Neutral Citation Number: [2017] EWHC 1017 (QB)

Case No: HQ16X00363

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/05/2017

Before:

THE HONOURABLE MRS JUSTICE ANDREWS DBE

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Between:

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE	**Claimant**
- and -	
EURASIAN NATURAL RESOURCES CORPORATION LTD	**Defendant**

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- -

Jonathan Fisher QC, James Segan and Eesvan Krishnan
(instructed by **Eversheds Sutherland LLP**) for the **Claimant**
Richard Lissack QC, Tamara Oppenheimer and Saaman Pourghadiri
(instructed by **Signature Litigation LLP**) for the **Defendant**

Hearing dates: 6, 7, 8 and 9 February 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mrs Justice Andrews:

INTRODUCTION

1. This is a claim by the Director of the Serious Fraud Office ("SFO") for a declaration that certain documents generated during investigations undertaken between 2011 and 2013 by solicitors and forensic accountants into the activities of the Defendant ("ENRC") and its subsidiaries (collectively, "the Disputed Documents"), are not subject to legal professional privilege ("LPP").

2. The claim is made against the background of an ongoing criminal investigation by the SFO, which began in late April 2013, relating to the activities of ENRC, its subsidiaries, officers and employees. It followed a lengthy period of dialogue between ENRC and the SFO which commenced in August 2011, which the SFO characterises as being (or becoming by no later than the end of November 2011) engagement in a self-reporting process in accordance with the SFO's 2009 Self-Reporting Guidelines. ENRC disputes that characterisation, although there is overwhelming evidence that those who were acting on its behalf in the discussions with the SFO believed at the time that they were engaged in such a process. That belief was not shared by all those within the SFO with whom they were dealing at different times throughout that period. The divergence of approach among SFO personnel appears to have been at least partially attributable to a change in policy, referred to later in this judgment, around a year after the dialogue began.

3. The SFO terminated the discussions in the wake of ENRC's decision to dispense with the services of the firm of solicitors, Dechert LLP ("Dechert") which had been representing it in its dealings with the SFO, and which was also responsible for the relevant investigations.

4. The criminal investigation into ENRC is focused on allegations of fraud, bribery and corruption in two foreign jurisdictions, one being Kazakhstan, the other, a country in Africa. Depending on its outcome, it may (or may not) lead to one or more criminal prosecution(s). ENRC denies that it has committed any criminal offence warranting investigation and/or prosecution by the SFO. However, the question whether there is justification for the current investigation, and the merits of any future case against ENRC, or any individual or company connected with ENRC, arising out of the matters under investigation, have no bearing on the issues in this case.

5. As part of the investigation, the SFO has exercised its powers pursuant to s.2(3) of the Criminal Justice Act 1987 ("CJA 1987") and issued notices against various entities and individuals, including ENRC, to compel the production of documents. The SFO's powers of compulsion do not extend to documents which the recipient of the notice "*would be entitled to refuse to disclose or produce on grounds of legal professional privilege in proceedings in the High Court"* (see s.2(9) CJA 1987). The issue that the Court has been asked to determine is whether ENRC is entitled to resist production of the Disputed Documents (or any of them) to the SFO on grounds of LPP.

6. ENRC contends that the Disputed Documents are subject to litigation privilege, legal advice privilege, or both, though the primary focus of the argument has been on litigation privilege. The SFO has always accepted that if any part of a Disputed Document contains legal advice, (in the sense in which that term is defined in *Three*

Rivers DC v Bank of England (No 6) [2004] UKHL 48, [2005] 1 AC 610) such advice may be redacted; but it disputes the generic claim to legal advice privilege.

7. I was told by Mr Richard Lissack QC, leading counsel for ENRC, that this is the first case in which the Court has had to consider a claim for litigation privilege against a background in which the adversarial litigation said to have been reasonably in contemplation by the party claiming privilege was criminal, rather than civil, in nature, although a scenario with certain similarities to the present was considered by Millett J in the case of *Price Waterhouse (a firm)* v *BCCI Holdings (Luxembourg) SA and others* [1992] BCLC 583. In that case, however, the documents were in the hands of a third party rather than a prospective defendant to criminal proceedings.

The Parties

8. The SFO is a non-Ministerial Department of State constituted under s.1(1) of the CJA 1987. Its functions include the investigation and prosecution of crimes involving serious or complex fraud (under the CJA 1987); the investigation and prosecution of cases (in both a civil and criminal capacity) involving domestic and overseas bribery and corruption (under the Bribery Act 2010); and statutory functions in relation to the recovery of proceeds of crime (under the Proceeds of Crime Act 2002).

9. By s.1(3) of the CJA 1987 the Director of the SFO may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud. S.2 sets out the powers that may be exercised for the purposes of an investigation under s.1. These include a power to require the person under investigation, or any other person who the Director has reason to believe has relevant information, to answer questions or produce documents which appear to relate to any matter relevant to the investigation, by serving a written notice on him to do so ("a s.2 notice").

10. As part of such an investigation the SFO may also follow the procedure set out in s.2(4) of the CJA 1987 for obtaining a warrant from a justice of the peace, enabling a constable accompanied by a member of the SFO (or other authorised person) to enter premises to search for and seize such documents. S.2(13) to (18) prescribe criminal sanctions for impeding an SFO investigation by, for example, failing to co-operate without reasonable excuse, destroying or concealing documents, or giving false answers to questions in a s.2 notice.

11. 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. Until 14 January 2014 it was a publicly limited company. Between 2007 and 2013 it was a FTSE-100 listed company. Until 2009/2010 its principal operations, carried out through its wholly-owned subsidiary Sokolov-Sarbai Mining Production Association ("SSGPO") were in Kazakhstan. In 2009/2010 it sought to diversify its operations through a series of acquisitions of companies operating in various parts of Africa.

12. The geographic regions in which ENRC and its subsidiaries operated, and the mining and natural resources sector in general, are widely perceived as being high risk in terms of incidence of public sector bribery and corruption. As Gross LJ observed in *R*

(Soma Oil and Gas Ltd) v Director of the Serious Fraud Office [2016] EWHC 2471 (Admin) [2017] Crim LR 65, at [4] - [5]:

"*International business operates in challenging parts of the world, geographically, politically, commercially and in terms of corporate governance. Those are the realities for a good part of the oil and gas industry…*

Cognisant of those realities, Parliament has, however, prioritised combating corruption. By the Bribery Act 2010 ("the Bribery Act"), Parliament has legislated, with extra-territorial effect (s.12), making it an offence (under s.6) where a person (P) bribes a foreign public official (F) and P's intention is to influence F in his capacity as a foreign public official and obtain or retain business or an advantage in the conduct of business. S.7 of the Bribery Act provides that a commercial organisation may incur criminal liability if a person who performs services for it commits bribery on its behalf and the commercial organisation cannot prove that it had adopted adequate procedures that were designed to prevent such conduct. Both ss. 6 and 7 supplement the two main general offences of bribery under the Bribery Act, namely, bribery of another person (s.1) and being bribed (s.2)."

The self-reporting regime

13. The Bribery Act came into effect on 1 July 2011, though its advent was widely heralded. In anticipation of its enactment, on 30 March 2011 the SFO and the Crown Prosecution Service ("CPS") published the joint Bribery Act Guidance, supplementing the pre-existing joint Guidelines on Corporate Prosecutions, which set out the policy governing the approach taken by the authorities when deciding whether to prosecute a corporate body for a criminal offence.

14. There are two stages in the decision-making process; the first is to evaluate whether there is sufficient evidence to provide a realistic prospect of a conviction. If there is, the prosecutor then decides whether a prosecution will be in the public interest. One of the factors to be considered at that second stage is whether the company has self-reported. If it has, that may weigh against it being in the public interest to prosecute it; but it will not be decisive.

The 2009 Guidelines

15. In July 2009, two years before the Bribery Act came into effect, the SFO published a document entitled "*Approach of the Serious Fraud Office to dealing with Overseas Corruption"*, commonly known as the "Self-Reporting Guidelines" ("the 2009 Guidelines"). This was the SFO's first attempt to set out guidance pertaining to a "*system of self-reporting cases of overseas corruption"* and on the benefits to be obtained by taking that course. It was published in response to requests from companies and their legal advisers for a document that covered the issues and indicated the approach the SFO was likely to take.

16. The 2009 Guidelines outlined a process whereby, in return for full and frank cooperation by a corporate body which discovers a problem concerning overseas corruption and reports it to the SFO, in appropriate circumstances the SFO might agree to a civil settlement in lieu of prosecution, or agree to accept a plea of guilty to a lesser charge than might otherwise be brought. The overall tenor of the guidance

was one of encouragement to corporates to self-report, on the basis that there were considerable advantages to be gained by doing so. Whilst there was no guarantee that self-reporting would improve the company's chances of avoiding prosecution, it would be regarded as a step in the right direction.

17. Paragraph 4 set out various matters that the SFO would want to establish "very soon after the self-report and the acknowledgment of a problem". These included satisfying itself that:

    i) the Board of the corporate was genuinely committed to resolving the issue and moving to a better corporate culture;

    ii) the corporate would work with the SFO on the scope and handling of any additional investigation it considered to be necessary;

    iii) at the end of the investigation (and assuming acknowledgment of a problem) the corporate would be prepared to discuss resolution of the issue on the basis, for example, of resolution 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;

    iv) the corporate understood that any resolution must satisfy the public interest and must be transparent.

18. The 2009 Guidelines made it clear that any voluntary report to the SFO would not guarantee that the company would avoid criminal prosecution, for: "*without knowing the facts no prosecutor can ever give an unconditional guarantee that there will not be a prosecution of the corporate*." However, in reflection of a policy instituted by the then Director of the SFO, Richard Alderman, they stated that the SFO wanted to settle cases that satisfied the criteria set out in paragraph 4 of the Guidelines civilly wherever possible. Paragraph 24 reinforced the message that self-referral would be in the best interests of the corporate; it pointed out that if the SFO discovered corruption for itself, it would regard the failure to self-report as a negative factor, increasing the prospects of a criminal investigation followed by prosecution and a confiscation order.

19. The body of the 2009 Guidelines set out what would be expected to happen if both parties were satisfied with the answers to the issues raised in paragraph 4. The SFO made it clear that it would expect any further investigation to be carried out by the corporate's professional advisers at the corporate's own expense, though it promised to look at this in a proportionate manner. Paragraph 12 stressed the importance of document recovery, analysis and preservation, and stated that electronic searches would be needed. Paragraph 13 indicated that the SFO would want to be involved in regular update discussions concerning the progress of any investigation. Paragraph 14 made it plain that the SFO would expect to discuss the results of the investigation with the corporate and its professional advisers before proceeding to negotiate any settlement. Anyone reading the 2009 Guidelines could be in no doubt that complete openness with the SFO about the results of the corporate's own investigation was an essential ingredient of the process.

20. It is obvious that the SFO would not necessarily take the results of the company's internal investigation at face value. It would wish to satisfy itself that the investigation was sufficiently thorough, and to carry out its own researches and checks against its own intelligence from other sources, though this is not expressly referred to in the Guidelines. This was confirmed by Mr John Gibson, a case controller at the SFO, in his evidence.

21. What the 2009 Guidelines do not make clear is what would trigger a company becoming engaged in the process that they describe, for the purposes of being able to seek to avail itself of the benefits it might offer. There is nothing to indicate whether the process only incepts when a company, having discovered wrongdoing that might attract a criminal sanction, formally reports that wrongdoing to the SFO, or whether it incepts at an earlier stage. Paragraph 2 is vague in this regard. The SFO states that it appreciates that a corporate will not want to approach it unless it has decided, following advice and a degree of investigation by its professional advisers, that there is a real issue and that remedial action is necessary. However, it then goes on to say that there may be earlier engagement between the advisers and the SFO "*in order to obtain an early indication where appropriate (and subject to a detailed review of the facts) of our approach*," and adds that the SFO would find this helpful, though it is ultimately a matter for the corporate and its advisers. That ties in with the reference in paragraph 4 of the Guidelines to the SFO being satisfied at the inception of the discussions that *at the end of the investigation*, the corporate would be prepared to enter into discussions to resolve the matter by a civil settlement.

22. Therefore, it was envisaged that an approach might be made to the SFO at a time when a company has not yet discovered any wrongdoing, or completed its own investigations, but is sufficiently concerned about the situation to decide to take a proactive stance. Such an approach would potentially enable the company to investigate or continue to investigate the matter itself, untrammelled by an SFO investigation (and all the unwelcome attendant publicity). Of course, as the Guidelines make plain, the price the company must pay is full co-operation, which necessarily involves agreeing to share the results of its own investigations with the SFO.

23. The 2009 Guidelines were withdrawn in October 2012 and replaced with a different set of Guidelines ("the 2012 Guidelines"). These moved 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. The 2012 Guidelines no longer portrayed the negotiation of a civil settlement as the SFO's preferred outcome in a case where the requirements of paragraph 4 were satisfied. From around this time, certain senior officials within the SFO took the stance that a corporate would not be regarded as having self-reported (and thus could not rely on any of the potential advantages that this conferred) unless and until it had made a formal report to the SFO, although others espoused the view that corporates such as ENRC who had already embarked on a process of early dialogue with the SFO in reliance upon the 2009 Guidelines should not be disadvantaged by the changes.

