Fountain Court

Quarterly Commercial Crime Newsletter:

COMMENTARY

Parallel civil, criminal and regulatory proceedings: evidential intersection and misdirection

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Introduction

The tasks faced by legal teams advising individuals or corporations accused of criminal wrongdoing on the one hand, or law enforcement agencies on the other, are complicated by the high likelihood that such proceedings will be accompanied by parallel civil claims and regulatory proceedings arising out of the same alleged wrongdoing. Those complications are heightened still further where one or more of the parallel proceedings is taking place in a different jurisdiction, with distinct procedural frameworks and protections.

One obvious antidote to those complications is the potential to stay or adjourn the civil or regulatory proceedings to allow the criminal proceedings to take their course. However, the threshold for obtaining such an outcome in respect of civil proceedings – which is always a matter for the Court's discretion – is high, and the mere existence of parallel proceedings without more will not be sufficient in the absence of demonstrable specific prejudice: see *Akciné v Antonov* [2013] EWHC 131 (Comm) at [18]. Such an application succeeded – at least to the extent of a time-limited adjournment of the civil trial – in *PCP Capital Partners LLP v Barclays Bank PLC* [2017] EWHC (Comm), but failed, in *Mozambique v Credit Suisse International* [2022] EWHC 3094 (Comm). In both cases, the applications were made to the same judge, Mr Justice Robin Knowles CBE.

The classic rationale for directing a stay in those circumstances is the risk that, particularly where the proceedings are likely to be well-publicised, the jury will be influenced by findings made to the lower standard of balance of probabilities in the parallel civil proceedings. At a higher level of abstraction, the motivating concern is the possibility of outcomes in one judicial process contaminating those in another, conducted under a different procedural framework.

In this article, we provide observations on two areas of what we loosely term "evidential intersection" – that is, situations where the available evidence in one set of proceedings may be influenced by the existence of parallel proceedings.

1. *Legal professional privilege: waiver and parties for the purposes of litigation privilege*

It is frequently the case that documents produced for the dominant purpose of criminal litigation are potentially disclosable in related civil proceedings, and the question then arises as to whether such documents can be withheld from inspection in the civil proceedings, on grounds of litigation privilege.

Two cases involving parallel proceedings illustrate some of the challenges that arise when making litigation privilege claims in this context:

- *SFO v ENRC*: The potential need to waive at least some privilege in order to support a claim for litigation privilege; and

- *Al Sadeq v Dechert*: The question of whether a non-party can be the proper subject of a claim to litigation privilege.

a. *ENRC: to waive or not to waive?*

In 2013, the SFO opened an investigation into ENRC Ltd, a company within a large mining group, concerning alleged corruption in respect of mining contracts in the Democratic Republic of Congo between 2009 and 2012. In August 2023, following an internal review, the investigation was closed on the basis that the absence of insufficient admissible evidence meant that the evidential and public interest prosecution tests in the Code for Crown Prosecutors were not satisfied.

The brief summary in the preceding paragraph reflects the content of the SFO's own press release. Whilst technically accurate, however, it omits a particularly prominent elephant in the room – the interposition during the course of the SFO's investigation of parallel civil proceedings. In those proceedings, ENRC succeeded in establishing via a civil claim for damages that the SFO, and the law firm advising ENRC in the investigation, were liable to ENRC in causes of action including (in the case of the law firm) breach of fiduciary duty and (in the case of the SFO) the tort of inducing a breach of the contractual duties in the law firm's retainer with ENRC.

At the theoretical level, the findings made in those civil proceedings would be legally irrelevant in the context of any criminal trial arising from the SFO's investigation (unless, perhaps, they could be admitted as evidence of bad character), had it proceeded to that point. We address that principle further below, in considering the present status of the rule in *Hollington v Hewthorn*. But at the practical level, the significance of the civil findings (and the evidence that was the basis for those findings) cannot be overstated.

The ENRC litigation generated some important authority concerning litigation privilege, addressing in particular the question of when litigation is in reasonable contemplation, in the context of a criminal investigation: see *SFO v ENRC* [2019] 1 WLR 791. In this article, we focus on one discrete practical question that arose in that case, namely the difficult question of whether, and if so to what extent, to waive privilege in order to substantiate a claim to privilege.

