JONATHAN BARNARD KC & ROBERT DACRE

SAFER SPACES

Developments in litigation privilege for the corporate

"a fascinating article... really worth a read"

COLIN PASSMORE – AUTHOR OF THE SEMINAL TEXTBOOK "PRIVILEGE"

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Authors

Jonathan Barnard KC

Jonathan is a leading advocate in the field of white collar crime.

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> Jonathan's CV

Robert Dacre

Robert joined Cloth Fair Chambers earlier in 2024. Called in 2013 and recognised as a rising star of the criminal bar, he specialises in crime, business crime and financial services, professional discipline, inquests and regulatory law.

LINKS

> Robert's CV

SUMMARY

The human person is almost always offered a safe space in which to obtain legal advice and plan her next move. Why should the position be any different for the corporate?

In this paper, we discuss the troubled legacy of the *Three Rivers 5* judgment and recent attempts by the Court of Appeal to manoeuvre around it: from a mechanistic interpretation of privilege, towards a principle-led focus on providing a safe space for the corporate to obtain crucial legal advice.

The Court of Appeal in *Three Rivers 5* relied on a number of nineteenth century authorities to decide that, in the case of a corporate client, legal advice privilege protects only communications with limited groups of officers or employees expressly designated to act as 'the client'. There is no protection for the instructed lawyer's interviews with other employees, or documents prepared by them, even if those documents were sent to the lawyers, prepared with the dominant purpose of obtaining legal advice and at the lawyer's request. This approach is both out of step with a number of jurisdictions and, we suggest, outdated: corporations have moved on a little since the age of steam. In this jurisdiction, successive Court of Appeal authorities have taken pot shots at the logic and effect of the judgment, signalling that it may be only a matter of time before the Supreme Court administers the *coup de grâce*.

It staggers on for now – a zombie judgment. Two recent Court of Appeal authorities have however refashioned litigation privilege for the corporate, filling the hole left by *Three Rivers 5* in relation to legal advice privilege. The Court of Appeal in *ENRC* fully endorsed the principle of engineering a safe space for corporates for the dominant purpose of obtaining legal advice, necessarily including communications with third parties. The Court considered that it was '*obviously in the public interest*' for companies to investigate allegations before approaching a potential prosecutor without losing the benefit of legal professional privilege for the product of that investigation. It held that the fact that a formal investigation had not been commenced or that the company might seek to resolve matters through agreement did not detract from the dominant purpose being the contemplation of adversarial litigation.

In *Al Sadeq* the Court of Appeal found that a non-party to proceedings (a position often occupied by the corporate) could claim litigation privilege. This was a principled approach that had as its focus the safe space rationale: '*the protection of a confidential space for a person and their lawyers to communicate with third parties, with candour on both sides, for the dominant purpose of litigation*'.

Armed with this purposive exposition of litigation privilege, which has firmly in mind what privilege is *for*, we reflect on the requirement that the litigation contemplated must be a real likelihood rather than a mere possibility (*Phillip Morris*). Why should a responsible company have to wait for proceedings to be likely before it can claim a safe space for its investigation?

LEGAL PROFESSIONAL PRIVILEGE FOR ALL

In the 1987 American neo-noir horror movie "Angel Heart", Mickey Rourke plays Harry Angel, a New York City private detective, hired by Robert De Niro's Lou Cyphre (say it quickly) to investigate a missing person. The investigation uncovers a series of brutal murders. By the finale, Mr Angel realises that the identity he has been searching for and the crimes he has exposed were all his own. That moment of realisation is witnessed only by Mr Cyphre, the ultimate persecutor, who knew all along that the investigation he had triggered would deliver to him eternal dominion over Harry's soul.

In one sense: poor Harry. Serial killer and in league with the devil, yes, but was he not entitled to the very basics: a little time in which to consult a lawyer and to evaluate his options before confronting his enforcer? Likening a Law Enforcement Agency ("LEA") to Satan may well be a step too far, but large corporations do often find themselves in the position of Harry Angel at the commencement of an internal investigation. Clues abound that something bad has happened, but the board is blissfully unaware that they might be implicated.

That is because large corporations are vast machines of interlocking cogs. The board, as the first cog, will know that it is turning and that products are coming out the other end. But it often has no idea that the 23rd and 48th cogs had to be given extra grease to continue turning through the peculiar filth of their specific environment, miles away from, and without direct connection to, that first cog.

An effective internal investigation will put the corporate person, as with Harry Angel, into that same position almost always already occupied by the human person: knowing what they have done. Once that investigation has unearthed the factual matrix, legal advice upon it can be obtained and informed decisions made.

That imperative to quiz others who may be far removed from the board room has become only more acute as corporate liability expands to the shoulders of senior managers through the operation of ss.196-198 of the Economic Crime and Corporate Transparency Act 2023.[1]

The human person is almost always afforded the safe space in which to obtain that critical legal advice and plan her next move, even without contemplating any litigation, under the cloak of *legal advice privilege*. That particular cloak of *legal advice privilege*, following *Three Rivers 5*, does not fit the form of the body corporate as snugly, leaving the corporate exposed, like Harry Angel, to the damning gaze of their prosecutor, potentially privy to every turn their investigation takes.