24. For the purposes of this claim, it is unnecessary to decide whether the SFO's characterisation of the dialogue between itself and ENRC is correct, because engagement in the self-reporting process would not be inconsistent with the corporation concerned contemplating that there was a real prospect that it would be

prosecuted. Indeed, that concern could be the very reason for its approach to the SFO with the objective of ameliorating its position, so far as that were possible. The clearest illustration of this is the scenario in which a corporation has already uncovered evidence of corruption which it decides to report to the SFO itself, instead of waiting for it to be uncovered.

THE DISPUTED DOCUMENTS

25. The Disputed Documents fall into four categories, which I shall briefly describe below, with a summary of ENRC's case in relation to each of them.

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. None of these individuals has been identified by name or even by job description.

27. 85 individuals were interviewed in respect of the Kazakhstan investigation, most of whom worked for SSGPO. Of the rest, 9 were employees of another affiliated company in Kazakhstan, 23 worked for stripping contractors, 5 were employees of outsourcing companies, 5 worked for suppliers, and 1 for a manufacturer. There is no similar breakdown of the categories of people who were interviewed in respect of the African investigation. The best evidence available is that in one of the progress reports into that investigation in November 2012, the SFO was told that 60 meetings or calls with ENRC managers or advisers had taken place.

28. ENRC claims that all these documents are subject to litigation privilege, alternatively legal advice privilege. Its case is that the dominant purpose of the interviews was to enable Dechert to obtain relevant information and instructions, and to provide ENRC with advice in connection with anticipated adversarial (criminal) litigation. In the context of the claim for legal advice privilege, ENRC also submits that the documents can be characterised as lawyers' work product, and that (if it is necessary to establish this), disclosure of Dechert's notes of the interviews would reveal the trend of the legal advice they were providing to ENRC.

Category 2

29. This category comprises materials generated by Forensic Risk Alliance ("FRA") (the forensic accountants) as part of "books and records" reviews they carried out in London, Zurich, Kazakhstan and Africa, with a focus on identifying controls and systems weaknesses and potential improvements. 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.

31. ENRC's case on litigation privilege in relation to Category 2 is that "*the dominant purpose of the reports was to identify issues which could likely give rise to intervention and prosecution by law enforcement agencies (specifically the SFO), with a particular focus on books and records offences, and to enable ENRC to obtain advice and assistance in connection with such anticipated litigation"*.

Category 3

32. This category comprises documents indicating or containing the factual evidence presented by Mr Neil Gerrard (the partner at Dechert who had conduct of the investigations at all material times) to ENRC's Nomination and Corporate Governance Committee and/or the ENRC Board on 14 and 15 March 2013.

33. It was originally ENRC's case that it had no documents falling within this category. Indeed, at one point ENRC sought summary judgment on that basis; however, in the wake of Mr Gerrard's response to a s.2 notice served on him, 5 such documents were identified by ENRC relatively shortly before the hearing, leading to the service of an Amended Defence and Amended Reply. The parties agreed that the trial of the claim should proceed on the basis that category 3 comprises only those 5 documents, and that any questions relating to a further 289 documents identified by Mr Gerrard in response to that s.2 notice shall be addressed after judgment is given in relation to the 5 documents. ENRC's primary case is that these documents are subject to legal advice privilege, but it asserts litigation privilege in the alternative.

Category 4

34. This comprises 17 documents referred to in a letter dated 22 August 2014 sent to the SFO by Fulcrum Chambers (who succeeded Dechert as ENRC's legal advisers), which independent counsel had determined did not attract LPP.

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 emails or letters "*enclosing copies of the FRA books and records reports, or otherwise relating to FRA's books and records work,*" and on that basis are said to be secondary evidence of privileged communications. 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 email communications between Mr Beat 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.

THE CLAIM FOR LEGAL PROFESSIONAL PRIVILEGE

37. LPP is a fundamental human right guaranteed by the common law, and a principle which is central to the administration of justice. Once a document is subject to privilege, the privilege is absolute: it cannot be overridden by some countervailing rule of public policy. Although it is possible for LPP to be waived, this case is not concerned with any arguments about waiver.

38. It is common ground that the evidential burden of establishing that a document or communication is privileged lies on the party claiming privilege, regardless of whether that party is the claimant or the defendant in the action: see *West London Pipeline v Total UK Ltd* [2008] EWHC 1729 (Comm), [2008] 2 CLC 258 at [50] and [86(1)], and *Westminster International BV v Dornoch* [2009] EWCA (Civ) 1323 at [36].

39. The question whether a document or communication is privileged is to be determined by the Court in the light of the evidence taken as a whole. The mere assertion of privilege, or statement of the purpose for which the document was created, is not in itself determinative, even if the person making the statement is a lawyer, and even if the assertion is made on oath. Whilst an affidavit of documents will generally be treated as conclusive on the question of privilege, it will not be treated as such if it appears from the affidavit itself that the deponent has erroneously mischaracterised the documents, or if it is reasonably certain from the other evidence before the court that it is incorrect or incomplete on the material points: see *West London Pipeline* at [86] and the authorities there cited.

40. A claim for privilege is an unusual claim, in the sense that the party claiming privilege and that party's legal advisers are, (subject to the power of the court to inspect the documents), the judges in their or their own client's cause. Because of this, the Court must consider very carefully the nature, quality and content of the evidence supporting the claim for privilege. The evidence should be specific enough to show something of the deponent's analysis of the documents and the purposes for which they were created, preferably by reference to such contemporaneous material as it is possible for him to refer without disclosing the very matters which the claim to privilege is designed to protect. In this case, the evidence is not of the highest quality, but Mr Lissack has asked the Court to make allowance for the difficulties that ENRC has encountered in obtaining evidence to support its claim for LPP, which he submitted were not of its own making.

41. In most cases in which LPP is claimed, the evidence in support will come, as indeed it should, from the person whose motivation and state of mind is in issue, namely the client or, if the client is a company, those individuals who were responsible for giving the relevant instructions to the lawyers on the company's behalf. It is only the person (or persons) who was or were ultimately responsible for the coming into existence of the document or documents in question who could explain, for example, why they contemplated litigation, or why they were seeking legal advice. There may also be, and often is, evidence from the lawyers, though that will be of secondary value.

42. For the reasons explained by Mr Spendlove, the solicitor with conduct of this matter on behalf of ENRC, in his first and seventh witness statements, and which it is unnecessary to rehearse in this judgment, it has not been possible for ENRC to obtain

such direct evidence. The group of individuals within ENRC responsible for directing the various investigations co-ordinated by Dechert changed over time. All, or almost all, of those directors or senior employees who would have had relevant evidence to give, have since left ENRC. Some have been unwilling to speak to ENRC's present solicitors. Others, to whom Mr Spendlove and his colleagues have spoken, are not even willing to be identified. I accept Mr Spendlove's evidence about the difficulties that he and his colleagues have faced in this regard.

43. Despite these difficulties, Mr Spendlove has identified a handful of individuals who held senior positions within ENRC and who were involved prior to and/or during the discussions with the SFO, as the sources of specific information contained in his first witness statement, which he says they have read and approved. Some of those individuals, such as Mr Dalman, who became the Chairman of ENRC, only took up their appointments at a time when the discussions with the SFO were already well advanced, and after the latest date from which, on ENRC's case, it contemplated adversarial litigation, namely, 19 August 2011. Their evidence is of less value, therefore, than the evidence of those who could speak to the events leading up to the instruction of the lawyers and forensic accountants. However, it is still relevant, given that ENRC contends that it had a reasonable anticipation of criminal litigation throughout its engagement with the SFO.

44. I accept that Mr Spendlove has reflected in his evidence what he was told by others, though he has obviously put what they told him in his own words. Whilst the absence of direct witness evidence is regrettable, and I am not persuaded that the reluctance of those witnesses to provide it (let alone to identify themselves) was necessarily justified, I do have a degree of sympathy with the position in which ENRC has found itself. Even if that evidence had been given by the witnesses themselves instead of via Mr Spendlove, the Court would still be faced with evaluating its quality and reliability in the light of all the other evidence, bearing in mind such matters as the effects of the passage of time on memories; hindsight; wishful thinking; and a natural tendency on the part of even the most honest witness to put a subconscious gloss on their version of history that supports the position they are now adopting.

45. The best evidence of what ENRC's senior management foresaw at the time and what impelled them to instruct lawyers and forensic accountants was always going to be the contemporaneous documents, against which their recollections could be tested. Mr Spendlove has stated in his latest witness statement that he and his colleagues reviewed "tens of thousands of documents in relation to the 2011 to 2013 period". Despite this, I have not been taken by Mr Lissack to any record of discussions either at Board level or within any group within ENRC which was responsible for giving instructions to the lawyers and forensic accountants, which might have shed light on what ENRC contemplated, and why, in the key period up to and including 19 August 2011. Most of the relevant contemporaneous documents in respect of that crucial period that have been adduced in evidence are internal emails, and a handful of newspaper reports.

46. ENRC has also been unable to adduce any evidence from Mr Gerrard or his colleagues. ENRC has fallen out with Dechert and Mr Gerrard, and it is fair to say that there is no love lost between them. There has already been at least one round of litigation relating to the costs of Dechert's investigations, and further litigation seems likely. ENRC has been highly critical of the way in which Mr Gerrard behaved during

the period of the investigations, particularly in respect of his dealings with the SFO on 16 occasions on which representatives of his clients were not present. Since Mr Gerrard and his firm are not parties to these proceedings they have had no opportunity to comment on those criticisms, let alone explain their side of the story. It is important for the Court, in fairness both to ENRC and to Dechert, to avoid being drawn into making unnecessary findings which could potentially be seized on by either of them in future litigation. Suffice it to say that there is an explanation for the absence of any evidence from Mr Gerrard, just as there is an explanation for the way in which the other evidence has been put before the Court by Mr Spendlove.

47. ENRC was able to adduce evidence from FRA, in the form of a witness statement from Mr Duthie, a partner in and co-founder of that firm. Mr Duthie took his instructions from Dechert, and therefore necessarily relied on what Mr Gerrard was telling him at the time.

48. In *West London Pipeline* Beatson J referred to the options open to the Court (other than concluding that the claim to privilege fails) where it is not satisfied on the basis of the evidence before it that the claim to privilege has been made out. These include ordering a further affidavit to deal with matters which the earlier affidavit does not cover, or on which it is unsatisfactory; ordering cross-examination of the deponent; or (as a last resort) inspecting the "privileged" documents itself. Beatson J indicated that inspection should not be undertaken unless either there is credible evidence that those claiming privilege have either misunderstood their duty or are not to be trusted with the decision-making, or there is no reasonably practical alternative.

49. At one point Mr Lissack floated the possibility that, if the Court were to conclude that the evidence fell short of establishing the claim to privilege, it might take the first of these options, but I was not satisfied that an order of the Court for the provision of further evidence would make any difference to the attitude of the prospective witnesses over whom ENRC has no powers of compulsion. At an earlier stage of these proceedings I invited the parties to consider whether they wished me to give directions for the claim to continue as a Part 7 claim, which might have enabled witness summonses to be issued; but neither party was attracted by that course. There is nothing that could be gained by cross-examining Mr Spendlove or Mr Duthie, and Mr Fisher QC on behalf of the SFO did not seek to do so. Nor do I consider that looking at the Disputed Documents themselves (apart from those that I was specifically invited to read by counsel) would shed any further light on the purposes for which they came into existence.

50. At the end of the day, and regardless of whether there is justification for the failure by ENRC to provide better evidence, the Court has no choice but to decide whether the Disputed Documents are privileged on the basis of the evidence before it. It can draw reasonable inferences, but it cannot supply evidence to make up any deficiencies in the evidence that has been adduced, regardless of the reasons why those deficiencies exist.

THE RELEVANT LEGAL PRINCIPLES

LITIGATION PRIVILEGE

51. Communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation attract litigation privilege when, at the time of the communication in question, the following conditions are satisfied:

(1) Litigation is in progress or reasonably in contemplation;

(2) The communications are made with the sole or dominant purpose of conducting that anticipated litigation.

(3) The litigation must be adversarial, not investigative or inquisitorial.

See *Three Rivers (No.6)* per Lord Carswell at [102].

52. The rationale behind litigation privilege was described by Lord Rodger in *Three Rivers (No 6)* at [52]:

"litigation privilege… is based on the idea that legal proceedings take the form of a contest in which each of the opposing parties assembles his own body of evidence and uses it to try to defeat the other, with the judge or jury determining the winner. In such a 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."

Likewise, in *Wheeler v Le Marchant* (1881) 17 Ch D 675, which concerned reports obtained by solicitors from surveyors and estate agents in the course of earlier proceedings unconnected with the relevant litigation, Cotton LJ said:

"hitherto such communications have only been protected when they had been in contemplation of some litigation, or for the purpose of giving advice on obtaining evidence with reference to it. And that is reasonable, because then the solicitor is preparing for the defence of 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."

53. Thus it is clear that the purpose of the privilege is to enable someone to prepare for the conduct of reasonably anticipated litigation. Such preparation will obviously include taking legal advice pertaining to the conduct of that litigation; but it is important not to blur the lines between litigation privilege and legal advice privilege.

54. The general trend has been towards strictly confining, rather than extending, the ambit of litigation privilege. In *Waugh v British Railways Board* [1980] AC 521, which is still the leading authority, Lord Edmund Davies said at 543:

"in my judgment we should start from the basis that the public interest is, on balance, best served by rigidly confining within narrow limits the cases where material relevant to litigation may be lawfully withheld. Justice is better served by candour rather than suppression."

