Legal professional privilege: It mustn't be taken for granted!

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Two recent English judgments have emphasised just how restrictive the scope of legal professional privilege is and the level of care financial services businesses must exercise to maximise the chances of their highly sensitive affairs being kept private. "Privilege" is a substantive legal right that enables a party to litigation or similar processes to resist disclosing certain documents to its adversaries.

The two cases – *Director of the Serious Fraud Office v Eurasian Natural Resources Corp [2017]* and *The RBS Rights Issue Litigation [2016]* – highlight the risk of privilege not applying when:

- Having investigations conducted by professionals other than lawyers (such as forensic accountants)
- Conducting internal investigations to meet regulatory obligations or because of possible criminal investigations
- Seeking legal advice from qualified lawyers within your organisation who are not explicitly employed to give legal advice
- Lawyers deal with a client's employees who are outside the group authorised to seek and receive legal advice

The *Eurasian* case, in particular, has evoked outrage among the legal profession and has been "lambasted" by the Law Society. Its effects may be especially serious for any company or person involved in regulatory action locally.

Click here to read our definition of legal privilege.

Serious Fraud Office v Eurasian Natural Resources Corporation

Eurasian Natural Resources, a mining company, was being investigated for fraud, bribery and corruption by the Serious Fraud Office (SFO). The SFO deployed its statutory powers to obtain various documents from ENRC but ENRC resisted providing the following classes of documents, claiming legal professional privilege. The SFO therefore brought a case to the High Court in London, seeking an order compelling ENRC to disclose the documents.

The issues raised in this case are of critical importance (and possibly grave concern) to financial services businesses in Guernsey and Jersey, particularly in the current regulatory environment.

Internal emails with a senior Eurasian executive were found to not be covered by legal advice privilege despite the fact that the executive was legally qualified and was giving legal advice. He was not employed specifically as an in-house lawyer but as "*Head of Mergers and Acquisitions*"; a role adjudged to make him "a man of business" rather than a lawyer.

This is of relevance to many offshore financial services businesses who employ legally qualified staff but who perform a variety of roles and seldom operate as "just" lawyers.

A forensic accountant's review of Eurasian's records did not benefit from litigation privilege. Eurasian argued that this review was conducted in contemplation of an impending criminal investigation but the court held the review was instead aimed at assessing and

remediating compliance failings within the company.

The potential impact of this locally is plain: it is not uncommon to conduct internal reviews of compliance issues and/or employ external consultants to fulfil that role. Such reports are unlikely to be protected from production in subsequent enforcement action by the regulator, or civil litigation, unless prepared by lawyers for the purpose of giving legal advice.

Lawyers' notes of interviews conducted with Eurasian's employees and third parties about a whistle-blower's allegations against the company were not privileged. The court found that litigation privilege applies only if Eurasian anticipated actual criminal prosecution and should protect only those prepared with the sole or dominant purpose of conducting adversarial litigation. The court ruled that an investigation by the SFO is not adversarial litigation for privilege purposes; it is a preliminary step taken, and generally completed, before any decision to prosecute is taken.

Again, the potential impact of this locally in relation to regulatory investigations is obvious and very worrying: it could be argued that confidential, internal documents prepared in the course of co-operating with a regulatory investigation are not protected by litigation privilege until such time as a business reasonably contemplates enforcement action (which assertion will be rigorously tested) and the documents are prepared for the dominant purpose of such action.

As mentioned above, this judgment has caused outrage and been described as "alarming" by the Law Society. We also understand that Eurasian intends to appeal, so watch this space…

The RBS Rights Issue Litigation

This case has recently made national headlines, following the adjournment of the trial to permit consideration of a last minute settlement offer by RBS. Here, however, we are concerned with an earlier decision of the High Court in the course of this long-running saga.

Shareholders of RBS claim that a prospectus issued at the time of a share rights issue during the financial crisis was inaccurate or incomplete and have sued RBS for their alleged losses. RBS had conducted two internal investigations and the shareholders sought disclosure of notes of interviews with employees and others conducted by their lawyers, both in-house and external from the US and the UK. RBS resisted on the grounds that legal advice privilege applied.

The judge in this case relied upon a controversial decision of the English Court of Appeal, *Three Rivers (No 5)*, where communications between the Bank of England's lawyers and employees were judged not to benefit from legal advice privilege. In that case, "client" was defined by the Court of Appeal very narrowly, consisting of a three-man team within the organisation formed to deal with the lawyers. The Court of Appeal held that communications with other employees were not between a lawyer and their client, and thus not privileged.

In the RBS case, the judge followed *Three Rivers (No 5)* and arguably extended its reach. The Court held that although the interview notes recorded direct communications with RBS's lawyers, they merely comprised information gathering from employees or former employees preparatory to and for the purpose of enabling RBS, through its directors or other persons authorised to do so on its behalf, to seek and receive legal advice. In other words, the RBS employees and former employees who were interviewed by the legal team did not fall within the definition of 'client' as defined in *Three Rivers (No 5)* and therefore the communications were not covered by legal advice privilege.

Unusually, the judge granted RBS permission to appeal directly to the Supreme Court, rather than having to go through the Court of Appeal. It therefore appeared that, for the first time in over a decade, there may be an opportunity for *Three Rivers (No 5)* to be

overturned and a wider definition of “client” for the purposes of legal advice privilege to prevail. Unfortunately, however, RBS did not pursue the appeal and *Three Rivers (No 5)* remains binding.

These decisions are relevant to offshore financial businesses and their lawyers, just as much as to their onshore counterparts or perhaps even more. Offshore businesses are often subsidiaries of onshore parents and may well have reporting lines up to "the legal department" and/or the board of a parent company. Great care must be taken in sharing any legal advice and or the processes followed to prepare for and obtaining legal advice, if waiver of privilege (or failure to attract it in the first place) is to be avoided.

The courts of Guernsey and Jersey are – of course – not bound to follow English case-law and so may be persuaded to take a slightly different approach, but we anticipate that they would take some convincing before doing so and, most likely, these cases would be followed locally.

These two new cases serve as stark reminders of the narrow scope of legal professional privilege and just how easy it is to think that highly sensitive documents are protected from production to adversaries when – in fact – they are not. It is more important than ever for directors and officers to understand the fundamentals of privilege, to think about the issue carefully when seeking and receiving legal advice or preparing sensitive internal reports, and to seek specialist legal advice if in doubt. Please contact Collas Crill LLP's dispute resolution team if you require further, bespoke guidance.

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