This paper looks at how those shortfalls in legal advice privilege have led to developments in *litigation privilege* in the two recent Court of Appeal decisions in *Director of the SFO v Eurasian National Resources Corporation Ltd (2018) EWCA Civ 2006* ("*ENRC*") and *Al Sadeq v Dechert LLP* [2024] EWCA Civ 28 ("*Al Sadeq*") to provide cover especially to corporates seeking legal advice. They have done so by moving away from a mechanistic, rules-based interpretation of privilege, focussing instead on the basic principles which have always been common to the two subsets of legal professional privilege.

THREE RIVERS 5

The current cut of legal advice privilege has been fashioned more for the human than the corporate body. That is owing to the notorious Court of Appeal decision in *Three Rivers District Council v Governor and Company of the Bank of England (No. 5) (2003) EWCA Civ 474* ('*Three Rivers 5*'). *Three Rivers 5* decided that, in the case of a corporate client, legal advice privilege protects only communications with that limited group of officers or employees expressly designated to act as 'the client'. Legal advice privilege therefore does not protect the instructed lawyer's interviews with other employees or ex-employees, or documents prepared by them, even if those documents were sent to the lawyer, prepared with the dominant purpose of obtaining legal advice and at the lawyer's request. Which means that if a solicitor is retained by a company to carry out investigations to provide the company with legal advice, requiring her to speak to employees or others who are not 'designated officers or employees' as the client, those communications will not be covered by legal advice privilege, even if the employees have been expressly authorised by the company to speak to the solicitor.[2]

Admiration for the decision in *Three Rivers 5* is not easy to find. It has not been followed in Australia,[3] Hong Kong,[4] Singapore[5] or the USA[6]. Even in this jurisdiction, its reception has been troubled. In *Three Rivers District Council v Bank of England* (No 6) [2005] 1 AC 610 ("*Three Rivers 6*"), although the House of Lords declined to consider the point, Lord Carswell emphasised that he saw "*considerable force*"[7] in the overturned first instance judgment of Tomlinson J in *Three Rivers 5*, and that it should not be assumed that he approved of the Court of Appeal's decision which overturned it.[8]

It is not far-fetched to recognise that first instance judgment of Tomlinson J's as the reigning UK champion of 'Most Vaunted Overturned First Instance Decision'. It is an accolade well-deserved. The judgment is in harmony with the approach taken by the jurisdictions cited above, and relies on a principled approach to the issue of privilege when applied to the operation of a corporate. It has become, as we shall see, something of a lodestar for the recent developments in litigation privilege, which this paper highlights. For all of those reasons, it helps to navigate those recent developments in *litigation* privilege by bearing closely in mind Tomlinson J's rationale:

> *"If the principle is that a person should not be in any way fettered in communicating with his solicitor, and must not be fettered in preparing documents to be communicated to his solicitor, it must be axiomatic that it is the confidentiality of the whole process of communication which requires protection, not just those documents which can be recognised as comprising the actual or final communication. This becomes particularly obvious when one considers the case of a corporation which can only act through individuals, perhaps needing to act through many. It would to my mind be wholly artificial, and not in any way consonant with the rationale underlying the principle, to confine protection to documents which are actually intended to be handed to the legal adviser or to serve as an aide-memoire whilst imparting information to him and seeking his advice thereon. If the protection were so confined it would lead, I think, to somewhat arbitrary and capricious distinctions. In modern conditions it would be unduly*

> *restrictive of the ability of a corporation to prepare in confidence for consultation with its legal adviser. Of course, there needs to be a control mechanism which prevents privilege attaching to documents which would have been brought into existence for other purposes in any event or to those which are brought into existence for a dual or multiple purpose. The necessary control mechanism is supplied by the dominant purpose test, which must be applied at the time of creation. In my judgment an internal confidential document, not being a communication with a third party, which was produced or brought into existence with the dominant purpose that it or its contents be used to obtain legal advice is privileged from production."*[9]

If the principle is the provision of a safe space for a person to obtain legal advice, then the application of that principle to the corporate person requires that safe space to include communications from the many individuals through whom the corporate acts to the lawyer for the dominant purpose of that advice. Without that inclusion, corporates cannot begin to obtain fulsome and proper legal advice.

Infamously, the Court of Appeal rejected Tomlinson J's analysis. They felt constrained to follow a rule excluding from legal advice privilege third party communications to lawyers, which they perceived to have been developed within a series of nineteenth century cases: *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 ("*Anderson*"), *Southwark and Vauxhall Water Co v Quick* (1878) 3 QBD 315 ("*Southwark*") and *Wheeler v Le Marchant* (1881) 17 Ch D 675, CA ("*Wheeler*").

Three Rivers 5's treatment of those three nineteenth century cases is problematic. The court began its analysis of *Anderson* by conceding that it had been wrongly decided, as litigation privilege should have applied.[10] It then identified *Anderson* as the first case drawing a distinction between litigation privilege and legal advice privilege,[11] before taking the same tangent of principal/agent which had dominated the Court of Appeal's approach in *Anderson*:

> *"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. If, however, it is intended that the information will be shown to a solicitor in the context of existing or contemplated litigation, it will fall into the second category, whether it was obtained for use as evidence or for the purpose of obtaining advice."*[12]

No attempt is made to explain why in principle the same information being provided to the same solicitor by the same route for the same purpose of legal advice should only be protected if litigation is contemplated. It amounts to little more than a Catch-22 situation of a rule-based system turned in on itself: a company will not find out what its employees have done without the protection of privilege, but a company cannot have the protection of privilege because it is deemed to know what its employees have done.