That was the basis for the requirement that the communication or document should be for the "dominant purpose" of the contemplated litigation. In *Balabel v Air India* [1988] Ch 317 at 332A Taylor LJ spoke of the need to "*re-examine the scope of legal*

professional privilege and keep it within justifiable bounds". Lord Scott in *Three Rivers (No 6)* suggested at [29] that in the light of developments in civil procedure that encourage more openness between the litigating parties, it may be time for a new look at the policy justification for this limb of LPP. That review has not yet taken place, but those judicial observations underline the need for the Court to be vigilant to avoid extending the ambit of the privilege beyond its current recognised confines.

55. The test as to the extent to which litigation must be anticipated in order for the privilege to attach, is notoriously difficult to express in words. In *Waugh*, Lord Simon of Glaisdale and Lord Edmund Davies referred with approval to a passage in the (minority) judgment of Barwick CJ in the High Court of Australia in *Grant v Downs* (1976) 135 CR 674 in which he referred to documents produced at a time when litigation was "in reasonable prospect". In *Axa Seguros SA v Allianz Insurance Plc and* others [2011] EWHC 268, Christopher Clarke J stated, at [14]:

"*Whether or not litigation is reasonably in prospect is an objective question on which, again, the views of any deponent are not necessarily conclusive, see Guinness Peat Properties Ltd v Fitzroy Robinson Partnership [1987] 1 WLR 1027."*

That approach is consistent with the test as set out by Lord Carswell in *Three Rivers (No 6)* referred to above.

56. Although the test is an objective one, the Court must also consider the actual state of mind of the party claiming privilege. As Millett J put it in *Plummers v Debenhams* [1986] BCLC 447 at 454: "*there must be a real prospect of litigation. Where it is neither pending nor threatened, it must be in the active contemplation of the party…."* That person must "*show that he was aware of circumstances which rendered litigation between himself and the particular person or class of persons a real likelihood rather than a mere possibility*": *USA v Philip Morris* [2003] EWHC 3028 (Comm) at [46]; [2004] 1 CLC 811 at 827.

57. The party claiming privilege is not required to show that it is more likely than not that adversarial litigation will ensue; on the other hand, it is insufficient to demonstrate that there is a "distinct possibility" that sooner or later someone might make a claim; or there is a general apprehension of future litigation: [*ibid*] at [68]. In *Axa Seguros SA v Allianz Insurance Plc* (above) Christopher Clarke J rightly observed at [43] that the dividing line is not entirely clear.

58. It follows from the rationale underlying the privilege that if a document is created with the express purpose of showing it to the prospective adversary, or with the intention or understanding that it will be shown to him (such as, for example, a position statement prepared for the purposes of a mediation) it cannot be subject to litigation privilege. It may be subject to obligations of confidentiality, but they would arise for other reasons.

59. In this context, I was referred by Mr Fisher QC, on behalf of the SFO, to a helpful decision of the Federal Court of Australia, *Bailey v Beagle Management Pty* [2001] FCA 185, in which the court distinguished between communications that were made "without prejudice" and communications subject to litigation privilege. 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 [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, unless there be an express waiver, 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 Part 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, and to decide what evidence you are planning to call if the case goes to court, and what tactics to employ, 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.

LEGAL ADVICE PRIVILEGE

62. Legal advice privilege attaches to all communications passing between the client and its lawyers, acting in their professional capacity, in connection with the provision of legal advice, which "*relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law"*: see *Three Rivers (No 6)* per Lord Scott at [38]; *R (Prudential plc) v The Special Commissioner of Income Tax* [2013] 2 AC 185 per Lord Neuberger at [19]. There is no need for litigation to be contemplated.

63. In *Three Rivers (No 6)* the central issue was whether communications between the Bank of England and its solicitors and counsel, relating to the content and presentation of a statement to the Bingham Inquiry, a public inquiry set up to inquire into the Bank's supervision of BCCI, qualified for legal advice privilege. The case did

not concern litigation privilege because the Bingham Inquiry was non-adversarial. The House of Lords held that legal advice, for these purposes, encompasses advice about what should prudently and sensibly be done in the relevant legal context. Therefore, the communications were privileged.

64. Legal advice privilege attaches to all communications made in confidence between solicitors and their clients (or their agents) for the purpose of giving or obtaining legal advice, even at a stage when litigation is not in contemplation. The scope of the privilege is the same, whether or not litigation is reasonably in contemplation: *Three Rivers (No 6)* per Lord Scott at [27]. Privilege attaches to all material forming part of the continuum of the lawyer/client communications even if those documents do not expressly seek or convey legal advice: *Balabel v Air India* [1988] 1 Ch 317. The test is whether "*they are part of that necessary exchange of information of which the object is the giving of legal advice as and when appropriate*".

65. Strictly speaking, and despite numerous references in the authorities to lawyer-client communications made for the dominant purpose of litigation as being within litigation privilege, or as covered by litigation privilege as well as legal advice privilege, this is wrong, as *Three Rivers (No 6)* made plain. If the communication is between client (or the client's agent) and lawyer for the purpose of obtaining legal advice in connection with anticipated litigation, it is covered by legal advice privilege rather than litigation privilege. If the communication is between the lawyer and someone other than the client, it will only be subject to LPP if it satisfies the test for litigation privilege. That is so whether the client is an individual, a partnership, an unincorporated association or a corporate entity. Communications between clients and third parties, such as professional advisers who are not lawyers, are not subject to legal advice privilege. Interposing a lawyer in the chain of communication will not improve the client's chances of claiming legal advice privilege.

66. The rationale behind legal advice privilege is that it encourages full and frank communication between lawyers and their clients, which promotes the rule of law and the administration of justice: *Three Rivers (No 6)* at [30] – [35]. It is therefore an essential prerequisite of the claim to privilege that the communication or the information passing between lawyer and client is confidential: *Three Rivers (No 6)* at [24]. The communication may be confidential (because it is between client and lawyer) even if what is communicated to the lawyer for the purpose of seeking or obtaining the advice is not confidential.

67. I have considered the observations of Snowden J in *Property Alliance Ltd v Royal Bank of Scotland Plc* [2015] EWHC 3187 (Ch), [2016] 1 WLR 992, at [44] and [45] as to the width of the policy justification for the privilege, and his exposition of why it is desirable that factual information that the lawyer communicates to his client, either in conjunction with the provision of legal advice, or so as to enable the client to take a fully informed decision as to what to do and what further advice to obtain, should also be protected from disclosure, even if that information is in the public domain, or would not attract privilege outside the communication between lawyer and client. Whilst I acknowledge the force of those observations, and concur in them, they do not support the contention that as a matter of policy, where the lawyer is carrying out, or directing others to carry out, a fact-finding or evidence gathering exercise in circumstances where litigation is <u>not</u> in contemplation, the fruits of his or their labours should be privileged from disclosure, independently of any communication of them

by the lawyer to the client, simply because the purpose of that exercise is to enable advice to be given to the client.

68. In *Three Rivers DC v Bank of England (No 5)* [2003] QB 1556, there were four classes of documents for which privilege was claimed, namely, (i) documents prepared by employees of the Bank of England with the intention that they should be sent to the Bank's solicitors for the purposes of the Bank obtaining legal advice, and that had been so sent; (ii) documents that the Bank asserted had been prepared with the dominant purpose of obtaining legal advice, but which had not been sent to the solicitors; (iii) documents that had been prepared not for the dominant purpose of obtaining legal advice, but that in fact had been sent to the solicitors, and (iv) documents in all those categories that had been prepared by people who were now ex-employees of the Bank.

69. The Court of Appeal (Lord Phillips MR, Longmore and Sedley LJJ) held that the Bank was not entitled to claim privilege in respect of any of those categories. It accepted the submission that it was only communications between solicitor and client for the purpose of seeking and obtaining legal advice, and evidence of the content of such communications, that were subject to legal advice privilege. Preparatory 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 fall within the scope of the privilege.

70. The question of who was the "client" in this context did not directly arise for consideration. 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.

71. I accept that the question "who is the client to whom the lawyer owes a duty?" and the question "who has the client authorised to act on his behalf in communicating with the lawyers?" are different; but in this specific context it is important to bear in mind that the privilege attaches only to those communications between lawyer and client (or the client's authorised representative) whose purpose is obtaining legal advice.

72. Mr Lissack relied on the way in which the judgment in *Three Rivers (No 5)* was interpreted by the Court of Appeal of Singapore in the case of *Skandinaviska Enskilda Banken AB v Asia Pacific Breweries (Singapore) Pte Ltd and others* [2007] SGCA 9. It said, at [41]:

"*The principle is that if an employee is not authorised to communicate with the company's solicitors for the purpose of obtaining legal advice, then that communication is not protected by legal advice privilege. We do not find this principle exceptional. When a company retains solicitors for legal advice, the client must be the company. But since a company can only act through its employees, communications made by employees who are authorised to do so would be communications made "on behalf of his client". The only relevant issue is whether the*

communication is made for the purpose of obtaining legal advice, and if so, the communication falls within the privilege provided the other requirements of the privilege are present, viz, that the communications are confidential in nature, and the purpose of the communication is for the purpose of seeking legal advice. Authorisation need not be express; it may be implied, if that function is related to or arises out of the relevant employee's work."

73. On the face of it that analysis seems uncontroversial. However, the phrase "*authorised to communicate with the company's solicitors for the purpose of obtaining legal advice*" is ambiguous. The 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, so that on the application of basic agency principles they are to be regarded as standing in the shoes of the client for the purposes of obtaining the legal advice. 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.

74. The judgments of the Court of Appeal in *Wheeler v Le Marchant* (1881), which played a large part in the Court of Appeal's reasoning in *Three Rivers (No 5)*, support the proposition that privilege will not attach to the employee's (or anyone else's) communication with the lawyer unless that person is acting as the client's agent for the purpose of obtaining the legal advice (in the sense that he has been tasked with obtaining it). Sir George Jessel MR identified the issue on which the Court had been asked to rule as follows (at 680-681):

"*… documents communicated to the solicitors of the defendants by third parties, though not communicated by such third parties as agents of the clients seeking advice, should be protected, because those documents contained information required or asked for by the solicitors, for the purpose of enabling them the better to advise their clients."* [emphasis added]

Cotton LJ made the following pertinent observations (at 684-685):

"it is said that as communications between the 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 also be 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 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." [emphasis added].

75. In *Three Rivers (No 5)* the Court of Appeal correctly identified *Wheeler v Le Marchant* as authority that legal advice privilege does not extend to documents obtained from third parties to be shown to a solicitor for advice. Such documents may only be protected under litigation privilege, if the conditions for claiming such privilege are made out. The expression "third parties" in this context means anyone other than the client or someone he has authorised to obtain the legal advice on his behalf, so that the communication can properly be characterised as a "communication between the client by his representatives and the solicitor".

76. Rejecting a submission by counsel for the Bank of England that, in the context of a corporate client, "*communications from an employee are different*", Longmore LJ (delivering the judgment of the court) stated (at 1574G-H) that information from an employee stands in the same position as information from an independent agent. He pointed out that it may 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. He added "*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 on the answer.*"

77. It is important to bear in mind that in the *Three Rivers* case, there was no dispute that the *only* entity within the Bank of England that had authority to communicate with its lawyers for the purposes of seeking and receiving the legal advice in question was the Bingham Inquiry Unit ("BIU"). There was therefore never any question in that case of any of the employees (let alone the ex-employees) who were the authors of the four categories of documents in question being authorised to act on behalf of the Bank for the purposes of seeking or receiving legal advice. That being so, the proposition that counsel for the Bank was trying to establish was that all authorised communications between *any* employee of the company and that company's lawyers for the purpose of enabling the lawyers to give legal advice to the company were protected by legal advice privilege, because the employee's act of communicating information to the solicitor was to be treated as the act of the company. That would have produced an approach consistent with that taken in other jurisdictions, see e.g. *Upjohn Co v United States (1991) 449 US 383; Citic Pacific Ltd v Secretary for Justice and another [2016] 1 HKC 157.* However, the Court of Appeal rejected that proposition.

78. The controversy generated by the decision in *Three Rivers (No 5)* was such that, although it did not strictly arise for determination, one of the issues that the House of Lords was asked to clarify in *Three Rivers (No 6)* was the approach that should be adopted in order 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* [my emphasis]. It was said that this was an issue of particular importance in the context of corporations. Various interested parties, including the Law Society, were given permission to intervene and make submissions.

79. Despite this, and despite the quality of those submissions, (see the notes of argument reported at [2005] 1 AC 630F-632A and 636G-637F) the invitation was firmly and politely declined. Lord Scott said that the issue was a difficult one with different views, leading to diametrically opposed conclusions, being eminently arguable. The appeal in *Three Rivers (No 6)* was not an appeal against the decision of the Court of Appeal in *Three Rivers (No 5)*. He referred to the fact that the Bank's petition for

leave to appeal in the earlier case had been refused; thus, whatever the House said about it, the guiding precedent would continue to be *Three Rivers (No 5)* and the possibility remained that a differently constituted House would disagree with any views that the current House expressed on the subject. Lord Rodger and Baroness Hale agreed at [49] and [63], as did Lord Carswell at [118], though the latter expressly stated that he was not to be taken to have approved of the decision in *Three Rivers (No 5)* and would reserve his position on its correctness.

80. I was referred by Mr Segan, junior counsel for the SFO, to two recent first instance authorities, *Astex Therapeutics v Astrazeneca* [2016] EWHC 2759 and *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) in which *Three Rivers (No 5)* was followed and applied. The latter judgment, being a decision of Hildyard J, is one that I am bound by convention to follow, unless I am persuaded that it is *per incuriam* or for some other reason plainly wrong. As Lord Neuberger put it in *Willers v Joyce (No 2)* [2016] UKSC 44 [2016] 3 WLR 534, at [9] a puisne judge should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so.