At first blush, that proposition appears surprising in light of two well-established principles. The first is the principle that no adverse inferences should be drawn against a party for electing to maintain privilege, which is after all, a fundamental right: see *R v Derby Magistrates Ex p. B* [1996] 1 AC 487, p.504-505; *R (Morgan Grenfell) v Special Commissioner of Income Tax* [2003] 1 AC 563. The second is that evidence in support of a claim to privilege should not make disclosure "*of the very matters that the claim for privilege is designed to protect*": *West London Pipeline and Storage v Total UK* [2008] 2 CLC 258 at [86].

However, balanced against this, are other equally important principles. These include that any claim to privilege necessarily involves the Court being deprived of material that is relevant to its determination of disputes: see *Waugh v British Railways Board* [1980] AC 521, p.536-537 per Lord Simon. In the context of civil disclosure, where a document is withheld from inspection on privilege grounds, the document is *ex hypothesi* one that has been determined by the reviewing party to have a material impact. Other principles include (i) that an assertion of privilege is evidence of a fact which may require to be independently proved; (ii) the party seeking to rely on privilege bears the burden of establishing it; and (iii) it is necessary for the Court to subject evidence in support of a claim to privilege to "*anxious scrutiny*", because of the risk arising from self-certification: see *Starbev GP Ltd v Interbrew Central European Holding BV* [2013] EWHC 4038 (Comm) at [11]-[12].

It is a corollary of this latter set of principles that there needs to be a sufficient evidential basis to make good a claim to litigation privilege, including the proposition that litigation was in reasonable contemplation as at the date of the relevant communications. This can give rise to difficult decisions for advisors as to what material to deploy to substantiate such a claim.

In *ENRC*, after careful consideration of the facts, the Court of Appeal overturned Mrs Justice Andrews' finding that criminal litigation against ENRC was not in reasonable contemplation on the date ENRC contended. The Court of Appeal's judgment (see [86]-[92]) gives a flavour of the extensive evidence relied on by ENRC in support of its privilege claim. That evidence included references to legal advice given to ENRC by both internal and external counsel, upon which the Court of Appeal placed particular reliance at [93]. The waiver of privilege in relation to that advice, therefore, was of critical importance in substantiating the wider claim to litigation privilege, which had the effect of enabling ENRC to withhold from production to the SFO (and also, insofar as relevant, disclosure in the parallel civil litigation) documents that had been created for the dominant purpose of the anticipated criminal proceedings.

Another context in which difficult waiver issues can arise concerns interactions with a regulatory or law enforcement agency. In

the case of negotiations with regulatory agencies, such negotiations can in principle be protected by without prejudice privilege. This was the position in *Property Alliance Group v RBS* [2016] 1 WLR 361, although the defendant was found to have waived that privilege by relying on the communications as part of its pleaded defence. In the case of negotiations with law enforcement agencies, without prejudice privilege is unlikely to arise as between a law enforcement agency and the accused. However, the willingness of a corporation to waive legal professional privilege in providing information to the SFO about wrongdoing is regarded by the SFO as a relevant factor in deciding whether to invite a corporation to enter into a Deferred Prosecution Agreement. If such a waiver is made, it seems unlikely that it would be possible to limit its scope to prevent wider dissemination of the privileged materials, given that (i) the purpose of the waiver from the SFO's perspective may be to assist it in successfully prosecuting individuals, and (ii) the waived materials may form the basis of the public Agreed Statement of Facts.

These cases illustrate the potential benefits and risks involved in waiving privilege in the context of parallel proceedings, and the need for a coherent strategy to be adopted at an early stage.

b. *Al Sadeq v Dechert: non-party litigation privilege*

It may not only be the defendant to actual or contemplated criminal proceedings who wishes to withhold from disclosure in related civil proceedings documents created for the dominant purpose of the criminal proceedings.

This issue arose in a recent case, *Al Sadeq v Dechert & Ors* [2023] 1 WLR 3749, which we also consider in our accompanying case update. In *Al Sadeq*, the Defendants sought to claim litigation privilege on behalf of their former clients, government entities of the Emirate of Ras-Al-Khaimah. The basis for some of the litigation privilege claims concerned criminal prosecutions in RAK, in respect of which the defendants' clients were the complainant, and thus neither actual nor potential parties to the RAK criminal proceedings (the actual parties being the accused and the RAK Public Prosecutor).