In the second of those cases, *Southwark*, Longmore LJ in *Three Rivers 5* was able to conclude that Cotton LJ "*was only talking in terms of litigation privilege*", when he stated:

> *"That, I think, is the true principle, that if a*

"First of all, this meeting never happened."

> *document comes into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice, or of enabling him either to prosecute or defend an action, then it is privileged, because it is something done for the purpose of serving as a communication between the client and the solicitor."*[13]

That conclusion relies on a heavily laboured parsing of the word "*or*" to shut out the more natural interpretation that Cotton LJ was in fact talking in terms of legal advice privilege as well. It also has to sit with Longmore LJ's simultaneous acceptance that "*the judgment of Cockburn CJ is in general terms which might arguably encompass legal advice privilege as well as litigation privilege*".[14]

The third case, *Wheeler*, concerned an individual seeking specific performance of a contract against the estate of a dead man. It could hardly have been further removed from the corporate context.

While those judges 150 years ago can be forgiven for ignoring a context which was irrelevant to them, the Court of Appeal in *Three Rivers 5* had no such excuse, having been addressed specifically on the critical point that "*a corporation can only act through its employees*".[15] Longmore LJ gave the fact little significance, stating that an employee is the same as an agent, the source of a solicitor's information could be either and it was "*undesirable that the presence or absence of privilege*

should depend on which it was".[16] Whether or not this misunderstanding of the issue was deliberate, the principled answer is that it should not matter whether the source is an employee or any other third party. The point is that if the information is relayed to the solicitor for the dominant purpose of giving of legal advice to the client, that communication should be protected by privilege in order to facilitate the corporate's proper participation in the rule in the law.

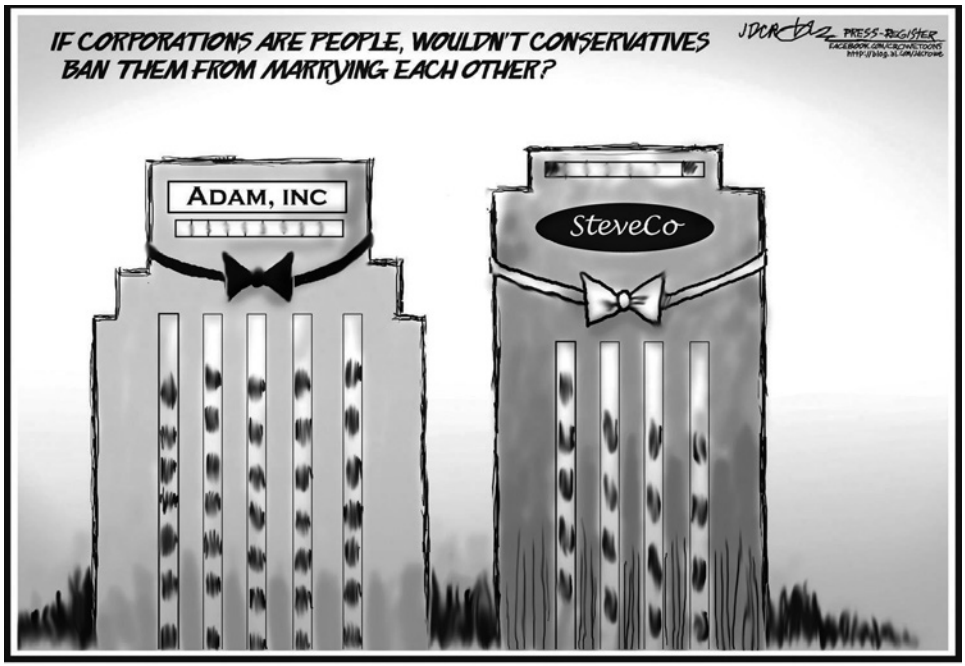
Increasingly, *Three Rivers 5* is treated as a dead judgment walking. Barely an appeal touching on the issue of legal professional privilege passes through Fleet Street without at least one barrister clamouring to lead the charge to the Supreme Court to rid the law books of this troublesome authority.

ENRC

While the days of *Three Rivers 5* are numbered, it still sits as an obstacle for the corporate. Without a day of reckoning before the Supreme Court in the diary, the Court of Appeal has been left to manoeuvre its way around it. In *ENRC* a powerful Court of Appeal including McCombe LJ and the President of the Queen's Bench Division (Leveson), endorsed the principle underpinning the widespread antipathy to *Three Rivers 5*,[17] noting its criticality to the proper participation of the corporate in the rule of law: to operate effectively, the rule of law needs persons to seek and obtain legal advice without fear of intrusion. That principle should apply equally to large multinationals companies, but is inhibited when the information upon which legal advice is sought by such companies is unlikely to be in the hands of the main board, and cannot be obtained by the board instructing its lawyers to seek it where it inevitably lies, i.e. from the company's employees, in a way which will be protected by legal advice privilege.[18] Unsurprisingly, the court had no hesitation in stating that it would have departed from *Three Rivers 5*, but that was a matter only for the Supreme Court.[19]

And so, the Court of Appeal in *ENRC* fully endorsed the principle of engineering a safe space for corporates for the dominant purpose of obtaining legal advice, necessarily including communications with third parties, set out by Tomlinson J at first instance in *Three Rivers 5*. While it could do nothing more in relation to *legal advice privilege*, the Court of Appeal used that same principle of dominant purpose to set about adapting *litigation privilege* to accommodate the particular demands of the corporate person.