81. In *The RBS Rights Issue Litigation*, it was submitted on behalf of RBS, the party claiming privilege, that the status in a corporate context of direct communication of information by an authorised employee (or ex-employee) to the corporation's legal adviser had not arisen and was not dealt with in *Three Rivers* (No. 5). RBS also sought to confine that case to its own particular facts, which was the way in which the Singapore Court of Appeal ultimately dealt with it in the *Skandanivska* case. Hildyard J concluded (at [54] - [60]) that the decision in *Three Rivers (No 5)* was based on principles of general application, which (despite considerable criticism in some academic circles) 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).*

82. Hildyard J accepted the submission that, in order to warrant protection, where the client is a corporation, the communication with the lawyer must be to or from a person who is authorised to seek and receive legal advice on behalf of the corporation, and the communication must be for the purposes of, or in the course of that person giving or receiving legal advice. Such a communication is to be distinguished from the preparatory work of compiling information undertaken by persons with no authority to seek or receive legal advice, for the purposes of enabling the corporate client to seek and receive such advice. That is so whether the preparatory work is conducted by the client or by the lawyer.

83. That analysis of the decision in *Three Rivers (No 5)* is consistent with the interpretation of it by Lord Scott and Lord Carswell in *Three Rivers (No 6)* at [13] and [72] respectively. It is also consistent with the interpretation of that decision by the editors of the leading textbook, The Law of Privilege, (2nd Edition, 2011) (Thanki, Goodall et al) who summarise the position thus at paragraph 2.21:

"*When addressing the question of which communications with the lawyer attract legal advice privilege, the courts will only regard as privileged those communications with officers or employees expressly or impliedly authorised by the company (a) to give instructions to the lawyer and (b) to seek and receive his legal advice. This is ultimately a question of attribution, namely which acts of which employees are to be*

attributed to the company. This, it is suggested, is the proper implication of Three Rivers 5. Although on the unusual facts of Three Rivers 5 the people within these two categories i.e. (a) and (b) above were seemingly held to be the same, there is no principled reason why this should be so and in a corporate context they will very often - perhaps usually - not be the same."

84. I agree that in the context of a company, particularly a large corporation, the person giving the instructions to the lawyers may not necessarily be the same as the person or persons who want to receive the advice. In-house counsel may well have authority to instruct external lawyers to advise the company, but the advice will not lose its privileged status because it is sent or given to the Board of Directors directly instead of via counsel. The Board would be the manifestation of the "client" for these purposes, whereas counsel employed by the company would be acting as the company's (and the Board's) agent for the specific purpose of instructing the external lawyers. In that example, both the Board and in-house counsel will be authorised to communicate with the external lawyers for the purpose of obtaining the legal advice, and both the instructions and the advice would be privileged.

85. However, and more controversially, the editors of Thanki go on to suggest that the concept of "instructions" to the lawyer is broad enough to encapsulate the communication of the relevant facts by *any employee authorised by the company to do so*, as much as any formal request for advice. That was the proposition of RBS in *The RBS Rights Issue Litigation* that Hildyard J rejected as inconsistent with *Three Rivers (No 5)* (see paragraphs [79] - [93] of his judgment). It was also, in effect, the submission of ENRC in the present case, though ENRC did not draw the line at an employee, but contended that communication of the facts by *any individual* authorised by the company to do so would qualify.

86. Mr Lissack submitted that the decision of Hildyard J was wrong and that his approach was inconsistent with the policy underpinning legal advice privilege outlined by Lord Scott in *Three Rivers (No 6)* and 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 by the company 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. If the client had been an individual, and the solicitor carried out evidence-gathering or fact-finding investigations by speaking to that individual's current employees, his communications with those employees would not be subject to legal advice privilege simply because he was obtaining the information from them for the purpose of giving legal advice to their employer. It makes no difference whether the employees have been authorised to speak to him or not. It is wholly artificial to treat the employees as "instructing" the solicitor on the client's behalf in that situation, when they are plainly not standing in the shoes of the client for the purpose of obtaining the legal advice. An employee may need his employer's authority to speak to a solicitor because of restrictions in his contract of employment; but by giving him that authority the employer is not constituting the employee his agent for the purposes of the employer obtaining legal advice. Nor does the employer, by

giving him that authority, adopt the employee's actions as his own. The need for the client to be able to communicate freely and frankly with his lawyer does not justify extending the protection afforded by legal advice privilege to cover communications of that type.

88. There is no reason in principle for a corporate client to be in any better position than an individual just because a corporation can only act through its officers and employees. One cannot treat the act of the employee in passing the information to the lawyer as an act of the company, for the purposes of attracting legal advice privilege, just because, for example, the directors of the company have authorised the employee to do it. The employee is authorised to hand over the information, but he does not thereby become part of the confidential lawyer/client relationship; his act in handing it over cannot be treated as a communication by the company with its lawyers for the purposes of seeking or receiving the legal advice.

89. Equally, as the Court of Appeal recognised in *Three Rivers (No 5),* there is no reason in principle to draw a demarcation line between the communication of facts to a solicitor by an employee of the company for the purpose of enabling the solicitor to provide legal advice to the company, and the communication of facts to the solicitor by someone outside the company, such as an authorised agent, or the employee of a subsidiary, for precisely the same purpose. It is perhaps in recognition of that difficulty, as well as the obvious evidential problems regarding the identities of those to whom Dechert spoke, that Mr Lissack submitted that there is "*no reason in principle why the same proposition cannot apply to employees of subsidiaries, ex-employees, or indeed other agents engaged by the company at the material time, provided that such individuals … are authorised to provide information to the solicitor for the purpose of the solicitor giving advice"*. Yet it would be extraordinary to treat someone who has no status within the company, and may never even have been employed by the company, as being someone through whom the corporate client is communicating with its lawyers in confidence in order to obtain legal advice. Matters would obviously be different if the client (whether individual or corporate) delegated the responsibility for obtaining legal advice to a senior employee, or group of employees, such as the BIU in the *Three Rivers* case, who then communicated with the lawyers for that purpose.

90. As Hildyard J succinctly put it at paragraph [64] of his judgment in the *RBS* case, *"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. Once matters are looked at from that perspective, it is obvious that there is even less justification for treating as "the client or a recognised emanation of the client" for these purposes an employee of a subsidiary, or someone who has ceased to work for the client, or someone who never worked for the company at all but worked for one of its customers or suppliers. 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 *The RBS Rights Issue Litigation* and the conclusion he reaches at [93]. I express no view on his further observations at [94] – [96] tentatively supporting the further proposition that

only individuals singly or together constituting part of the directing mind and will of the corporation can be treated for the purposes of legal advice privilege as being, or being a qualifying emanation of, the "client". That issue does not arise in respect of any of the classes of documents with which I am concerned.

92. In a case where the client is a corporate body, one would expect the requisite authority to obtain legal advice on the company's behalf to be vested in the Board of Directors, although they might well delegate authority to another group or person. It might also be persuasively argued that the company's in-house lawyers or general counsel would have the necessary authority, by virtue of their office, to seek and obtain legal advice from external lawyers on behalf of the company. Whether they, or any other individual employee or group of employees had such authority in a given case, is a question of fact to be determined on the evidence.

93. On the current state of the law, the decision in *The RBS Rights Issue Litigation* 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.

94. Finally, and of some importance in the present case, there are obvious evidential difficulties in establishing authority in a case where the identity of the person(s) with whom the lawyer communicated is unknown. As Moore-Bick J pertinently observed in *United States v Philip Morris* at first instance [2003] EWHC 3028 (Comm) at [39]:

> "*without knowing the identity of the person with whom [the lawyer] communicated in any given case it is not possible to say whether that person is properly to be regarded as his client for these purposes."*

The anonymity of certain of the sources of the information deposed to by Mr Spendlove creates a serious problem for ENRC in that regard.

PRIVILEGE ATTACHING TO LAWYERS' WORK PRODUCT

95. As a sub-species of legal advice privilege, a claim is made for privilege in respect of the Category 1 documents and Category 3 documents on the basis that they are confidential documents created by a lawyer for the purpose of giving legal advice. At one stage, it appeared to be common ground that the test to be adopted in respect of a lawyer's working papers is whether the documents created by the lawyer would betray the tenor of the legal advice. However in its written submissions in reply, ENRC submitted that it was "very doubtful" that such a requirement existed, citing *Balabel* at p.323, *Three Rivers (No 5)* at [30] and Thanki at paragraph 2.60 where it is stated that :

> "*The principle is accurately summarized by Bray:*
>
> *... all memoranda or writings of any kind made by the solicitor, whether for his own use in his client's business, or for the client's use, are within the privilege and stand*

in all respects on the same footing as actual communications between solicitor and client".

96. As Hildyard J observed in *The RBS Litigation* at [99], the decisions in *Balabel* and *Three Rivers (No 5)* that privilege attached to the solicitors' working papers in those cases were based on assumptions made without any principled discussion. He relied on the observations of Cotton LJ in *Lyell v Kennedy (No 3)* (1884) 27 Ch D 1 at 26 and Bingham LJ in *Ventouris v Mountain* [1991] 1 WLR 607 that the justification for withholding disclosure of such documents was that they would give the opposing party a clue to the advice which had been given by the solicitor, or that the selection of documents would betray the trend of that advice. He also approved the contrast drawn by Warren J in *Stax Claimants v Bank of Nova Scotia* [2007] EWHC 1153 (Ch) at [10] between a note which "records the substance of a conversation" (which would not be privileged) and a note which also records "the note-taker's own thoughts and comments on what he is recording with a view to advising his client" (which almost certainly would be privileged.)

97. In my judgment, the approach taken by Warren J and Hildyard J 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.

THE FACTS

98. At the time when ENRC sought to expand its operations into Africa in 2009/2010, it became aware of various unsubstantiated allegations of previous criminality (including corrupt practices) on the part of the target companies it was seeking to acquire, or of those individuals who were said to be behind them. ENRC's acquisition of a company named Camrose (and its subsidiaries) in mid-2010 gave rise to a degree of controversy that was widely reported in the press. It led to litigation in the British Virgin Islands and elsewhere between a Canadian corporation called First Quantum Minerals and ENRC that eventually settled at a time when ENRC was in dialogue with the SFO, which gave its approval to the settlement.

99. First Quantum claimed that a copper mine been unlawfully expropriated by the Government of the country in question, and sold by that Government for a modest sum to a company which was allegedly linked to a friend of the President. That individual had then procured that company to be sold soon afterwards to ENRC as part of the Camrose deal, allegedly making a handsome profit in the process. The media, particularly in Canada, alleged that the sale of the Camrose group (and with it, the mine) was part of a so-called "flip and grab" strategy designed to benefit the individual concerned, and others with whom he was associated. There was no suggestion that ENRC paid the vendors less than the mine was worth on the open market.

100. ENRC, acting through different firms of solicitors (Herbert Smith and latterly Jones Day) took all the steps that one might expect a responsible corporation to take in such circumstances to safeguard its position, and specifically to protect itself from any exposure to liability or sanction that might arise under the Proceeds of Crime Act 2002 on proof that there had indeed been criminal activity by the others with whom it had had dealings. I have taken those steps into account in assessing whether criminal proceedings were reasonably in contemplation at any material time, but I do not consider that they advance ENRC's case. In August 2010, the recorded view of ENRC and its advisors were that the allegations of wrongdoing made against those from whom it had acquired Camrose were "*in large part unsubstantiated, but bearing in mind the low threshold for suspicion it is not possible to discount them completely.*" I have seen no evidence to suggest that that view changed at any material time.

101. Having taken those precautions, I am satisfied that there was no reason for ENRC's management to have feared at the time they were taken that the acquisition of Camrose and its subsidiaries was going to expose ENRC or any of its officers to the risk of criminal prosecution. It is therefore unsurprising that there is no evidence that the Board had any concerns in that regard, let alone that it had such concerns in respect of ENRC's earlier acquisitions in Africa.

102. It is suggested by Mr Spendlove that ENRC's management was fully aware that ENRC faced a higher risk than most companies of intervention or interest from a law enforcement agency such as the SFO. However, apart from the fact that it operated in the sector that it did, there was nothing to single out ENRC for special attention, and no contemporaneous document corroborates Mr Spendlove's assertion of a perception by the Board that ENRC was particularly vulnerable. Even if that perception did exist, it did not extend to any concern beyond the prospect of a future investigation, and all that that entailed. 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.

103. On 20 December 2010, ENRC received an email from an apparent whistleblower ("the whistleblower report") containing allegations of "corruption and financial wrongdoing" within SSGPO. The email was brought to the attention of ENRC's Audit Committee, which discussed the allegations, and reported them to ENRC's Board. The Audit Committee instructed DLA Piper UK LLP to investigate the allegations made in the email. Mr Gerrard was at that time head of litigation at DLA Piper, and was widely regarded as an expert on regulatory investigations and prosecutions undertaken by UK, US and EU regulators. The investigation was to be carried out by one of Mr Gerrard's associates under his supervision.

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. Although it was envisaged that the investigation would entail carrying out interviews, the first set of interview notes falling within Category 1

of the Disputed Documents did not materialise until 10 August 2011, (coincidentally, the day on which the SFO decided to contact ENRC).

105. Mr Spendlove's evidence is that the Board's collective understanding at the time of the instruction of DLA Piper was that the whistleblower allegations "*could have been of interest to the SFO and legal advice from an experienced practitioner ought to be sought in relation to them*". 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.

