More lessons on privilege

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The English courts have had another busy few months considering the protective scope of legal professional privilege.

In the last update in our series of insights on this topic, we wrote about the Court of Appeal's welcome ruling in *The Director of the Serious Fraud Office* v *Eurasian Natural Resources Corporation Ltd* (ENRC) [2018] EWCA Civ 2006. That judgment held that certain documents generated by ENRC during a criminal investigation (including internal communications, and notes and advice prepared by in-house lawyers), but prior to court proceedings, are as protected by litigation privilege as those prepared in the defence of proceedings (click here for details). Less welcome was the position the Court of Appeal took in relation to legal advice privilege when it declined to depart from its earlier ruling in *Three Rivers District Council* v *Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474 that communications between an employee of a corporation and the corporation's lawyers could not attract legal advice privilege unless that employee is tasked with seeking and receiving advice on behalf of his or her employer, the "client".

Since the ruling in *SFO* v *ENRC*, three decisions of the English courts towards the end of 2018 (and a further judgment in one of those cases this year), all of which concerned internal communications within an organisation, have provided further guidance on some important issues for businesses: the scope of legal advice privilege where an in-house lawyer is involved and where emails are sent to multiple addressees; and, the types of documents and communications that may not be covered by litigation privilege.

Some clarification on legal advice privilege for in-house lawyers

Who is the "client"?

In *Glaxo Wellcome UK Ltd (t/a Allen & Hanburys) & anr* v *Sandoz Ltd & ors* [2018] EWHC 2747 (Ch), the English High Court considered the availability of legal advice privilege in circumstances where an in-house lawyer was both giving legal advice to a colleague and obtaining legal advice on behalf of her employer from external lawyers. The court applied the strict approach of *Three Rivers (No 5)* but the case distinguished between who the "client" was for the purposes of internal advice and the advice sought from external lawyers.

The background

Glaxo Wellcome had brought legal proceedings against the Sandoz Group for passing off their generic inhaler product as Glaxo Wellcome's inhaler (which had achieved worldwide sales of approximately £62 billion since its launch in 1999). The claim centred around the use of the colour purple in the Sandoz inhaler which, Glaxo Wellcome alleged, had the deliberate aim of deceiving or creating confusion in the mind of the relevant public. Sandoz accepted that the question of whether the public were deceptively confused might take into account their intentions and that documents relating to the design history of the generic inhaler had to be disclosed in a date range going back to 2003.

Following an epic disclosure exercise – some 406,300 documents were reviewed by 50 legally qualified reviewers over a period of 6 months and at a cost of circa £2 million, with 75,326 documents being disclosed to the claimants – the claimants challenged the Sandoz Group's claim to legal advice privilege in respect of two documents. The documents in question were internal emails from the

Sandoz Group's in-house lawyer to another employee of the Sandoz Group (a drugs regulatory affairs manager) seeking information to provide to the group's external legal advisers for the purpose of them giving legal advice, and an internal email response to one of those emails from that employee providing the requested information to the in-house lawyer.

The Sandoz Group had claimed legal advice privilege over other documents, including an email from the same employee to the in-house lawyer requesting legal advice and a note of the legal advice given by her. The assertion of legal advice privilege over those documents was not challenged and the court accepted that these documents were privileged. For the purposes of that email, the employee was the "client" of the in-house lawyer.

The scope of legal advice privilege

Following *Three Rivers (No 5)* and the decision in *SFO* v *ENRC*, the High Court found that communications between an employee of a company and the company's lawyers could not attract legal advice privilege unless that employee had been tasked with seeking and receiving such advice on behalf of the client. The court emphasised the narrow interpretation of legal advice privilege in *SFO* v *ENRC* that the employee had to be authorised to seek and/or obtain "the legal advice that is the reason for the communication".

The Sandoz Group claimed that the employee involved in the communications in question was *authorised to request and receive legal advice where relevant to the performance of his job functions*, but did not provide any evidence that this was the case and nor did they initially identify the employee in question or explain his role.

As it turned out, the employee was not employed by the member of the Sandoz Group for which legal advice was being sought from the external lawyers (he was employed by another member of the group) and there was no evidence that he was authorised to seek legal advice from external lawyers acting for that member of the Sandoz Group. The employee was therefore not part of the narrowly defined "client" group entitled to legal advice privilege under *Three Rivers (No 5)*.

The Court of Appeal held that the Sandoz Group had not demonstrated an entitlement to legal advice privilege in respect of the emails in question and that the claimants were entitled to inspect them.

Issues for corporate groups

The case serves as a warning for large corporate groups involved in any matter where legal advice is needed insofar as senior managers and executives authorised to obtain legal advice on behalf of their employer may not be entitled to legal advice privilege where the advice is being given to a member of the group which is not their employer. Corporate groups engaging external lawyers should carefully consider whether the retainer covers all members of the group involved in the matter on which advice is being sought, particularly where employees may need to provide information to, or otherwise engage with, the external lawyers. Firms should also ensure that all communications with external lawyers are from an employee authorised to seek and/or obtain the relevant legal advice, and should consider clearly setting out such authority in job descriptions or employment contracts for relevant employees.