The Court of Appeal had another swipe at the *Three Rivers 5* approach in *The Civil Aviation Authority v R (on the Application of Jet2.com Limited and the Law Society* [2020] QB 1027 ("*Jet2*"). Higginbottom LJ would have been '*disinclined to follow*' *Three Rivers 5* had he not been bound by it, and his judgment is peppered with withering comments about the logic of the decision – '*I respectfully doubt the analysis and the conclusion*'; '*I do not find that analysis, or conclusion, easy*'; '*I find parts of the judgment, including this part, difficult*'.[20] *Three Rivers 5* was then distinguished on the facts because the non-lawyers involved in the internal correspondence that was the subject matter of the appeal were found to be '*relatively senior executives*'[21] – it is possible to detect a measure of judicial relief that the facts did not require the logic of *Three Rivers 5* to be applied.



The Court also went further than *ENRC* in recognising the similarity in principle – or in purpose - between *legal advice privilege* and *litigation privilege* – '*I am unpersuaded that [ENRC] is correct to consider the limbs as fundamentally different with regard to purpose*', and ultimately concluded that the dominant purpose test applied to *legal advice privilege.*[22] To this extent, it was another step towards a unified *purposive* approach to privilege with dominant purpose as its lodestar, and to the elision of the two limbs of privilege.

In a move that can alarm lay clients, particularly responsible boards of directors, there is a distinct advantage to foreseeing the deeply unattractive beast of a criminal prosecution when it first hoves into view. The earlier it can be said that proceedings were anticipated, the sooner the cloak of litigation privilege can descend. Key to the claim of litigation privilege is that the *dominant* purpose of the communication was the obtaining of legal advice in *relation to the contemplated proceedings*. The pre-condition to establishing the dominant purpose is, therefore, that a reasonable contemplation of proceedings exists. It falls to the astute corporate lawyer to raise the binoculars to the board's eyes, albeit delicately.

ENRC's principled judgment significantly drove back the accepted point in time when proceedings can be anticipated. Over-ruling the first instance decision of

Andrews J, the Court of Appeal made plain in *ENRC* that criminal proceedings could sufficiently be contemplated to engage litigation privilege even when a long way off on the horizon. *ENRC* sought to claim litigation privilege in relation to advice received when the SFO had not even started an investigation. The DSFO had written to the company reminding it of the self-reporting avenue, stating explicitly that no investigation had been commenced. At first instance, Andrews J had no hesitation in concluding that those facts did not allow the contemplation of criminal proceedings to be reasonable at that stage, and, moreover, that *ENRC*'s stance at that point was to resolve matters, not fight them.

Andrews J's judgment caused ripples of fear across the corporate crime sector. With *Three Rivers 5* whisking away legal advice privilege, it seemed that litigation privilege, too, was beyond the reach of the corporate grasp at those crucial early stages when rumours abound, nothing is known for certain, and the board is rattled.

However, that first instance judgment, like *Three Rivers 5*, relied on the strait-jacket of a rule-based approach to the application of litigation privilege. The Court of Appeal held closely in mind that it was '*obviously in the public interest*'[23] for companies to investigate allegations before approaching a potential prosecutor without losing the benefit of legal professional privilege for the work product of that investigation. Eschewing Andrews J's mechanistic approach for a more nuanced, principle-based analysis, the court rejected the notion 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 had not been commenced was just one part of the factual matrix, not determinative.[24] Moreover, the fact that the company might hope to resolve matters through agreement did not detract from the dominant purpose being the contemplation of adversarial litigation.

Aside from that major boon to the corporate, the Court of Appeal made other facilitations. Andrews J at first instance had confidently found that there was insufficient evidence that the company itself was contemplating anything because evidence relating to this issue came, strictly

speaking, only from its instructed solicitor, not a directing mind. The Court of Appeal, however, accepted that the evidence that the company was contemplating litigation as the dominant purpose being located within the hearsay of its external lawyer's statement *was* sufficient.[25]

The claimant in *Al Sadeq* launched the same attack on the sufficiency of the evidence that the defendant was contemplating litigation when housed in the hearsay statement of its external lawyer.[26] Again, the Court of Appeal brushed aside these concerns. The focus for this principle-led analysis is on the factual circumstances said to make that contemplation of proceedings *reasonable*, not the isolated, technical issue of from whose mouth the contemplation is asserted. The strategic advantage of placing the hearsay assertion that proceedings were contemplated in the statement of the external solicitor (thereby obviating the unattractive prospect of a director asserting the same, and being open to cross examination), remains available. Andrews J assumption that the evidence "*should*" come from '*those individuals who were responsible for giving the relevant instructions to the lawyers on the company's behalf*"[27] has rather been left in the dust.[28] The real issue attracting the court's interest will be whether that assertion can be claimed as *reasonable* in the circumstances.

