

ENRC privilege decision: welcome news but difficulties remain

A recent Court of Appeal decision has restored the orthodox position on litigation privilege, but has left the battle to be fought another day for a more workable approach to legal advice privilege (*The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006).

In relation to litigation privilege, the court disagreed with the High Court's overly strict approach to whether litigation was in reasonable contemplation when the company undertook an internal investigation into alleged wrongdoing, and whether documents forming part of that investigation were for the dominant purpose of the litigation ([2017] EWHC 1017; see *News brief "Investigations and privilege: a restrictive scope"*, www.practicallaw.com/w-008-3720). The decision is particularly helpful in dispelling the troubling suggestion at first instance that litigation privilege did not apply to documents aimed at preventing or settling litigation, as opposed to defending it.

In relation to legal advice privilege, however, the court considered itself bound by the notorious *Three Rivers District Council and others v The Governor and Company of the Bank of England (Three Rivers No 5)* decision to find that the privilege is limited to communications between a lawyer and those tasked with seeking and receiving advice on behalf of the client company, rather than all employees ([2003] EWCA Civ 474). As such, any extension will have to be a matter for the Supreme Court.

SFO v ENRC

As part of its criminal investigation into the activities of Eurasian Natural Resources Corporation Ltd (ENRC), the Serious Fraud Office (SFO) issued notices under section 2(3) of the Criminal Justice Act 1987 against various parties, including ENRC, to compel the production of certain categories of documents. These included notes taken by ENRC's former lawyers of interviews with its employees and former employees as part of an internal investigation which was prompted by a whistleblower's allegations.

The claims to privilege were rejected at first instance, with the High Court taking a very narrow approach to both litigation privilege and legal advice privilege. ENRC appealed.

Contemplating litigation

The court held that the High Court was wrong to conclude that a criminal prosecution was not reasonably in prospect at the relevant time. In the court's view, the possibility of prosecution, if the self-reporting process did not result in a settlement, formed the whole sub-text of the relationship between ENRC and the SFO. Where the SFO specifically made clear to ENRC the prospect of a criminal prosecution, and legal advisers were engaged to deal with that situation, there was a clear ground for contending that litigation was in reasonable contemplation.

The decision is helpful in confirming that litigation may be in contemplation even if a party needs to make further investigations before it can say with certainty that proceedings are likely. This is consistent with previous authority, which makes it clear that the question of whether litigation is in reasonable prospect is not a question to be determined on the balance of probabilities. It is a matter of fact and degree.

Dominant purpose

The court also held that the High Court was wrong to conclude that, if litigation was in contemplation, the documents were not prepared for the dominant purpose of that litigation. The court helpfully clarified three issues of principle, on which the High Court had made errors:

- It confirmed that, contrary to the High Court's view, documents prepared for the purpose of taking legal advice on how to avoid or settle proceedings are as much protected by litigation privilege as those prepared to take advice for the purpose of defending proceedings.
- It confirmed that investigating the facts may be a subset of the overarching purpose of advising on contemplated legal proceedings, rather than a separate competing purpose. The court commented that, while a reputable company will wish to ensure high ethical standards for its own sake, where there is a clear threat of a criminal investigation, the dominant purpose for investigating whistleblower allegations is likely to be preventing or dealing with litigation.

- It dismissed the idea that, where a document is created with the intention of showing it to the opposing party, that means it cannot be subject to litigation privilege. It is, of course, often the case that draft documents, such as witness statements, are covered by litigation privilege even though the final version will be served on the opponent.

The "client" problem lives on

The court did not need to decide whether the communications in question were covered by legal advice privilege, given its conclusions in relation to litigation privilege, but nonetheless indicated how it would have decided the issue.

It agreed with the High Court that *Three Rivers No 5* is binding authority that legal advice privilege cannot apply to communications between a company's legal adviser and its employee unless that employee was tasked with seeking and receiving legal advice on behalf of the client. Authority to provide information to the lawyers in order to enable them to advise is not sufficient to render the employee part of the client for the purpose of legal advice privilege.

An unequal application of privilege

The court said that, if it had been free to depart from the *Three Rivers No 5* approach, it would have done so based on a principled analysis of the purpose of legal advice privilege. That is to enable clients to place the full facts before their lawyers in order to obtain legal advice on their affairs, without fear that what they tell their lawyers will be disclosed without their consent.

In the court's view, the rule should apply equally to all. However, the current approach is unfair to large companies, as in that context it is much less likely that the information the lawyers need will be in the hands of those appointed to seek and obtain legal advice on the company's behalf. It also means that English law is out of step with other common law jurisdictions on this issue, which the court described as undesirable.

Off to the Supreme Court?

The court said that the question of whether *Three Rivers No 5* was wrong in its approach to legal advice privilege could

only be determined by the Supreme Court. However, unless the SFO seeks and obtains permission to appeal on the question of litigation privilege, which seems unlikely as the court's decision on that aspect seems entirely orthodox, a reconsideration of legal advice privilege will have to wait for another case.

When the matter does come before the Supreme Court, as seems inevitable, the court's comments in this case will no doubt

be of great interest. In that regard, it is worth noting that the court did not appear to favour the dominant purpose test for legal advice privilege which has been adopted in place of *Three Rivers No 5* in Australia and Hong Kong. Although it did not express any final conclusion on the point, it did not see why there should be an additional test of dominant purpose, given that legal advice privilege can only be claimed where legal advice is being sought or given. Nor was it persuaded that former employees should be treated any

differently from other third parties, whose communications are not covered by legal advice privilege. However, it said that was an issue that could be considered if, and when, the Supreme Court had cause to decide a challenge to *Three Rivers No 5*.

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