Emails sent to both in-house lawyers and other employees

In another case involving in-house lawyers, *R (on the application of Jet2.com Ltd)* (Jet2.com) v *Civil Aviation Authority* (CAA) [2018] EWHC 3364 (Admin), and subsequently *Jet2.com v CAA* [2019] EWHC 336 (Admin), the High Court needed to consider the application of legal advice privilege where an internal email was sent to both lawyers and non-lawyers.

Background

The case concerns ongoing judicial review proceedings in which Jet2.com is challenging the Civil Aviation Authority's (**CAA**) very public criticism of Jet2.com's decision not to participate in a new, voluntary, alternative dispute resolution (**ADR**) scheme introduced for the aviation authority.

The CAA issued a press release in December 2017 concerning the new ADR scheme in which it criticised Jet2.com's refusal to participate in the scheme and accused it of putting its customers at a "distinct disadvantage". Jet2.com wrote to the CAA to complain about the tone and content of the press release and explained its reasons or choosing not to move to the scheme. The CAA's response letter criticised Jet2.com further and defended the position it had taken in the press release. Details of the correspondence were subsequently published in the Daily Mail in February 2018.

As part of the judicial review proceedings, Jet2.com made an application for an order for specific disclosure of several categories of documents including drafts of the CAA's letter to Jet2.com and records of related discussions within the CAA. The drafts of the letter had been circulated internally, including to the CAA's in-house lawyers, and there were various internal email exchanges amongst senior employees and the in-house lawyers discussing the contents of the draft letter and the approach the CAA had decided to take in respect of Jet2.com.

The CAA asserted legal advice privilege in respect of the drafts of the letter and its internal discussions on the basis that the CAA's in-house lawyers were involved in those discussions and had given legal advice in relation to the various drafts of the Jet2.com letter in the internal email exchanges (even though the first draft of the letter was created before the lawyers became involved), and disclosure of the drafts revealed the content of the legal advice.

After considering a number of authorities, including *Three Rivers* and *SFO* v *ENRC*, the Court summarised the following principles:

Lawyer involvement does not automatically protect a document from disclosure

- The mere involvement of a lawyer is not enough to justify a claim for privilege. Simply copying in a lawyer to correspondence or forwarding a document to a lawyer will not necessarily protect a document.

The application of the "dominant purpose" test to legal advice privilege

- Legal advice privilege applies only to confidential communications between client and lawyer which are made *for the purpose of giving or obtaining legal advice*.

- Communication between a lawyer and his or her client relating to a transaction in which the lawyer is instructed to provide legal advice will be privileged. However, legal advice privilege does not apply to documents which are merely *raw materials* (such as draft letters and copy documents) that were not created for the purpose of obtaining legal advice, even though they are sent to the lawyer.

- Claims for legal advice privilege are, in principle, subject to a dominant purpose test, namely, whether the communication or document was brought into existence with the dominant purpose of it (or its contents) being used to obtain legal advice.

This is unlikely to be an issue where an email is sent to an external lawyer (the dominant purpose of the email or its contents will usually be to obtain legal advice). However, in-house lawyers may have a dual role in a company, providing legal advice and taking part in general business discussions which do not involve legal advice. Where an in-house lawyer is being consulted as an executive about a largely commercial issue, the dominant purpose test will not be satisfied.

- Where an email is sent to multiple addressees, some of whom are lawyers and some of whom are not, the entitlement to privilege will depend on the dominant purpose of the email:

- if the dominant purpose is **to seek advice from the lawyer** and others are copied in for information only, the email is privileged;

- if the dominant purpose of the email is **to seek commercial views**, and the lawyer is copied in, whether for information or even for the purpose of legal advice, then the email, in so far as it is sent to non-lawyers, is not privileged;

- if the email is sent to non-lawyers for **commercial comment**, but sent to the lawyers for **legal advice**, then the email is not protected by privilege, unless the responses disclose or might disclose the nature of the legal advice sought and given.

The Court applied these principles to the facts of the case.

Documents which were not protected

- Any draft of the letter created before in-house lawyers were consulted, or created without any involvement of in-house lawyers, was not privileged, even if it were known that in due course legal advice would be taken on the draft. That is the case, unless the dominant purpose of creating the draft was for the purpose of seeking legal advice on it, then that draft would be privileged.

- Further drafts of the letter were not covered by privilege unless specifically drafted by the lawyers or for the dominant purpose of obtaining legal advice. Such drafts did not subsequently attract privilege when they were shown to the in-house lawyers.