AL SADEQ

Al Sadeq went further in the refashioning of litigation privilege for the corporate.[29] At first instance, the claimants relied on the firm and unanimous view of all three leading textbooks on privilege *The Law of Privilege* (Thanki),[30] *Documentary Evidence* (Hollander)[31] and *Privilege* (Passmore)[32] that litigation privilege could *only be claimed* by a party (for our purposes, prosecution or defence) to the relevant proceedings. Murray J accepted that:

i. each of those views derived from misreadings of different authorities;
ii. there was in fact no authority determining that only a party to the proceedings could claim litigation privilege (Moulder J in *Minera Las Bambas v Glencore* [2018] EWHC 286) being the only authority which addressed the point and then only to endorse *Passmore on Privilege*, without more);
iii. there was no reason as a matter of principle or policy to limit the availability of litigation privilege to a party to litigation.[33]

A court comprising three Lord Justices (Underhill, Males and Popplewell) heard the appeal, embellishing Murray J's view. Far from being an absent inhibitor, the court found that principle positively endorsed the determination that a non-party could claim litigation privilege:

> *"It is, in substance, the protection of a confidential space for a person and their lawyers to communicate with third parties, with candour on both sides, for the dominant purpose of litigation. The parties referred to this in argument as the 'safe space' rationale…"*[34]

This coupling of the safe space for legal advice for the dominant purpose of legal advice, imbues litigation privilege with the self-same principles set out in Tomlinson J's over-ruled, first instance analysis relating to legal advice privilege in *Three Rivers 5*[35] and endorsed in *ENRC* and *Jet2*.

Moreover, Popplewell LJ identified a series of "*unjust anomalies*" were litigation privilege limited only to parties to the litigation.[36] Perhaps most pertinent of those examples for the business crime lawyer, he pointed out that a witness/victim can be compensated through successful criminal proceedings brought by a public prosecutor, thereby obviating the need for a separate civil claim. Why should that *victim* in criminal proceedings have no claim to litigation privilege which would have been available to them as a party to the private action? This seems particularly unfair when the victim does not control whether or not the public prosecutor decides to proceed, and, in the case of a corporate, may well have had their lawyers carry out an extensive investigation including, for example, interviewing many of its employees and instructing an expert valuation of the sum lost to the crime, none of which would be covered by legal advice privilege alone, thanks to *Three Rivers 5*.

Al Sadeq is of great assistance to the lawyer advising a corporate. So often in investigations, corporations are involved either

- as the victim,
- as implicated in the wrong doing without occupying the status of suspect, or
- simply as providing the context to the alleged wrongdoing.

A corporation finding itself in any of those situations is not deprived of claiming litigation privilege, as was previously, widely, and authoritatively, believed.

Although the limitation of being a party to the contemplated litigation is now gone, whether or not the requirement that the person/company has *sufficient interest* in the litigation may remain. The issue did not arise on the facts of *Al Sadeq*, allowing the court to leave the issue for another case to decide. If a test of sufficient interest does pertain, *Al Sadeq* makes plain that both a corporate victim and the subsequent corporate owner or manager of the assets which sustained losses from the alleged crime will undoubtedly have that sufficiency of interest.[37] The court was no doubt alive to the fact that it is difficult to imagine a corporate putting resources into an investigation with the contemplation of litigation as its dominant purpose without that corporate having a sufficiency of interest. In a corporate world driven by the pursuit of profit for its shareholders, why would a company fund an investigation in which it has insufficient interest in possible proceedings related to it?

REVISITING *PHILIP MORRIS*

If the logical end point for the application of the dominant purpose/safe space rationale secures the protection of litigation privilege for the corporate with only an indirect, non-party interest (after *Al Sadeq*), in proceedings which (after *ENRC*) are being contemplated at a time before any investigation by an LEA has even begun, how does that impact, if at all, on the *degree* of contemplation of litigation required? After *ENRC*, it is difficult to identify just how far off litigation needs to be *not* to enter the realm of reasonable contemplation. With Andrews J's limitations dismantled on the basis of principle, authority and fact, it will be a brave first instance judge who upholds a challenge to an arguable claim to litigation privilege by a corporate on the basis that the contemplation was no more than fanciful.

"Winton, if you must mention corporate malfeasence please stick to the subjunctive."

Properly analysed, the limitation imposed by Andrews J on the claiming of litigation privilege before a formal investigation had even been opened was inherent to the notion that litigation privilege could only be claimed by a party to that litigation. Part of Andrews J's reasoning was how could a company possibly contemplate that it was going to be a defendant, as opposed to a witness, before an investigation had begun - particularly if it intended to cooperate with the investigation?[38] But such imagined quandaries fall away when it is appreciated that litigation can be contemplated when it is several steps away *and, accordingly*, can be contemplated by one who is not going to be a party to those proceedings. That is the link into *Al Sadeq*.

The leading authority on the requisite degree of contemplation of proceedings is *United States of America v Philip Morris Inc. (British American Tobacco (Investments) Ltd intervening) [2004] EWCA Civ 330; [2004] 1 C.L.C. 811* ("*Philip Morris*"). That case decided that the litigation contemplated must be a real likelihood rather than a mere possibility (without having to be more likely than not).[39] The reasoning in *Philip Morris* is problematic after the sea change brought about by *ENRC* and *Al Sadeq*.