106. This is supported by Mr Spendlove's evidence that in January and February 2011 three people, namely Mr Gerrard, ENRC's then Head of Compliance, and ENRC's then General Counsel, were all advising ENRC's Board that there was a risk of formal SFO intervention and/or a so-called "dawn raid", and that the Board accepted that advice. "Dawn raid" is a generic term that embraced, in the words of an internal ENRC email, "*any regulatory authorities and inspectors such as the Police, Serious Fraud Office, Competition Commission, Financial Services Authority, Health and Safety Executive to name but a few, [coming] to our offices unannounced and [demanding] to speak to company directors ... and [demanding] to see confidential documents."*

107. Mr Spendlove was told by a number of witnesses that in early February 2011, a new allegation of possible corruption at SSGPO was raised, which led to the Audit Committee instructing DLA Piper to widen its investigation so as to encompass that allegation. There is no evidence as to whether the source of that allegation was the same or different, or as to whether anyone carried out an assessment of its credibility, and unlike the original whistleblower report, there is no contemporaneous document corroborating what Mr Spendlove was told. Mr Spendlove says there was some concern within ENRC that the further allegation might be of interest to the US Department of Justice as well as to the SFO. However, there is no evidence that this further allegation had become known to anyone outside ENRC or that ENRC thought that it had. There could be no prosecution for a criminal offence, unless and until the prosecutor became aware of the matters which could give rise to such a prosecution.

108. Mr Spendlove says that it was clear to him that various members of the Board and the Audit Committee expressed concerns that if ENRC did not conduct a thorough investigation into the various allegations that had been made (in respect of SSGPO/Kazakhstan), it would become the subject of law enforcement and/ or regulatory intervention, "in particular by the SFO". This evidence suggests that the internal investigation was regarded as a means of reducing the risk of external intervention. It is hardly surprising that the Board and the Audit Committee wanted to make sure that if any action was taken against ENRC by a regulator (which the SFO is not), or if the SFO or any other enforcement agency decided to initiate an investigation, it would be able to show that it had handled matters appropriately, which would obviously include taking the allegations seriously and trying to ascertain if there was any truth in them. That is demonstrated by the fact that ENRC engaged Jones Day to advise and assist them with compliance and regulatory matters. In any event, on Mr Spendlove's evidence, the concerns of the Board and Audit Committee

about being subject to enforcement and/or regulatory intervention were contingent on the lack of an internal investigation, or on the commissioned investigation not being sufficiently thorough. There was no reason to believe that DLA Piper would not conduct a thorough investigation.

109. In February 2011, a member of ENRC's audit team at PricewaterhouseCoopers (PwC) contacted Mr Gerrard indicating that PwC wanted to satisfy itself as to the scope of DLA Piper's investigation. Mr Gerrard reported this back to ENRC's then General Counsel and Head of Compliance, commenting that he had spent some time explaining to PwC the steps they were currently taking, as a number of allegations in the whistleblower report "*were impossible to get to the bottom of.*" The Head of Compliance responded by saying that he thought the whistleblower report was not nearly as thin/vague as DLA Piper had seemed to suggest, and explained his reasons. He commented that if PwC made a report to SOCA about it, "*we should prepare very fast for a visit (a likely unpleasant one)*." The reference to SOCA was a reference to the Serious Organised Crime Agency, a separate national law enforcement agency from the SFO, which still existed at that time (it did not merge into the National Crime Agency until October 2013). It was then the agency to whom reports of suspicious activities or transactions (known as SARs) had to be made under the Proceeds of Crime Act. The Head of Compliance anticipated that PwC might make a SAR to SOCA, which is entirely understandable, because the threshold for making such a report is a very low one, and PwC would be concerned to protect their own position.

110. The reference to the "unpleasant visit" was, of course, a reference to the prospect of a dawn raid. The Head of Compliance thought that ENRC should prepare themselves for such an event by putting together a mock dawn raid scenario in the next 30 calendar days. ENRC's General Counsel agreed with that strategy, and by late March 2011 it was envisaged that DLA Piper would come in and provide training and knowledge on how to deal with this type of event professionally and calmly.

111. The focus during the period up to April 2011 was undoubtedly on regulatory matters and on compliance. In mid-March 2011 ENRC's General Counsel was warning ENRC's Audit Committee that it should be careful not to be too bullish about <u>regulatory risk</u> (my emphasis). He said in an email sent to one of the non-executive directors that he could sense from meetings that he and other General Counsel of major listed companies had had with the Ministry of Justice 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"*.

112. Mr Gerrard's departure from DLA Piper to join Dechert was announced at the beginning of April 2011. At around the same time, Eric Joyce MP started to raise questions in Parliament regarding the Camrose deal. On 8 April 2011, he was widely reported in the press as having written to the SFO asking it to check whether ENRC was complying with the Bribery Act (even though that Act was not yet in force). The essential complaint being aired by Mr Joyce, apparently in support of First Quantum's position in the litigation pertaining to the allegedly unlawfully expropriated copper mine, was that ENRC should have asked more questions than it did about the deal. In response to the media coverage, ENRC's Head of Compliance said in an internal email "*I predict a sh!tstorm and a SFO dawn raid in London before summer's over … the companies' books and records will be a first port of call"*. The email was

forwarded to the CEO and to ENRC's then General Counsel. The latter commented "*He is fundamentally correct – we need to be prepared."* Steps were duly put in train to ensure that such preparations were undertaken.

113. It was at around that time that FRA was first instructed to undertake a books and records review in respect of the various jurisdictions already mentioned, though it did not start work until May 2011. Mr Spendlove and Mr Duthie refer in their evidence to the provisions of the Companies Act 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 and its subsidiaries. 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.

114. Mr Spendlove's evidence is that he was told by one source that ENRC became "so concerned" about a SFO intervention that the issue was being discussed between members of senior management on a daily basis. If that were the case, I would have expected at least some of those discussions to have been recorded in writing, but I have been shown no document to substantiate that assertion, which I regard as an exaggeration. There was no good reason for ENRC's senior management to be so concerned about an SFO investigation, other than the obvious impact that such a move could have on ENRC's market reputation and the price of its shares. The emails relating to the steps that were planned internally to deal with a "dawn raid" suggest calm, professional, planning and preparation to ensure that everything would go smoothly, with maximum co-operation, which tends to suggest that although ENRC anticipated a "dawn raid" its concern was less about the outcome, than about being properly prepared for it as and when it happened.

115. Mr Spendlove also states that he was told by a member of ENRC's senior management that Mr Gerrard had fuelled ENRC's concerns by suggesting that it was only because he was acting on ENRC's behalf that the SFO had not already commenced a criminal investigation into its affairs. This was apparently something of a recurring theme with Mr Gerrard. I am prepared to accept that Mr Gerrard was keen to justify his retainer, and that a degree of self-aggrandisement may have been involved. It is quite possible that he suggested that the fact that he was known in the market to be acting for ENRC was enough to dissuade the SFO from starting an investigation. However, there is not a shred of evidence that Mr Gerrard had ever had any discussions with the SFO about ENRC, even informally, prior to August 2011. In any event, there was no reason for ENRC to suppose that the SFO had got wind of the whistleblower's allegations regarding Kazakhstan, ENRC were still none the wiser as to whether there was any substance in those allegations, and although the First Quantum allegations were in the public domain and had been for some time, the SFO had not yet shown any interest in pursuing an investigation into them.

116. In April 2011, a sub-committee of the Audit Committee, entitled the Investigations Committee, was formed for the specific purpose of overseeing the investigations into the whistleblowing allegations pertaining to SSGPO. On 21 April, Mr Gerrard wrote a letter to ENRC's General Counsel in response to a request to provide a written advice

to, inter alia, the Investigations Committee and the Internal Audit team, "*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*" (i.e. the investigation into the allegations pertaining to SSGPO).

117. The letter from Mr Gerrard contains certain legal advice, to which I need not refer, and which remains privileged. The most important part of the letter for present purposes is paragraph 16, which states:

"*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."*

In the absence of any documents evidencing consideration of the contents of that letter, it is reasonable to infer that those to whom this letter was addressed accepted Mr Gerrard's advice at the time, and therefore believed that they could make out a case for the documents generated during the Kazakh investigation being subject to LPP, but they also knew that there was a chance that the claim to privilege would not be accepted if it were challenged.

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.

119. When Mr Gerrard moved to Dechert on 23 April 2011, ENRC decided to follow him, and transferred its instructions to Dechert. One of the reasons why it did so was that Mr Gerrard had persuaded ENRC that he had a very close relationship with certain SFO contacts which he could legitimately utilise to reduce the risks of formal investigation and possible criminal prosecution. At that time, the internal investigation was still confined to the allegations pertaining to Kazakhstan. At some point thereafter, though the evidence is unclear as to precisely when, Dechert's investigation was expanded to embrace the acquisitions of the companies in Africa (including Camrose).

120. Although Mr Joyce's correspondence in April 2011 did not provoke the SFO into making any kind of move against ENRC, the media did not lose interest in the matters pertaining to the alleged expropriation of the African mine. So, for example, on 9 June 2011, the Times published an article which stated, among other matters, that "*investors were concerned about the perception of corruption in the (Camrose) deal*".

121. On 1 July 2011 Mr Ehrensberger became ENRC's General Counsel. After discussing Dechert's investigations into the affairs of SSGPO with the chairman of the Audit and Investigations Committees and with Mr Gerrard, he said he too became concerned about the "real and serious risk" of an SFO investigation into those matters (my emphasis). He told Mr Spendlove that he recalled Mr Gerrard emphasising the

thoroughness of any such investigation in colourful terms, saying that the SFO would "go through your wife's underwear". Mr Gerrard apparently told ENRC that he had heard through his various contacts that a raid was imminent (in fact, it was not, but ENRC no doubt believed him). On 2 July 2011 the Head of Compliance emailed the Chief Financial Officer stating that "*we should anticipate an SFO raid, possibly in conjunction with the FSA – as the Listing Authority, in September. It could happen in July, but now on reflection seems unlikely."*

122. It is a consistent theme of Mr Spendlove's evidence that various people within ENRC to whom he had spoken feared, or believed there to be a real (or as he put it, serious) risk that, once an SFO investigation started, ENRC would face a criminal prosecution. None of them appears to have explained to him why they assumed that if there was an investigation, a prosecution was likely to follow. On the evidence before the Court, none of them had any reason to believe that the SFO would find sufficient evidence on which to bring such a prosecution. They may have feared that would happen, but that did not make prosecution a real likelihood rather than a mere possibility. They simply did not know enough to be able to form a view one way or the other. A fear of prosecution on a "worst case scenario" is not good enough. It is perhaps worth mentioning at this juncture that when the report of Dechert's investigations into affairs in Kazakhstan was eventually presented to the SFO in December 2012, it concluded that SSGPO was the victim, rather than the perpetrator, of any wrongdoing.

123. By the summer of 2011 FRA's work on books and records is said to have developed into providing support to Dechert's investigative work, for example "by data gathering". In mid-July 2011 Dechert sent a formal letter of instruction to FRA which included instructions to assert "robustly" that litigation privilege applied to the work that they had asked FRA to undertake (Dechert having informed FRA that this was the view that they, Dechert, took). This instruction has understandably coloured Mr Duthie's view of the matter. I intend no criticism of Mr Duthie, but it is his client's state of mind and the objective prospect of criminal proceedings that matter for the purposes of determining whether litigation privilege attaches to the documents that his firm were producing.

124. On 9 August 2011, the Times published another article, this time obviously based on insider information from ENRC or SSGPO, referring to the specific allegations made in the whistleblower email sent in December 2010, and to the fact that DLA Piper had been instructed to investigate them. Mr Ehrensberger was understandably concerned about the leak to the press about these allegations before the internal investigation into them was complete. The potential for reputational damage was self-evident; but more pertinently, the specific allegations about SSGPO were now out in the public domain, and that obviously increased the prospect of the SFO deciding to commence an investigation into those matters.

125. It was therefore hardly surprising that the SFO decided to get in touch with ENRC on the very next day. Mr McCarthy wrote a letter on 10 August 2011 addressed to Mr Ehrensberger personally. It arrived on 11 August. The letter referred to a discussion between Mr McCarthy and the then Director of the SFO, Mr Alderman, about "*recent intelligence and media reports concerning allegations of corruption and wrongdoing by [ENRC]"*. It drew attention to the 2009 Self-Reporting Guidelines and to the link where they could be found on the SFO's website. It urged Mr Ehrensberger to consider the guidance carefully whilst ENRC undertook any internal investigations,

and invited him to meet with Messrs McCarthy and Alderman to discuss matters further.

126. The letter stated that the SFO was not carrying out a criminal investigation into ENRC "at this stage." However, anyone reading it would have been left in no doubt that the prospect of such an investigation was tacitly being used as a strong incentive to co-operate. I have no doubt that was the message that the SFO intended to convey. Mr Ehrensberger understood that a formal criminal investigation would follow if ENRC representatives did not meet with the SFO and comply with its requests for co-operation. He was particularly struck by the fact that the Director of the SFO had asked to meet with him personally. Mr Ehrensberger considered that this was such a serious development that he needed to refer the matter to the Board before formulating a response. Having done so, he replied on 19 August 2011 agreeing to a meeting. 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 that topic with the SFO at the meeting.