Documents which are protected

- On the basis that the CAA's in-house lawyers were instructed for the purposes of obtaining legal advice, then any communication with the lawyers, including comments and advice on the draft letter (whether on the document itself or in a covering communication) are covered by legal advice privilege. Moreover, any communication between non-lawyer executives which disclosed or might disclose comments and advice from the in-house lawyers in relation to the draft are also covered by legal advice privilege.

The Judge concluded by directing the CAA to reconsider the materials in respect of which it had asserted legal advice privilege in light of his conclusions, noting that he expected further drafts of the CAA's letter to Jet2.com to be disclosed (possibly subject to any embedded legal advice) and possibly also internal communications not involving in-house lawyers.

Appeal against judgment

The CAA sought permission to appeal against the High Court decision on the grounds that there is no dominant purpose test for legal advice privilege, that the approach taken to multi-addressee communications was incorrect and that an email and its attachment are to be regarded as a single communication for the purposes of assessing privilege.

In a second judgment handed down last month, the Judge concluded that the grounds of appeal had no reasonable prospect of success and refused permission to appeal, so the conclusions outlined above remain good law (although the Judge seemed to anticipate a renewed application to the Court of Appeal for permission to appeal. Watch this space for further developments).

Internal emails

This case is a reminder that businesses should take care when circulating internal emails to both in-house lawyers and other employees. Copying in an in-house lawyer (or even an external lawyer) will not automatically make an email privileged. Consideration should be given to the purpose of the email exchange and if its main purpose is to obtain legal advice this should be made clear in the contents of emails. If the main purpose of the emails is to discuss commercial matters, consideration should be given to keeping such discussions off line. This brings us neatly to the third case covered in this note.

Litigation privilege and commercial discussions in respect of settlement

The Court of Appeal had another opportunity to consider the scope of litigation privilege two months after its ruling in *SFO* v *ENRC*. In *WH Holding Ltd, West Ham United Football Club Limited (*West Ham) v *E20 Stadium LLP* (E20) [2018] EWCA Civ 2652 the court needed to determine whether litigation privilege extended to documents concerned with settling litigation (here emails reflecting commercial discussions as to the merits of settlement) where the documents neither sought advice or information for the purpose of conducting litigation nor revealed the nature of such advice or information.

The background

West Ham and E20 had entered an agreement which enabled the football club to use the London Olympic Stadium for its home football matches. A dispute arose over the number of seats in the stadium that West Ham is entitled to use, that resulted in legal proceedings in the English High Court. Shortly before trial, West Ham asked the court to inspect six emails sent between E20's board members and between E20's board members and stakeholders. E20 claimed that the emails were protected by litigation privilege as the emails had been written with the dominant purpose of discussing a commercial proposal for settling the litigation.

It was not in dispute that the documents were relevant to the issues arising in the proceedings but West Ham challenged the application of litigation privilege on the basis that the emails neither sought advice or information for the purpose of conducting litigation nor revealed the nature of such advice or information.

The scope of litigation privilege

The High Court held that the emails were protected by litigation privilege relying on *SFO* v *ENRC* as they were prepared for the sole or dominant purpose of "conducting litigation". The Court of Appeal ruled in *SFO* v *ENRC* that the concept of "conducting litigation" includes deciding whether to settle it, so documents created for the purpose of settling or heading off legal proceedings could attract litigation privilege.

However, the Court of Appeal allowed the appeal against the High Court decision on the basis that there was no authority (in *SRO* v *ENRC* or otherwise) or justification for extending the scope of litigation privilege to purely commercial discussions. The court's conclusions are a helpful summary of the law on litigation privilege as it currently stands:

- Litigation privilege is engaged when litigation is in reasonable contemplation by the parties.
- Once litigation privilege is engaged, it covers communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with the conduct of the litigation, provided it is for the sole or dominant purpose of the conduct of the litigation.

- Conducting the litigation includes deciding whether to litigate and also includes whether to settle the dispute giving rise to the litigation.

- Documents in which such information or advice cannot be disentangled or which would otherwise reveal such information or advice are covered by litigation privilege.

- There is no separate head of privilege which covers internal communication falling outside the ambit of litigation privilege as described above.

Lessons to be learnt

Whilst this case concerned internal emails, it seems likely that the same analysis will apply to other internal corporate documents discussing litigation to which a company is party or likely to become party. This would presumably include those documents which deal with its strategy in relation to settling or heading off the dispute, such as file notes and minutes. Great care should therefore be taken when preparing such documents that should only be prepared by someone who fully understands the concept of privilege or, if there is any doubt, after having taken legal advice.

Firms should consider ensuring that internal commercial discussions concerning current or prospective litigation should, as far as possible, take place orally and that written communications about the litigation should be limited to the following:

- correspondence with lawyers engaged by the firm (ensuring that the person who corresponds with the lawyers is tasked with obtaining legal advice relating to the litigation);

- correspondence with third parties which is clearly for the purpose of obtaining information relating to the litigation; and

- documents which include specific reference to legal advice which has been received previously (ideally with a summary of the advice).

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