The background to *Philip Morris* is of interest, and perhaps explains the reluctance to adopt the full-throated, principle-led delineation of litigation privilege which was to come in *ENRC* and *Al Sadeq*. The US government brought a $289

billion action against a number of tobacco firms alleging that, since 1953, they had defrauded the American public about the health risks of smoking. The appellants, BATco, claimed litigation privilege over documents sent to the company's lawyer emanating from third parties used to evaluate relevance to claims that might be made by smokers, and to advise the company on how it might best defend itself against such claims from the mid 1980s, on the basis that litigation was reasonably in prospect: BATco could then have expected to be sued in the US and elsewhere before long (both, in fact, transpired) and applications for disclosure would be made against it in proceedings to which it was not itself a party.

Why, in principle, should a company be deprived of the safe space of working with its lawyers to identify its potential liabilities and plot a favourable (and lawful) course of action as a consequence? The proceedings may well have been some way off, but what would be the point of forcing a company to hold its legal horses until it became more likely before they could prepare for it in an informed and properly advised manner?

The decision in *Philip Morris* did not embrace such principles unreservedly. Upholding the first instance decision of Moore-Bick J (as he then was) the Court of Appeal ruled that litigation privilege could not be claimed. Brooke LJ stated that, although the concept behind the real likelihood test was notoriously difficult to express,[40] it had not been passed in this case.

Interestingly, Brooke LJ stated that his view was "*reinforced by the consideration that the exercise for which Lovells was retained had nothing to do with the preparation of the brief for a trial which is the traditional justification for litigation privilege.*"[41] After *ENRC*, such consideration provides little comfort. It amounts to no more than the natural corollary of there in fact being no proceedings instituted at the time, which *ENRC* made plain is far from determinative.

Brooke LJ then turned his attention to the situation in which BATco were preparing for being compelled as a non-party to produce relevant documents. He reasoned that while a non-party may wish to seek legal advice about its obligations in this regard,

> *"there is never any question of collecting evidence from third parties as part of the material for the brief in the action, or of seeking information which might lead to the obtaining of such evidence... If the non-party wishes to notify somebody else that it has received the application, and that other party may wish to take steps to assert a claim for confidentiality or privilege in the documents sought, it is difficult to see why litigation privilege should attach to that communication."*[42]

Compare that to Popplewell LJ in *Al Sadeq*, noting that a non-party may seek:

> *"advice as to the assistance he can and should give to a party. X may well wish to be advised in relation to the litigation, including whether and how they should participate in it, either formally by becoming a party or being a witness, or informally by providing assistance or evidence to a party. The advice would be covered by legal advice privilege but it would be anomalous, and contrary to principle, if communications by X or his lawyers with*

third parties for the dominant purpose of giving and getting such advice were not protected by privilege."[43]

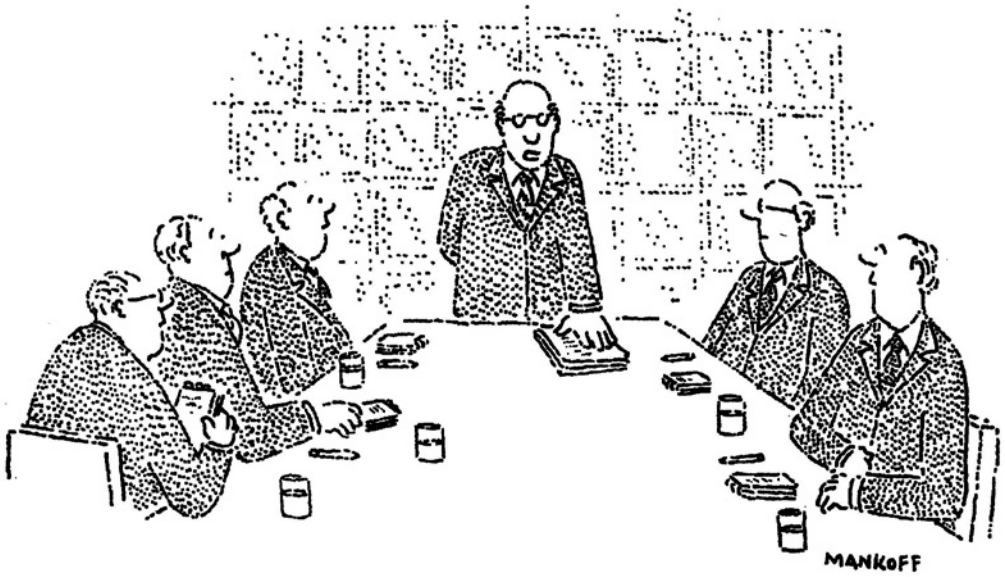
The stark difference in approach between the two judgments flows from the heavy emphasis in *Al Sadeq* on the principle for litigation privilege being the provision of a safe space for the dominant purpose of legal advice (untrammelled by any possible notion that a claim to privilege could be misused to endow a policy of document destruction with some legitimacy, as haunts the *Philip Morris* judgment):