127. At around the same time, a new sub-committee of the Board was set up within ENRC to oversee Dechert's work. It was called the Special Committee, and its members comprised various senior executives and directors. The Special Committee continued to be responsible for overseeing Dechert's work until June 2012, when it was replaced by another sub-committee of the Board known as the Special Investigation Committee.

128. A solicitor from Addleshaw Goddard ("Addleshaws"), Alastair Simpson, joined the latter Committee as a permanent representative. He is described as the adviser to that Committee in various contemporaneous documents, including one of the PowerPoint presentations made to the SFO on 20 July 2012. Under the heading "the investigation team", the Dechert team is described as initially reporting to the Audit Committee, then the Special Committee, then the Special Investigation Committee. FRA are described as "forensic accounting experts". Thus, at least from July 2012 onwards, there appeared to be a clear demarcation line between Dechert's responsibilities as information gatherers, and the job of other lawyers, such as Addleshaws, to give legal advice to ENRC based on the information gleaned in consequence of their investigations. Addleshaws subsequently took over the position of deputy general counsel within ENRC, and by November 2012 they were being described to the SFO as "*solely engaged in managing the investigation, reporting directly to the chairman and Special Investigations Committee*." Addleshaws' retainer was terminated at around the same time as Dechert's.

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.

130. Mr Lissack submitted that adversarial criminal proceedings were actively contemplated, and were in reasonable contemplation, from around April 2011 onwards; but that if the Court did not accept that submission, the reasonable anticipation of criminal proceedings crystallised when the letter from the SFO arrived. Indeed, he submitted that it was the anticipation of criminal proceedings that drove ENRC to make the approach to the SFO on 19 August 2011. He contended that ENRC continued to have a reasonable anticipation of criminal litigation thereafter, and throughout its engagement with the SFO. However, as Mr Lissack confirmed when I sought clarification on the point, it was no part of ENRC's case that something happened after 19 August 2011 to make the prospect of criminal litigation more likely than it was on that date, or to have an impact on ENRC's perception of its likelihood. It was not contended, for example, that something emerged during the course of the investigations, and prior to the creation of some or any Disputed Documents, which enhanced the prospects of a prosecution.

131. Since 19 August 2011 is the latest date at which, on ENRC's pleaded case, criminal litigation was reasonably in prospect, it is unnecessary to burden this already lengthy judgment with the full detail of what happened after ENRC's response to the SFO letter. It is dealt with at some length in the evidence of Mr Mark Thompson, who acted as the lead SFO contact in dealing with ENRC and its advisers for most of the period of dialogue. Between around July 2012 and September 2016 Mr Thompson was the Head of the Proceeds of Crime Division of the SFO. For around the last 18 months of that period he was also its Chief Financial Officer. His involvement with the SFO's engagement with ENRC began on around 17 November 2011 (at which point he was a case manager in the Proceeds of Crime Division), and continued (albeit in different roles, and with breaks) until the commencement of the criminal investigation in April 2013. Mr Thompson's factual account was not seriously disputed, and is largely replicated in the agreed chronology.

132. However, I cannot avoid referring to these events altogether, because some of the statements made during the period of dialogue are relevant to the question of what was the dominant purpose of the creation of certain of the documents for which litigation privilege is claimed. I make it clear that, although I have taken all the evidence fully into account, I will only mention those aspects of the dialogue between the parties which are of direct relevance to the issues I am required to determine.

133. On 3 October 2011, Mr Ehrensberger, Mr Gerrard and Mr Richards of Jones Day met with Mr McCarthy and Mr Alderman. Mr Ehrensberger stated that ENRC had taken the 10 August letter from the SFO very seriously and that the Board were keen to ensure that as a company they were fully compliant and that governance was properly applied across the group. He told the SFO that Deloitte had been hired to undertake a risk review, and that Mr Gerrard had been hired to undertake two specific reviews for the Audit Committee concerning allegations in Kazakhstan raised by a whistleblower, which were currently being undertaken with a view to determining whether there was any substance in them. (Therefore, at that stage ENRC *still* did not know whether there was any truth in what the whistleblower had alleged).

134. On 7 October 2011, Mr McCarthy sent an internal email to Mr Alderman in which he referred to a conversation he (Mr McCarthy) had had with Mr Gerrard, who had confirmed that "*our tactics worked*". I interpret that comment as being Mr McCarthy's characterisation (rather than Mr Gerrard's), the "our" being himself and

Mr Alderman (or, generically, the SFO), and the "tactics" being the sending of the 10 August letter coupled with the link to the 2009 Guidelines, with a view to getting ENRC to engage in the process described in those Guidelines. Mr McCarthy said that Mr Gerrard told him that he was working independently of Jones Day, and that Jones Day had been asked to do a compliance review on behalf of the Audit Committee and the main Board, and that a full forensic audit of the books and records would be undertaken. That description of what was going on is consistent with other contemporaneous documents. In any event, Mr Gerrard had no reason to misrepresent to the SFO what steps his clients or their other professional advisers were taking at that time.

135. On 9 November 2011 Mr Ehrensberger wrote a letter to the SFO in which he said that he had discussed the matters raised in their recent meeting with ENRC's executive committee. He had also met with ENRC's Board of Directors to seek their approval of a proposal to "*conduct certain further reviews of operations*" and "*to engage with the SFO regarding the results of those reviews*". That was true: the minute of the relevant Board meeting is in evidence. Mr Ehrensberger said that he was pleased to confirm that the ENRC Board members were entirely supportive of his proposal. 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.

136. On 30 November 2011, Mr Ehrensberger, together with Mr Gerrard and Mr Richards, had a further meeting with representatives of the SFO, including Mr Alderman and Mr Thompson. Mr Ehrensberger again informed the SFO that ENRC was "fully committed" to the self-reporting process. He said that this had started already, that ENRC wanted to get the procedures right, and that the message had come from the CEO. It was agreed that Mr Gerrard would be the SFO's point of contact in this regard. Prior to the meeting, Mr Gerrard had rung Mr Thompson, and told him, among other things, that it would be helpful if ENRC were made fully aware of the SFO's position that full and frank disclosure was required. Mr Gerrard explained to Mr Thompson why he was concerned to get that message across. He said that the emphasis had originally been on Africa, but he wanted to ensure that any issue that might emerge in relation to problems in other jurisdictions was included in the scope of the process. Presumably he had in mind the ongoing Kazakh investigations.

137. Mr Ehrensberger also spoke to Mr Thompson on the telephone later that day following some further publicity in the press which, like the earlier Times article, had obviously been generated by a leak from an inside source. Mr Ehrensberger said that the publicity was not what ENRC had wanted. He insisted that he still had full support for providing the SFO with ENRC's investigative findings, and putting in

place adequate procedures with a view to becoming good corporate citizens. The SFO had no reason to doubt that Mr Ehrensberger meant what he said, and I have seen no evidence that would cast doubt on it either. Similar assurances were given by Mr Gerrard and Mr Ehrensberger to the SFO at subsequent meetings.

138. Consistently with those assurances, on 5 March 2012, in Mr Ehrensberger's presence, Mr Gerrard gave the SFO a detailed update on the current results of Dechert's investigations, presenting a narrative of the work they had carried out so far, and what had been discovered to date, using a 21 page PowerPoint presentation.

139. On 10 May 2012, the new Chairman of ENRC, Mr Dalman, accompanied by Mr Gerrard, had a meeting with Mr Thompson and Mr Gould of the SFO to provide further reassurance as to the Board's commitment to "transparency, co-operation and openness". Mr Dalman told the SFO that to that end, he had taken personal charge of the investigation work, and now insisted that the investigators reported directly to him. In response to the assurances of transparency, Mr Thompson expressed some concern that progress had been slow and that nothing substantive had yet been reported to the SFO. In early June 2012, he followed this up by requiring a meeting to provide the SFO with an update on progress and to agree the immediate steps necessary for ENRC to enable it to continue to avail itself of the self-reporting process.

140. At that meeting with the SFO on 18 June 2012, which was attended by ENRC's then deputy general counsel, Mr Zinger, Mr Gerrard explained why there had been some delay in relation to the Africa investigation. The SFO representatives indicated that they were running out of patience and that it was essential that the investigation findings were closed in the near future. Matters were left on the basis that Mr Gerrard would revert with a proposed timetable for finalising the investigations, presenting the report to the SFO and making a proposal for a civil settlement.

141. The pressure exerted by the SFO on that occasion initially appeared to be effective, in that on 20 July 2012 Mr Gerrard made a detailed presentation to the SFO about both strands of Dechert's investigations, and subsequently sent soft copies of it to them. He reiterated the Chairman's, the Board's, and the Special Investigation Committee's commitment to a full and frank process. There were periodic meetings or telephone calls between Mr Gerrard and the SFO over the next three months in which Mr Gerrard gave updates.

142. On 28 November 2012 representatives of ENRC and its advisers turned out in force at another meeting with the SFO, at which an update was given in respect of the internal investigations. In a prior internal note, the SFO described this as an "*important meeting which will provide us with a key opportunity [of] understanding what they are formally reporting to us*." This was the first meeting after the 2012 Guidelines came into force. By this time, Mr Thompson had moved to a different area of responsibility within the SFO, although Mr Gerrard still used him as a point of contact regarding ENRC from time to time. Mr Dalman was among those present at the meeting, as was Mr Duthie of FRA. There was a further presentation to the SFO by Mr Gerrard using slides, and again reassurances were given as to ENRC's commitment to "*full transparency*" and a "*full and frank process"*.

143. On 12 December 2012 Dechert wrote to the SFO indicating that they now had a draft report on Kazakhstan, and seeking reassurance that ENRC were still within the corporate self-reporting process. This was the first time at which there was any mention in inter-party correspondence of the report being privileged. Dechert said in the letter that any report it would submit would be submitted "under a limited waiver of LPP" for the purposes of the corporate self-report only. When this was considered internally by the SFO, one of the senior SFO officials, Mr Rappo, made it clear that he did not believe that ENRC had entered the self-reporting process, because they had not yet made any report of wrongdoing. By then, the change in policy that I have already described had come into effect following the departure of Mr Alderman and the arrival of Mr Green as Director of the SFO. Mr Rappo was not particularly surprised by the claim to LPP; he referred to the fact that companies in ENRC's position often took that stance. He identified the issue for the SFO as being whether (i) they accepted the claim of privilege; (ii) they entered into an arrangement with ENRC pursuant to which the SFO would not use the contents of any disclosed report for the purposes of any prosecution; (iii) they stated that nothing was guaranteed, and the SFO did not accept the claim of limited waiver or (iv) they simply told ENRC to go away.

144. The solution which appears to have commended itself to the SFO was the second option. Mr Gould of the SFO drafted a notice under s.72 of the Serious Organized Crime and Police Act which was sent to Mr Gerrard on 20 December. However, for reasons that are not apparent, that solution was not taken up, and so in the SFO's formal response to Mr Gerrard's letter of 12 December 2012, sent on 21 January 2013, Mr Rappo said "*it is a matter for ENRC and its advisers as to which if any, elements are covered by legal professional privilege and whether they waive any privilege"*. The letter made it plain that the SFO refused to accept that any report was subject to LPP or to accept any conditions that Mr Gerrard proposed. It made it clear that the SFO was not prepared to give any assurances to ENRC at that stage, and said that the SFO awaited Dechert's reports and would analyse them in detail prior to making any decisions as to the way forward, including any possible prosecutions. This was all in line with the shift in policy.

145. On 29 January 2013 Mr Gerrard responded by sending an emollient letter, yet again assuring the SFO that "*extensive investigation is continuing, fully supported by me and the board of ENRC"*. He stated that it remained ENRC's prime objective to reach an equitable settlement between ENRC and the SFO. Despite the fact that the SFO had not accepted the claim of privilege, drafts of the report concerning the Kazakh investigation followed, and the final version was sent to the SFO on 28 February 2013.

146. On 14 March 2013, Mr Gerrard presented his findings on the African aspect of the investigation to the Nomination and Governance Committee of the ENRC Board. Very shortly after that, ENRC's Board underwent a reshuffle, and several senior personnel departed. On 27 March 2013, ENRC terminated Dechert's retainer and engaged Fulcrum Chambers to represent it. This appears to have been the final catalyst for the SFO commencing the criminal investigation into ENRC's affairs, which is still ongoing.

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, in order to buy Dechert sufficient time to complete their investigations without outside interference, thereby enabling ENRC to evaluate whether there was any legitimate cause for concern. Mr Lissack did not advance that case before me, though he expressly reserved his position in respect of other proceedings. 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.

THE CLAIM FOR LITIGATION PRIVILEGE

149. Adopting the test in *USA v Philip Morris*, ENRC must establish that, as at 19 August 2011, 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).

150. Mr Lissack made the ambitious submission that a criminal investigation by the SFO should be treated as adversarial litigation for these purposes. I reject that characterisation as misconceived. An SFO investigation is a preliminary step taken, and generally completed, before any decision to prosecute is taken in accordance with the published guidance after consideration of the results of the investigation. The individual or entity that is subject to the investigation need not be a potential defendant; for example, they could be an adviser or some other third party. Although the SFO has statutory powers that enable it to compel co-operation, and it has a dual function as investigator and prosecutor, its investigation is no different in nature and purpose from any other criminal investigation. Of course, non-cooperation could lead to criminal proceedings and criminal sanctions, but it is no part of ENRC's case that it planned to be uncooperative in the event of a "Dawn Raid" and that criminal proceedings were envisaged on that account. On the contrary, and as one might expect of a responsible corporation, it took steps to make sure that its staff knew exactly what to do and that they would afford the investigators full co-operation.

