preparation of the interview notes and the documents review was to resist or avoid contemplated criminal proceedings against ENRC or its subsidiaries or their employees.

Issue 6(c): Was the judge right to conclude that none of the Documents was protected by legal advice privilege on the basis that there was overwhelming evidence that ENRC had always intended and/or agreed to share the information they obtained with the SFO as part of a self-reporting process?

137. We have dealt with this point at paragraph 112 above. For the reasons given in that paragraph, we do not think that the documentation demonstrates that ENRC ever intended or agreed to share the information it obtained with the SFO. ENRC, as we have also already said, certainly gave the SFO indications that it was going in the future to make full and frank disclosure, but in fact it never formally agreed to do so

or actually did so, before it retreated to the position that everything was covered by legal professional privilege. Accordingly, this was not a valid reason for depriving ENRC of legal advice privilege.

Issue 7: Are the answers to issue 6 above different if the employees in question are ex-employees at the time that the information is imparted?

138. In the light of the conclusions already reached, this issue does not really arise. It is not doubted that interviews by ENRC's lawyers with ex-employees for the purpose of resisting contemplated proceedings are covered by litigation privilege. The question is only whether interviews with ex-employees would be covered by legal advice privilege. ENRC argued that ex-employees were as likely to have information relevant to defending legal proceedings as current employees, and that if the rationale was to enable the lawyer to gain a full picture of the facts, then information obtained from ex-employees should be as privileged as that secured from current staff.

139. In our judgment, information obtained from ex-employees falls into the same category as that obtained from third parties, which ENRC accepts cannot be held to be covered by legal advice privilege at this level. An ex-employee is in all respects equivalent to a third party, and however desirable it might be that information obtained from such a person should be covered by legal advice privilege, we do not think that that is, on any analysis, the current law. As the SFO submitted, the only authority emanates from the USA, where there are two cases pointing in different directions.[4]

140. This is an issue that can be considered if and when the Supreme Court has cause to decide a challenge to the correctness of *Three Rivers (No. 5)*.

Issue 8: Was the judge right to hold that lawyers' working papers are only protected by legal advice privilege if they would betray the tenor of the legal advice?

141. Once again, this issue does not now strictly arise. The judge decided at paragraphs 95-97 and 180 that the Category 1 documents were not privileged under the heading of lawyers' working papers. She held that the evidence did not establish on the balance of probabilities that the interview notes would betray the tenor of the legal advice given to ENRC or any aspect of it. Mr Thanki submitted that the test the judge applied was wrong, and that all that was required for lawyers' working papers to be privileged was that they were confidential documents created by a lawyer for the purpose of giving legal advice. He said that Hildyard J in *RBS* had wrongly relied on observations made in a different context in *Lyell v. Kennedy (No. 3)* (1884) 27 Ch D 1 at page 26, and *Ventouris v. Mountain* [1991] 1 WLR 607.

142. Since we have held that the interview notes here are covered by litigation privilege, it is not necessary for us to resolve this question. It seems to us that it would be better if it were considered in the context of the Supreme Court's future consideration of legal advice privilege.

Issue 9: If not, was the judge right to deny any or all of the Documents the benefit of legal advice privilege as lawyers' working papers?

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4 *Newman v. Highland* (2016) 188 Wn 2d 769 and *Upjohn Company v. United States* (1981) 449 US 383

143. For the same reasons, it is not necessary to answer this question.

Conclusion

144. For the reasons that we have tried to give as shortly as possible, we will allow the appeal against Andrews J's declarations that the documents in Categories 1, 2 and 4 (save for the two Ehrensberger emails) were not covered by litigation privilege, but otherwise dismiss the appeal.