Mr Justice Murray held that litigation privilege could arise in such circumstances in favour of a non-party (i.e. the putative victim of alleged fraud). In so doing, Murray J decided not to follow another first instance judgment which had held that only actual or potential parties to the relevant proceedings are able to claim litigation privilege (*Minera Las Bambas v Glencore* [2018] EWHC 286 (Comm)), as well as the views of the authors of several privilege texts. Murray J regarded the touchstone for the availability of litigation privilege in such a context as being whether the third party to the proceedings has a sufficient interest in them such that it is motivated to seek legal advice and, in connection with that advice, communicates with third parties to ensure the advice is properly founded: [212].

That conclusion is the subject of an appeal to the Court of Appeal. For present purposes, we note three consequences that are material for evidential intersection in parallel proceedings.

First, the Judge's sufficient interest test appears not intended to be limited to the criminal context, but, as articulated by the Judge, would likely extend to a situation where a non-party with a sufficient interest in *civil* litigation (such as, for example, another entity within the same

corporate group as the party) could rely on that interest to claim litigation privilege to withhold documents from production. This potentially broadens the scope of litigation privilege (at least, as it had previously been understood) substantially, as it must be commonplace for a corporate entity to be sufficiently concerned with litigation involving another entity in its group to seek to advise lawyers and communicate with third parties about it. Prior to the *Al Sadeq* judgment, the prevailing view would have been that the only type of privilege that would be available to that interested non-party in that context (putting to one side any questions of common interest privilege) would be legal advice privilege, which would not extend to its communications with third parties.

Second, Murray J's analysis places substantial weight on the relationship between third party communications and the instruction of a lawyer about the relevant criminal proceedings. If the Judge's conclusion is upheld, this would appear to encourage parties in the position of a victim to alleged criminal wrongdoing to obtain legal representation at an early stage, so as to maximise the prospect of litigation privilege being available in respect of their third-party communications.

Third, the position in relation to private prosecutions is unclear. A victim pursuing a private prosecution plainly has a sufficient interest in those criminal proceedings, applying Murray J's test. Yet – perversely – the victim's communications with third parties for the dominant purpose of those proceedings would likely be expected to fall within the private prosecutor's duties of disclosure, applying the Code for Private Prosecutors (which envisages that the prosecutorial disclosure duties under the CPS Disclosure Manual will be complied with, and includes a specific provision preventing private prosecutors from withholding materials on grounds of legal professional privilege).

Plainly, if Murray J's conclusion is upheld, there will be ample scope for further argument as to its implications for various types of parallel proceedings.

c. *The rule in* Hollington v Hewthorn*: observance in the breach*

So far, we have been concerned with the relationship between disclosure of documents and parallel proceedings in the context of privilege claims. However, a far greater prize or risk, depending on one's perspective, may be the ability to deploy findings made in one set of parallel proceedings in another. This involves consideration of the rule in *Hollington v Hewthorn* – the principle that findings in one set of proceedings are not, absent estoppel or abuse of process, admissible in other related proceedings. The rationale for this principle is that a judicial decision in proceedings between A and B is no more than irrelevant opinion evidence for the purposes of later proceedings between A and C, and is thus inadmissible.

The 21st century Clapham Omnibus person would perhaps be surprised to encounter this principle, the corollary of which is that the conclusion of (say) a Commercial Court judge in the first set of proceedings, likely reached after a lengthy trial and consideration of thousands of documents, is of precisely the same irrelevance in the later proceedings as the view of any other person. However, that is the core of the principle which in its basic form remains good law today – and it applies not only to the factual findings made in judgments, but also to the legal effect of that judgment - see e.g. *Ward v Savill* [2021] EWCA Civ at [33]; [81]; [83].

That said, as a practical matter, the application of the rule today is not as

absolute as its strict formulation suggests. In particular, there are various ways in which a judgment may nonetheless be of significance in parallel proceedings not involving commonality of parties. In particular:

1. The effect of the rule has been abrogated in respect of criminal convictions by s.11 of the Civil Evidence Act 1968, with the result that criminal convictions are not only admissible in related civil proceedings but give rise to a rebuttable presumption that the accused convicted the offence. It should be noted, however, that foreign convictions remain inadmissible under the rule in *Hollington v Hewthorn* – see *Daley v Bakiev* [2016] EWHC 1972 (QB) at [5]; Appendix 1, [25]-26].

2. In criminal proceedings, findings made in civil proceedings have been held to be admissible as evidence of bad character under s.98 of the Criminal Justice Act 2003: see *R v Hogart* [2007] EWCA Crim 338. The judge was held by the Court of Appeal to have rightly exercised his discretion to admit the evidence because *"precisely the same allegations were being made in the civil proceedings as in the criminal proceedings…"*: see [33]. The Court of Appeal also considered it material that there would be no barrier to questions being asked in cross-examination about the allegations made in the first set of proceedings, and as such, the *"jury would be mystified if they were told there were proceedings in which these allegations were made but they could not be told what the judge had found in relation to them."* It may be observed that that reasoning is difficult to reconcile with the basic rationale for the *Hollington v Hewthorn* principle.