"a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth and that a client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Or as Bingham LJ put it in Ventouris v Mountain at p. 611C-D, it is necessary that actual and potential litigants, be they claimants or respondents, should be free to unburden themselves without reserve to their legal advisers, and their legal advisers be free to give honest and candid advice on a sound factual basis, without fear that these communications may be relied on by an opposing party if the dispute comes before the court for decision. This applies as much to litigation privilege as to legal advice privilege: see Anderson v Bank of British Columbia (1876) 2 Ch D 644 per Sir George Jessel MR at p. 649;[44] *Waugh v British Railways Board [1980] AC 521 per Lord Wilberforce at p. 531D-E. That rationale only applies where a lawyer is engaged, which was the context in which the privilege was developed in the 19th century cases, but litigation privilege is also enjoyed by a person acting without a lawyer in relation to actual or contemplated litigation (as Lord Carswell's formulation of the privilege in Three Rivers (No 6) at [102] encompasses). This is explained by the second rationale, which is that expressed by Lord Rodger in Three Rivers (No 6) at [52], that in an adversarial system each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations. It is, in substance, the protection of a confidential space for a person and their lawyers to communicate with third parties, with candour on both sides, for the dominant purpose of litigation. The parties referred to this in argument as the 'safe space' rationale…*

195. Provided the dominant purpose ingredient is fulfilled, there seems no principled basis for limiting the scope of litigation to that to which the person is a party."[45]

In *Philip Morris*, on the other hand, there was continual reference to the public policy balancing exercise. As Brooke LJ noted of Moore Bick's judgment, without reservation:

"The judge said that it had been recognised on many occasions that there was a conflict between the need to enable clients to communicate freely with their legal advisers in relation to litigation and the need to ensure that all relevant material was before the court. He cited in this context Lord Wilberforce in Waugh v British Railways Board at pp 531–532 and Lord Simon of Glaisdale at pp 535–537. The point at which litigation should be regarded as sufficiently likely for confidential communications between client and his lawyer to attract privilege on this ground therefore involved striking an appropriate balance between these two factors. The requirement that litigation be 'reasonably in prospect'



"There you have it, gentlemen – the upside potential is tremendous, but the downside risk is jail."

> *was not in his view satisfied unless the party seeking to claim privilege could show that he was aware of circumstances which rendered litigation between himself and a particular person or class of persons a real likelihood rather than a mere possibility."*[46]

The strong implication is that this balancing act is for the judge to conduct at first instance. Nowhere in *Al Sadeq* is this conflict between the need to enable clients to communicate freely with their legal advisers in relation to litigation and the need to ensure that all relevant material was before the court recognised or even mentioned. The reasoning in *Al Sadeq* relies powerfully and simply on the application of the safe space principle. Could it be that this balancing act, both conceptually and, more importantly, in practical terms by the court examining the claim to privilege, is receding in significance?[47] Either the matter is covered by privilege, allowing the safe space rationale to breathe, or it is not; there is nothing to balance it against.

A PRINCIPLED END POINT

This is not merely a question of recognising that *Philip Morris* may well have been decided differently had the approach set out in *Al Sadeq* been applied to its facts.

The logical challenge presented by *Al Sadeq* is more fundamental than that. If the safe space rationale is the driving principle, and one (deliberate) effect is to fill the hole felt by corporates left by *Three Rivers 5* in relation to legal advice privilege, then why does the contemplation of proceedings even need to be '*likely*'?

Why should a corporate be prevented, should it wish, to instruct its lawyers to carry out an internal investigation without an LEA investigation pending, without an LEA even interested, and even without the corporate itself having any awareness of any criminality lurking in quiet corners of its operations? It would seem sensible for corporates to be free to conduct 'spring cleans' in this way in the same safe space carved out by *Al Sadeq*. Conversely, without that protection, the effect is to inhibit corporates from triggering internal investigations unless and until they are confident that there exist objectively identifiable grounds for an LEA's interest, following the rubric of *Philip Morris*, however much it may have been diluted by *ENRC*.

The rational end point for the application of the *Al Sadeq* principle is a collapse in the current distinction between litigation and legal advice privilege.[48] That collapse does little more than bring the matter full circle, reinstating the reasoning of Tomlinson J's much-admired first instance judgment in *Three Rivers 5*, in relation to litigation privilege at least, before the Supreme Court has even considered the issue in relation to legal advice privilege.

Legal advice privilege and litigation privilege are subsets of the same mechanism, so should and do have common underlying principles. The more recent distinction between the two appears ever more arbitrary, unnecessary, and coming to a close, sooner or later, one way or another.

ENDNOTES

1 The Act came into force on 26 December 2023. The category of individuals whose criminal acts and mental state can bind the company extends to include 'senior management' (acting within the actual or apparent scope of his or her authority), defined as a person who plays a significant role in the making of decisions about how the whole or a substantial part of the company activities are to be managed or organised, or the actual managing or organising of the whole or a substantial part of those activities (s. 196(4)). Assuming continued adherence to the Corporate Manslaughter and Corporate Homicide Act 2007, from which the definition is sourced, those included are likely to be persons in the direct chain of management, those in strategic or regulatory compliance roles, regional managers in national organisations and managers of different operational divisions. The range of economic crimes affected is set out in the ECCTA 2023, s. 196(2) and sch. 12 and includes the Fraud Act 2006, Theft Act 1968, money laundering, terrorist financing, sanctions offences, misleading the market, bribery and customs and excise offences, a list which will only expand.