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. The policy that justifies litigation privilege does not extend to enabling a party to protect itself from having to disclose documents to an investigator. Documents that are generated at a time when there is no more than a general apprehension of future litigation cannot be

protected by litigation privilege just because an investigation is, or is believed to be imminent.

152. Mr Lissack's alternative submission was that once a criminal investigation by the SFO was reasonably contemplated, then so too was a criminal prosecution. If the SFO believed there was something to investigate, there must have been more than a fanciful prospect that at the end of that investigation there was going to be a prosecution. He submitted that once it had reason to believe that the SFO was going to investigate it, any sensible corporation would want to start carrying out its own investigation, and that it would be unrealistic to deny litigation privilege to the fruits of such an investigation on the basis that it was premature.

153. Mr Lissack also relied on the fact that in order to obtain a warrant, the SFO must persuade the magistrates that there are reasonable grounds to believe that an indictable criminal offence has been committed. However, that is true of any investigative body seeking a search warrant. The police are under similar constraints. The threshold exists to protect the suspect from an arbitrary invasion of privacy, and is not a particularly high one to surmount. It is far lower than the threshold for a prosecution. The prosecutor needs more than reasonable grounds for belief that an offence has been committed to be able to mount a prosecution. It needs sufficient cogent evidence.

154. The reasonable contemplation of a criminal investigation does not necessarily equate to the reasonable contemplation of a prosecution. The investigation and the inception of a prosecution cannot be characterised as part and parcel of one continuous amorphous process, as Mr Lissack contended, so that the reasonable expectation of the one necessarily involves the reasonable contemplation of the other. There may be cases in which an expectation of an investigation can be equated with a reasonable contemplation that the person with that expectation will be prosecuted, but that will depend on the facts. It is always *possible* that a prosecution might ensue, depending on what the investigation uncovers; but unless the person who anticipates the investigation is aware of circumstances that, once discovered, make a prosecution likely, it cannot be established that just because there is a real risk of an investigation, there is also a real risk of prosecution. The question whether the person anticipating a criminal investigation also contemplates that prosecution is likely (though not more likely than not) to follow the investigation, rather than just possible, must therefore be considered on a case by case basis.

155. Knowledge that someone has accused someone within a company's or its subsidiary's organisation of corrupt practices, or of turning a blind eye to corrupt practices, may raise a legitimate fear of prosecution if the allegations turn out to have any substance in them; but prosecution only becomes a real prospect once it is discovered that there is some truth in the accusations, or at the very least that there is some material to support the allegations of corrupt practices. In this case, there is no evidence that there was anything beyond the unverified allegations themselves. ENRC's management may well have feared that there might be a problem, depending on what the investigators turned up, but nothing concrete had materialised by 19 August 2011. The internal investigation had not progressed very far (or very fast) by the latest date on which it is contended that ENRC reasonably contemplated being prosecuted. Dechert had barely begun interviewing witnesses regarding Kazakhstan when the

SFO's letter arrived on 11 August 2011, and had apparently done nothing yet in respect of Africa.

156. Mr Lissack concentrated his submissions on Africa. He suggested that there was evidence of a freestanding knowledge base within ENRC before, during and after Mr Gerrard's instruction which reinforced and made real the likelihood that if somebody took a view of the facts akin to the views expressed by First Quantum, there would be a prosecution. I disagree, though even if that had been a correct characterisation of the evidence, which it was not, it would still be insufficient to meet the test. There would have to be sufficient knowledge of circumstances that indicated that the views expressed by First Quantum not only as to the unlawfulness of the vendors' behaviour, but as to ENRC's turning a blind eye to it at the time of the acquisition of Camrose were, or at the very least may well have been, right. The evidence in this case fell a long way short of that; indeed, there is nothing specifically addressing what anyone who might represent the mind and will of ENRC thought about the circumstances of the African acquisitions, let alone anyone's concerns or perceptions that any aspects of those transactions left ENRC vulnerable to prosecution.

157. Mr Lissack contended that a party does not need to have carried out a detailed investigation in order to appreciate that there is a problem which makes criminal prosecution a realistic proposition. Whilst that is undoubtedly correct, it would still be necessary to show that the party knew that there was a problem regardless of what the investigation might uncover, or alternatively that the problem emerged in the course of the investigation. By 19 August 2011, ENRC did not know, one way or the other, if it had such a problem – that is why it had deployed DLA Piper, and then Dechert, to find out if it did. ENRC's decision to co-operate (and, as ENRC saw it, engage in the self-reporting process) was not driven by the discovery of such a problem, but rather by the understandable desire to avail itself of the possible advantages of the self-reporting process should the worst-case scenario emerge, and to retain control over the investigations.

158. Mr Lissack relied upon *Westminster International BV v Dornoch* [2009] EWCA Civ 1323, as an example of a situation in which civil litigation was regarded as being realistically in prospect even though the investigations were not yet complete. I do not regard that case as laying down any principle of general application, or the situation with which it was concerned as analogous. The issue in that case was whether the judge had applied the correct test in deciding on which side of the line the information fell. The Court of Appeal decided that the judge had used the words "may happen" as shorthand for the test articulated in *USA v Phillip Morris,* and had not mixed up what was merely possible with what was sufficiently likely.

159. In the specific context of that case, the judge's assessment of the situation was not surprising. A dispute may arise which is unlikely to be resolved without recourse to civil litigation, irrespective of the existence or outcome of any investigation. An assured party may reasonably anticipate that, in the wake of a serious unexplained casualty, the insurer will not sign a large cheque voluntarily. Therefore, the assured could realistically expect to have to sue the insurer for payment under the policy, even though he had no reason to doubt that the casualty was an accident. A commercial entity may reasonably anticipate that a rival is going to sue it over a trade dispute when it receives correspondence on the subject, even if the threat of litigation has not

yet been articulated. An investigation into the rights and wrongs of the trade dispute will not preclude litigation from being in reasonable contemplation.

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.

162. It is entirely understandable that ENRC wanted to be the first to know if there was a problem, rather than leaving it to the SFO to find one. However, the evidence fell a long way short of establishing that anyone whose state of mind might be identified for these purposes as the representing the mind and will of ENRC regarded the company being prosecuted as anything other than a possibility, in the same way as any person expecting an SFO investigation might regard prosecution as one possible outcome, depending on what the investigation discovered. The evidence does not even establish that ENRC believed that evidence implicating it in wrongdoing, or evidence of a lack of proper internal controls and safeguards against bribery and corruption, was likely to emerge from an investigation, whether carried out by its own lawyers or by the SFO. There is no evidence that that was even regarded as a "distinct possibility" because there is simply no evidence that anyone within ENRC actively turned their mind to what the investigators might discover (or had discovered) either about the Camrose deal or about the various allegations made by the whistleblower relating to Kazakhstan.

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. There is no evidence that the perception of any person in senior

management changed in consequence of any information that came to light after 19 August 2011 in consequence of the internal investigations, and before further Disputed Documents were created. Nor was it submitted that anything happened during the period of dialogue and investigation to make prosecution objectively a more realistic prospect than it was on 19 August 2011. Therefore, the prospect of criminal proceedings being brought against ENRC or its subsidiaries was never anything more than speculative.

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. Mr Lissack concentrated his submissions on the dominant purpose of the documents being the obtaining of legal advice pertaining to the conduct of the anticipated criminal litigation, there being no evidence that anyone intended that the information being gathered by Dechert should be deployed as part of ENRC's (or any connected person's) defence. However, 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. At the time when DLA Piper's investigation was commissioned, the primary purpose of the investigation was to find out if there was any truth in the whistleblower's allegations (and then to decide what to do about it if there was, no doubt with the benefit of legal advice, though not necessarily from DLA Piper). 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. ENRC's focus was initially on trying to *prepare for* an investigation by a regulator or other investigatory body (including, but by no means limited to, the SFO) and to address compliance and regulatory issues with that in mind, whilst separately (and in parallel) DLA Piper sought to get to the bottom of the whistleblower allegations and find out if there was any truth in them, hopefully before any outside agency became involved. ENRC only began to actively try to ward off an SFO investigation after the SFO initiated the discussions in August 2011 and drew specific attention to the 2009 Self-Reporting Guidelines.

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.

167. Although the evidence points to DLA Piper and then Dechert being engaged as information gatherers rather than as legal advisors, and it appears that other lawyers such as Addleshaws had the advisory role, it is realistic to assume that ENRC

intended to obtain legal advice from Mr Gerrard concerning its dealings with the SFO, including to how best to avoid an SFO investigation and to persuade the SFO to let ENRC continue to carry out the investigation itself. He was, after all, a self-proclaimed expert in this area. However, documents generated in the course of the internal investigation, even those generated in early August 2011, were not generated for the purpose of enabling Mr Gerrard to give advice to ENRC about how it should deal with the SFO if and when the SFO decided to show an active interest in ENRC's affairs. Even if they had been, those documents would still not have been created for the dominant purpose of obtaining legal advice pertaining to the conduct of litigation.

168. Once ENRC had committed itself to what it regarded as engagement in a self-reporting process any legal advice sought (whether from Dechert or others) in consequence of the fruits of the internal investigation, as and when they emerged, would have been directed towards how best to persuade the SFO to go down the route of civil settlement instead of prosecution – i.e. the *avoidance* of, rather than the conduct of, the allegedly contemplated adversarial litigation – against a background of complete openness. In theory, it is conceivable that documents could be generated for the purpose of assisting a company to persuade the SFO not to prosecute but also, if that failed, to help it mount a defence to criminal proceedings; but the evidence in this case does not establish such a dual purpose, let alone that the latter purpose was the dominant one.

169. At no stage was the purpose of the internal investigation anything to do with the conduct of future criminal proceedings that might be brought against ENRC (or anyone associated with ENRC) in the event that evidence of criminal conduct emerged, and attempts to persuade the SFO to engage in a civil settlement failed. Regardless of when the evidence was obtained, the dominant purpose of obtaining evidence from employees, ex-employees, and suppliers or manufacturers was not to use the information for the purposes of constructing a defence, or to obtain legal advice relating to the defence of a future criminal prosecution. ENRC's evidence goes nowhere near establishing this. It cannot even be established that the persons interviewed by Dechert were potential defence witnesses, since there is insufficient information as to who they were and no indication of what specific role they played. In any event, Dechert's role did not extend to giving advice relating to the conduct of future criminal litigation.

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. It does not matter whether the reason why they are going to be shown to the adversary is to persuade him to settle, or not to bring proceedings in the first place. The justification for the privilege does not exist in such circumstances and the Court must take care not to widen its boundaries beyond what is permissible. There is a distinction between that scenario, and creating privileged documents for the dominant purpose of defending oneself and obtaining advice pertaining to the defence to anticipated legal proceedings, whilst also having it in mind that you might waive privilege over those documents in future either generically or for a limited purpose. That was not this case, despite the attempt by ENRC to characterise it as such at a late stage of its dialogue with the SFO.

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. The commitment to transparency and sharing of information was made in the knowledge and expectation that the SFO would want to satisfy itself that the reports were accurate and thorough, and carry out its own audit. If the SFO called for the underlying material as part of the audit, ENRC and its advisers knew that ENRC could not refuse. Therefore, no legitimate distinction can be drawn between the reports and the underlying materials in terms of the purpose for which they were created.

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 (even the hypothetical prosecution for books and records offences that the Head of Compliance had expressed some concerns about at a time when no compliance issues had yet been identified) and was primarily focused upon compliance and remediation.

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.

175. It is Mr Duthie's evidence that the compliance aspects of the books and records review that FRA was undertaking, assisting Jones Day, was subsidiary to the purpose of "*identifying issues in anticipation of feared intervention*" and "feeding into and supporting" the investigative work that Dechert was undertaking. As I have already pointed out, Mr Duthie's understanding was entirely dependent on what he was being told by Mr Gerrard, and it is what ENRC intended to use the documents for that matters, not what Mr Duthie thought the purpose of the review was. I am unimpressed by the fact that Mr Duthie has failed to address any of the contemporaneous documents that suggest that far from being the subsidiary purpose, compliance and remediation was the dominant purpose of the review, and he has not pointed to any document that supports his understanding.

176. In any event, "identifying issues" in anticipation that the SFO might carry out a criminal investigation into ENRC's affairs is not the same thing as preparing for the conduct of adversarial litigation or enabling lawyers to give advice about its conduct; and to the extent that FRA were supporting DLA Piper's and then Dechert's investigations, the documents that it generated were no more created for the dominant purpose of the conduct of a defence to criminal proceedings, or enabling lawyers to advise ENRC on the conduct of their defence, than were the documents that Dechert obtained from its interviews with other third parties. The claim for litigation privilege therefore fails in respect of all the categories of documents for which it is made.

THE CLAIM FOR LEGAL ADVICE PRIVILEGE

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 (whoever they were) 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. The fact that the notes were made by Dechert, rather than being verbatim transcripts, does not strengthen the claim for privilege under this head. A document, such as a witness statement, that would not be privileged if it had been created by a non-lawyer does not acquire a privileged status just because a lawyer has created it. 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. In *Parry v News Group Newspapers* [1990] 141 NLJ 1719 (CA) Bingham LJ, having acknowledged that a note of a conversation taken by a solicitor inevitably involved a process of distillation and selection, nevertheless stated that "*a bare record of what passed is in my view entitled to no legal professional privilege, whether it is a solicitors' memorandum, a transcript, or an exchange of letters.*"

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 and has no principled foundation. A similar claim for privilege over documents of this type was made and rejected in *The RBS Rights Issue Litigation,* 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.