3. Certain types of proceedings have been held to comprise recognised exceptions to the rule in *Hollington v Hewthorn*. In particular:

    a. Family law proceedings are excepted, on the basis that to prevent regard being had to an earlier judgment would conflict with the Court's overriding duty to ascertain the truth in the interests of the child: see *re W-A (Children: Foreign Conviction)* [2022] EWCA Civ 1118.

    b. Directors' disqualification proceedings under s.7 of the Company Directors Disqualification Act 1986 have been held to involve an implied exception to the rule: see *Sec State for Business v Aaron* [2009] Bus LR 809 at [29].

4. In the civil context, there are various cases which have, contrary to the strict formulation of the rule, recognised certain purposes for which factual findings made in earlier related proceedings can be relied upon:

    a. In *Oktritie International Investment Management v Gersamia and Jemai* [2015] EWHC 821 (Comm), at [33] Eder J held that a party could rely on findings made in an earlier judgment to which they were not party, on the basis that the court could have regard to the "*matters of primary fact"* recorded in that judgment, and was entitled to reach the same conclusions as

reached in the earlier judgment, if those matters of primary fact justified it.

b. In *Sabbagh v Khoury* [2014] EWHC 3233 (Comm) Carr J held that judicial findings in third party civil litigation were admissible for the purposes of demonstrating at an interlocutory stage that the threshold of "serious issue to be tried" was met: see [206]. In a recent case, *Tulip Trading Ltd v Bitcoin Association for Bsv* [2023] EWHC 2437 (Ch), this was held at [40] to be an illustration of a more general proposition that the rule in *Hollington v Hewthorn* is not applicable "*where the case is at a preparatory stage yet the court has to consider what evidence at trial there might be.*"

c. In *JSC BTA Bank v Ablyazov* [2016] EWHC 3071 (Comm), at [24] the Deputy Judge (Laurence Rabinowitz QC) held that the principle in *Hollington v Hewthorn* has in recent years become "*substantially diluted*", including because reliance is permissible on the "*substance of the evidence*" referred to in the earlier judgment.

Accordingly, despite the apparent strictness of the rule, it can be seen that there are numerous contexts in which an increasingly flexible approach appears to be taken to the prohibition against relying upon findings made in related proceedings. This gives rise to both opportunities and risks for practitioners in cases involving parallel proceedings, given the significant prize (or prejudice) involved in wielding findings made in separate but related proceedings.

Fountain Court barristers appeared in many of the cases referred to in this article.

Richard Lissack KC, Robin Barclay KC and Eleanor Davison acted in respect of the Barclays criminal, civil and/or parallel regulatory proceedings.

Richard Lissack KC, Bankim Thanki KC, Robin Barclay KC, Tamara Oppenheimer KC and Rebecca Loveridge acted for ENRC in various respects in the ENRC litigation.

David Railton KC and Adam Sher acted for *Royal Bank of Scotland Plc in Property Alliance Group v RBS* [2016] 1 WLR 361.

Tamara Oppenheimer KC and Simon Paul acted for *Mr Al Sadeq in Al Sadeq v Dechert & Ors* [2023] 1 WLR 3749.

Philip Ahlquist acted for the Second to Twelfth Defendants in *Tulip Trading Ltd v Bitcoin Association for Bsv* [2023] EWHC 2437 (Ch).

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Richard is a nationally and internationally recognised leader in his fields. For several years Richard has been recommended as a leader in Commercial Crime in the legal directories and has led on some of the most significant commercial and regulatory cases. Described in the directories as being “at the cutting edge of the cross over between criminal and civil law”, he remains one of the most sought-after silks in the area, representing organisations, their directors and other High Net Worth individuals.

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Simon combines a broad commercial litigation and arbitration practice with commercial crime work and is appointed to the SFO’s Panel of External Counsel (Proceeds of Crime, Panel B), and to the CPS Advocate Panel. Simon has considerable experience advising on issues concerning the UK sanctions relating to Russia. He is ranked in The Legal 500 as a leading junior where he is described as “an extraordinary barrister, wise beyond his years” and “an absolutely first-rate junior”.