2 *RBS Rights Issue Litigation (2016) EWHC 3161 (Ch)*, §79-93, approved in *Director of the SFO v Eurasian Natural Resources Corporation Ltd (2017) EWHC 1017 (QB)*, at §85-91.

3 *Kennedy v Wallace* (2004) 213 ALR 108; Pratt Holdings Pty Ltd v Commissioner of Taxation (2004) 207 ALR 217

4 *Kennedy v Wallace* (2004) 213 ALR 108; Pratt Holdings Pty Ltd v Commissioner of Taxation (2004) 207 ALR 217

5 *Skandinaviska Enskilda Banken v Asia Pacific Breweries* (2007) SLR ® 367

6 *Upjohn Co v USA 449 US 383* (1981), discussed extensively in *Three Rivers 6*

7 *Three Rivers 6*, §70

8 *Three Rivers 6*, §118, a speech with which the whole court agreed. Furthermore, the House of Lords in *Three Rivers 6* overturned the Court of Appeal's ruling, a ruling which the Court of Appeal stated had been based on their approach to *Three Rivers 5*.

9 *Three Rivers DC v Bank of England* [2003] CP Rep 34, §30 (emphasis added)

10 *Three Rivers 5,* §10, endorsing Bingham LJ's comment to the same effect in *Ventouris v Mountain* [1991] 1 WLR 607 at page 612h; similarly, *Three Rivers 6*, §96
11 *Three Rivers 5,* §10, 12
12 *Three Rivers 5*, §14
13 Page 1571
14 Page 1570
15 Page 1574
16 *Three Rivers 5*, p1574
17 *ENRC* cited extensively from *Three Rivers 6*, steering away from *Three Rivers 5*'s grip of the trio of 19th century authorities of (above) and instead expressly adopting Lord Scott's principled analysis of the purpose of legal advice privilege (at §34): "*…corporations, whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs… 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…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…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 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 15.8–15.10 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.*"
18 *ENRC*, §127
19 Ibid, §130
20 *Jet2*, §57, 54, §48
21 Ibid, §59
22 Ibid, §95-96
23 *ENRC*, §118
24 *ENRC*, §100
25 *ENRC*, §90 & 93
26 *Al Sadeq*, §186
27 Ibid §41
28 The Court will, however, scrutinise affidavits from lawyers in respect of privilege – '*A claim for privilege is an unusual claim in the sense that the party claiming privilege and the party's legal advisers are, subject to the power of the court to inspect documents, the judges in their own client's cause. Because of this, the court must be particularly careful to consider how the claim for privilege is made out…*' *West London Pipeline and Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm), § 86(1).
29 In addition to what follows, it should be noted that a large part of *Al Sadeq* is dedicated to examining the proper approach to the iniquity exception to legal professional privilege, establishing the proper test for a finding of the iniquity exception as more probable than not, see §63
30 §3.80
31 §18.01
32 §3-006
33 *Al Sadeq v Dechert LLP* [2023] 1 WLR 3749, §169-173, 189
34 *Al Sadeq*, §193
35 As is now traditional, the court in *Al Sadeq* noted that *Three Rivers 5* had "*received considerable criticism, both judicially and by leading commentators, and has not been followed in other jurisdictions*" and, unsurprisingly, rejected the appellant's contention that 'the *Three Rivers 5* principle' (i.e. that privilege only applies to communications with those individuals within the corporate who have been expressly designated as the client) should be expanded to apply to litigation privilege, too (§221-3).
36 Ibid, §195
37 *Al Sadeq*, §220
38 *DSFO v ENRC [2017] EWHC 1017 (QB)*, §150
39 Adopting Batt JA's formulation set out in *Mitsubishi Electric Australia PTY Ltd v Victorian Work Cover Authority* [202] VSCA 59
40 §68
41 §70
42 §72
43 §195(7)
44 Note the ongoing re-appropriation of *Anderson* from its opposite interpretation in *Three Rivers 5*.
45 §193, 195
46 *Philip Morris*, §54
47 Interestingly, Popplewell LJ did repeatedly refer to a balancing exercise but only in formulating the threshold test for the iniquity exception, which had to balance the competing public policy considerations of a party's right to legal professional privilege against uncovering the iniquity (see §65-69)
48 Albeit the one remaining distinction would be that litigation privilege, unlike legal advice privilege, can be claimed in relation to communications with non-lawyers. The High Court is more reluctant to allow such claims. In *State of Qatar v Banque Havilland* [2021] EWHC 2172 (Comm), an online article suggested that a presentation by a bank employee had been leaked. The presentation was reported to have suggested that the bank had devised a scheme to drive down the value of Qatar's bonds in order to create a currency crisis. The bank commissioned an investigation report from PWC, over which it claimed litigation privilege. The Court found that this was not one of those cases where, as in *ENRC* '*(so to speak) the writing was on the wall*' (§166). The dominant purpose of the report was to enable the bank to answer questions posed by its regulator, with the evidence providing "*little support for contemplated adversarial proceedings*", including "*there being nothing in PWC's own terms of engagement that suggests a litigious purpose for its work*" (§183, 186).

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CHAMBERS DIRECTOR
Annaleen Stephens
annaleenstephens@clothfairchambers.com

cloth fair
CHAMBERS

39-40 Cloth Fair
London EC1A 7NT

tel: 020 7710 6444

www.clothfairchambers.com