180. Like Hildyard J, I consider that the question is ultimately an evidential one, and in this case the evidence does not establish on the balance of probabilities that the notes would give a clue as to legal advice or any aspect of legal advice given to ENRC. Mr Spendlove makes no suggestion that the notes include Decherts' qualitative assessment of the evidence, or any thoughts about its importance or relevance to the inquiry, or even indications of further areas of investigation that the lawyer making the notes considered might be fruitful in consequence of what the witness had said, though the betrayal of further lines of inquiry would not in itself have been sufficient in any event. As in *The RBS Rights Issue Litigation*, the evidence relied on by ENRC fails to show anything substantial of its legal team's analysis of the documents, and fails to give examples of the sort of legal input into the document that would justify a claim to privilege. The evidence consists of no more than conclusory statements that fell well short of what would suffice to make out a claim for working papers privilege.

181. I turn next to the Category 3 documents. Mr Spendlove, in his sixth witness statement served on 13 January 2017, states that the slides and the meeting notes falling within Category 3 contain or reveal advice by Mr Gerrard as to "*potential allegations of criminality and the steps the company should take in respect of those potential allegations*…" The SFO contends that if that is so, the advice can and should be redacted, but insofar as Mr Gerrard was presenting to the Board the findings of the internal investigation, those aspects of the documents cannot be privileged.

182. It must be borne in mind that information which would not ordinarily be privileged, even information which is already in the public domain, may fall under the umbrella of legal advice privilege if it is part and parcel of the continuum of confidential communication between lawyer and client whose purpose is the giving or receiving of legal advice. Thus, if at a time when litigation was not in reasonable contemplation, the client sent a copy of a report from a private investigator to the solicitor and asked him to give some advice about what to do in consequences of the fact-findings made by that investigator, the copy of the report sent to the solicitor would be privileged, as would any quotations from it in the resulting letter of advice, even though the original report would not be privileged.

183. This is not a case in which the report was sent by the client to the solicitor, but one in which the solicitor carried out the factual investigations at the behest of the client; but the same principles apply. If the solicitor had simply been reporting his fact findings to the Board, and there was no legal advice involved, the minutes recording what transpired at the meeting at which the fact findings were reported to the client would not be subject to legal advice privilege. However, the evidence in respect of the meetings in March 2013 for which that slide presentation was prepared by Mr Gerrard does indicate that Dechert had been instructed to give legal advice to the Board about certain specific matters consequential on their findings. Addleshaws were also giving legal advice to the Board on other matters at the meeting on 15 March 2013.

184. In my judgment, the slides prepared by Dechert for the specific purpose of giving legal advice to ENRC are plainly privileged, even if reference is made in them to factual information, or findings from the African investigation that would not otherwise be privileged; they are part and parcel of the confidential solicitor-client communication, and also fall within the ambit of the protection of solicitors' work product.

185. Bearing in mind the policy objective that underlies legal advice privilege – the importance of ensuring that solicitors and clients can speak freely in confidence - it seems to me that if and to the extent that Mr Gerrard may have verbally elaborated on what was on the face of the slides, as part of the background to, or foundation for the advice he gave to the client as to what it should do next, what he said at the meeting (and any record of it, whether or not taken by a lawyer) must be privileged, even if he were referring to information which would not otherwise be privileged. I cannot see how in context the distinction contended for by the SFO could sensibly be drawn.

186. The results of Dechert's investigations, any reports, any fact-findings made by them, and the underlying data upon which they are based, would not be subject to LPP outside this specific context. It is only if they are properly to be characterised as a record of the confidential solicitor-client dialogue for the purpose of giving and receiving legal advice that they would be subject to legal advice privilege. So, any Dechert report of its investigation into Africa and the underlying materials used by Mr Gerrard and his colleagues to produce it will not be privileged; the privilege extends only to what he said to his client at the meeting(s) in March 2013 at which that slide presentation was made and any record of what he said on that occasion.

187. Therefore, 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 emails "*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 during the relevant period. ENRC's annual report and accounts for 2009 described his role as being "*to lead on and execute the Group's M&A transactions and be involved in the strategic planning, supporting the CEO and Head of Business Development*." The same document states that Mr Ehrensberger was responsible for the Group's legal affairs "until mid-2008". That statement also appears in the annual report and accounts for 2010. Moreover, ENRC's Mergers and Acquisitions Policy dated 2011 draws a clear demarcation line between the role of the Head of M&A and the role of General Counsel (who is said to be responsible for ensuring that all M&A activity and M&A transactions are legally compliant with all applicable laws and regulations.)

190. The objective evidence therefore 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 to which he could bring the perspective of a qualified lawyer. 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.

DISCRETION

191. Finally I address two points raised by Mr Lissack which he contended have a bearing on the question whether the Court should grant the declaratory relief sought by the SFO in the event that it rejected the claim to privilege in respect of some or all of the Disputed Documents. I regret to say that despite the engaging manner in which they were presented, I found these points utterly misguided. As a matter of principle, it is difficult to see why, once it has been asked by the parties to rule on an issue, the Court should not grant a declaration that brings into effect those matters on which the Court has already pronounced in its judgment. ENRC has not sought to persuade this Court to make no ruling on the question of privilege. The declaration would do no more than formally confirm that ENRC would not be entitled to refuse to disclose the documents that are not privileged to the SFO in response to a Section 2 notice. To refuse a declaration would bring ENRC no advantage.

THE USE OF THE PART 8 PROCEDURE

192. First, ENRC has complained that the SFO did not challenge its claim to privilege via the issue of a warrant pursuant to s.2(4) of the CJA 1987. Had the SFO taken that course, the issues relating to LPP that this court has had to determine would have had to have been grappled with by a Justice of the Peace or District Judge (Crime) in proceedings to which ENRC was not, or at least not initially, likely to have been a party. Since either the SFO or ENRC was bound to have been dissatisfied with the outcome of that application, the claim to LPP would have inevitably ended up in a higher court either on an appeal or on an application for judicial review.

193. I can well understand why the SFO took the view that it accorded with the overriding objective to cut to the chase, and start Part 8 proceedings in the High Court designed to resolve the dispute about LPP. It is not contended that it was not entitled to take that course; plainly it was. There is nothing in the CJA 1987 to indicate that applying for a warrant is the exclusive route to take when there is inevitably going to be a dispute of this nature. Section 2(9) itself identifies the key issue as being whether the documents are documents which ENRC "*would be entitled to refuse to disclose or produce on grounds of legal professional privilege in proceedings in the High Court"*. It cannot be sensibly suggested that the High Court is the inappropriate forum for determining that issue. There is precedent for such a course being taken in similar circumstances, albeit that the documents over which privilege was claimed were in the hands of a third party: see *Price Waterhouse (a firm)* v *BCCI Holdings (Luxembourg) SA and others* (above).

194. ENRC complains that the route which the SFO took did not afford it the procedural protection that is provided when a warrant is issued. Had it sought a warrant, the SFO would have had a duty of full and frank disclosure, including disclosure of anything that might have militated against the grant of the warrant. Under the Criminal Procedure Rules, it would have been obliged in the application for the warrant, among other things, to describe the investigation it was conducting, including an explanation

of what is alleged and why, and to set out a chronology of relevant events; and in relation to each document or description of documents sought, it would have had to explain the grounds for believing that each such document related to a matter relevant to the investigation, and could not be withheld from disclosure of production on grounds of LPP. Finally, it would have had to explain the grounds for believing that ENRC had failed to comply with a s.2 notice to produce the documents.

195. All these safeguards are built into that procedure because the person against whom the warrant is to be issued does not participate in the hearing of the initial application (save in the unusual circumstances in which it is expressly put on notice). The procedure adopted by the SFO in the present case put ENRC on notice, and the Particulars of Claim identified why the SFO did not accept its claim to LPP. There has been extensive disclosure by the SFO, there is a full agreed chronology of relevant events, and ENRC always knew the case it had to meet. I cannot see how adopting the far more intrusive procedure under s.2(4) of the CJA 1987 would have left ENRC any better off so far as its claim to privilege is concerned. The SFO would no doubt have given the magistrates' court the same reasons for believing the 4 categories of documents not to be subject to LPP, as it has deployed in this claim. If the warrant had been issued, as seems likely, the evidential burden would have been on ENRC to justify withholding the documents on grounds of LPP in any event.

196. The SFO was under an obligation as an investigative body to consider all proportionate routes falling short of applying for a warrant, and that is exactly what it did. The procedure it chose to adopt has caused ENRC no prejudice, it is far less intrusive than the alternative process would have been, and the course that was taken was proportionate and fair. It provides no justification for complaint, let alone for this Court to refuse a discretionary remedy to which the SFO is otherwise entitled.

MR GERRARD'S AUTHORITY

197. ENRC alleges that in certain of his dealings with the SFO, Mr Gerrard was acting without ENRC's authority, and that the SFO ought to have known that he was so acting. It was contended that this was of relevance in two respects:

i) It was submitted that unauthorised communications by Mr Gerrard could not fairly form part of the Court's assessment of whether the necessary requirements for litigation privilege have been established;

ii) if the SFO knew or ought to have known that the communications were unauthorised, and yet sought to rely upon them, it was contended that this was a factor militating against the exercise of the discretion in favour of granting the declaratory relief that it seeks.

198. The focus was on 16 communications between Mr Gerrard and representatives of the SFO, which took place in the absence of a representative of ENRC. The vast majority of these meetings took place shortly before formal meetings with the SFO in which Mr Gerrard and at least one representative of his clients were present; there was one occasion on which Mr Gerrard had a meeting with the SFO on his own after such a meeting at which his clients were present. The SFO's notes of those meetings have been disclosed. They make no material difference to the SFO's case on the question whether privilege attaches to the Disputed Documents.

199. I have already referred to the fact that neither Mr Gerrard nor Dechert are parties to this litigation, and therefore they have had no opportunity to answer the criticisms made of them. The Court should be astute to avoid expressing views about matters in dispute between ENRC and its former legal advisers which are more appropriately dealt with elsewhere.

200. I permitted questions to be asked in cross-examination of Mr Thompson, who had a substantial number of dealings with Mr Gerrard on behalf of the SFO during the relevant period, pertaining to the SFO's state of knowledge regarding Mr Gerrard's authority. Mr Thompson was present at 11 of the 16 meetings with Mr Gerrard. He said that Mr Gerrard had been nominated as the principal point of contact and that it was normal for the lawyers to take the lead in the discussions with the SFO. On a number of occasions, Mr Gerrard would seek to have a conversation about the meetings that were coming up. This was the first case of self-reporting that Mr Thompson had been involved in, and so he had nothing with which to compare it. So far as he was concerned, Mr Gerrard's behaviour did not appear to be improper or abnormal, and he did not consider that he was briefing against his client. On the contrary, he believed Mr Gerrard was trying to cultivate a positive relationship with the SFO for the benefit of ENRC. He seemed to Mr Thompson to be doing his best to achieve a result that he thought to be in ENRC's best interests, namely, a civil settlement, which he was also trying to persuade the SFO would be a good outcome for them. He pointed out that Mr Gerrard was well aware that he, Mr Thompson, was taking a note of their conversations.

201. I am satisfied that if what Mr Gerrard was doing was unauthorised (a point on which I expressly refrain from making any finding) his lack of authority was not something of which the SFO was aware or ought to have been aware at any material time. I note that what Mr Gerrard is recorded as saying on occasions when his clients were not present was often repeated by him in their presence without demur. In any event, there was nothing of any substance in the records of those meetings or conversations which cast any light on whether litigation was reasonably in contemplation at any material time (especially bearing in mind that every one of those meetings post-dated 19 August 2011). Moreover, I did not need to rely on anything said by Mr Gerrard on any of those occasions, and did not do so, in order to form a view about the dominant purpose for which the Category 1 documents were created.

202. Even if I had been satisfied that the SFO was on notice that Mr Gerrard was acting without authority at any material time, it would have made no difference to the exercise of my discretion regarding the granting of declaratory relief. The Disputed Documents are either privileged, or they are not. If they are privileged, ENRC does not have to disclose them in response to a s.2 notice. If they are not, it must disclose them. The question whether Mr Gerrard was or was not authorised to do or say what he did, has no relevance to the issues of privilege that I have decided. Any lack of authority on his part would be no justification for refusing the SFO the declaratory relief to which it is otherwise entitled.

OTHER CONSIDERATIONS

203. Finally, I agree with the points made by the SFO as to the public interest in granting declaratory relief in a case such as the present. The ordinary approach of the Court is

that if a litigant has made good his case, meaningful relief should follow. As Lord Oliver put it in *R v Attorney General, ex parte ICI plc* [1987] 1 CMLR 72 at [112]:

"it must be wrong in principle, when a litigant has succeeded in making good his case and has done nothing to disentitle himself to relief, to deny him any remedy unless, at any rate, there are extremely strong reasons in public policy for doing so."

204. There is a recognised public interest in the SFO being able to go about its business of investigating and prosecuting crime; and the sort of evidence which one would expect to be found in the Disputed Documents is likely to be of considerable value to its current investigation, particularly as Dechert were investigating matters much nearer in time to the events in question. Moreover, ENRC repeatedly promised that it would give full and frank disclosure of the results of its internal investigations to the SFO, but then changed its mind. If the documents are not privileged, there is no reason why the Court should exercise its discretion in a manner that would enable ENRC to escape compliance with those promises.

205. I shall therefore grant the SFO the relief that it seeks in respect of all classes of Disputed Documents except Category 3.