THE TIMES

The Times September 20, 2018

Privilege and the power of the prosecutor

The decision of the Court of Appeal in Serious Fraud Office v ENRC on the subject of legal professional privilege has been widely reported. It has generated a tsunami of relieved commentary from a legal profession happy that at least one key aspect of privilege had been rescued. A lay person might be puzzled by this. Why has a case concerning a few dozen interview notes and some technical points of law caused such a strong reaction?

Privilege, which is a right of the client, is essential if that client is going to receive proper legal advice. However, this is not always recognised. The House of Lords ruling in Three Rivers No 5 in 2004 meant that privilege was far less readily available to businesses unless litigation was in prospect.

In ENRC the SFO sought to foreclose the scope of litigation privilege as well. Among other things, it argued that a person concerned about a criminal allegation could not trigger privilege unless he could show that there was enough evidence against himself to justify a prosecution. This was a Catch-22 worthy of Joseph Heller himself. Unfortunately, the judge at first instance concurred.

If the decision had stood, the work of lawyers advising their clients on a criminal investigation might be handed over to the police, SFO or anyone else who might want to sue. This is a recipe for a "see-no-evil" response to allegations of wrong doing by companies, and would ultimately lower standards of governance.

The Court of Appeal's judgment now means that, subject to any further appeal, most investigation work can proceed with a far greater prospect of being privileged, and the immediate danger to companies doing this has been averted. There may be another reason that the legal sector and "UK Plc" will be happy with this result. The "war on privilege" has come to be linked with something else, a marked shift in decision-making about how business-crime cases turn out. Broadly, that shift has been from the court to the prosecutor's office.

In non-business cases, the test is what a jury will make of the evidence. In business cases the SFO and other agencies now have very significant discretionary power to determine outcomes. For example, the SFO can decide whether to offer a deferred prosecution agreement and up to 50 per cent off penalties if the company is "co-operative", which a judge may then approve. Co-operation often means self-reporting and handing over the fruits of any internal investigation. This is a form of self-incrimination, the effects of which can be pretty-much final. Without privilege it would be much more difficult for companies to resist this and the scales would tip farther in the prosecutor's favour.

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A prosecutor with a dispositive discretion may or may not be worth having, but its powers must be subject to proper limits. ENRC is a powerful reminder that fundamental rights should be available to all, including businesses, and may not be compromised for the convenience of the authorities. Technical though it may seem, this is a good result for justice and the rule of law.

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