PRIVILEGE IS A RIGHT NOT A PRIVILEGE

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The Court of Appeal's decision in SFO v ENRC

In 2017 we wrote on the risk to privilege not applying to certain documents created in the course of internal regulatory investigations in light of the decisions in two English cases: *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited [2017]* and *The RBS Rights Issue Litigation [2016]*. *E*arlier this year we commented on the decision in *Bilta (UK) Ltd v Royal Bank Of Scotland Plc & Anor [2017] EWHC 3535 (Ch)* where the High Court refused claims for legal privilege for internal investigation documents in the context of a regulatory investigation.

This month the English Court of Appeal handed down its much anticipated judgment in the *SFO v ENRC* case. The Court of Appeal's judgment resurrects legal privilege in respect of internal investigation documents. It is a welcome decision and indicates why firms should engage their external lawyers early to assist with undertaking internal investigations where a regulatory body may become obviously interested in, is inquiring of, or investigating, an alleged wrongdoing.

The background:

The facts of the case centre around fraudulent practices allegedly committed in Kazakhstan and Africa notified to ENRC by a whistle-blower that resulted in ENRC engaging its external lawyers and a firm of forensic accountants in 2011 to undertake an investigation and a review of its books and records to (i) primarily, identify the risk of exposure to bribery and corruption; and (ii) secondly, provide advice on its compliance programme.

In 2013 the SFO opened a criminal investigation into ENRC and sought disclosure of documents generated during the investigation process, claiming that the documents were not the subject of legal professional privilege. ENRC refused to comply, arguing that the documents were covered by litigation privilege or legal advice privilege. The SFO sought a declaration from the High Court that the documents were not privileged.

ENRC claimed litigation privilege in respect of:

- Lawyers' notes and working papers of fact-finding interviews with ENRC's employees, ex-employees, subsidiaries and other third parties;
- Materials generated by external forensic accountants;
- Presentations to ENRC's committee and/or board by external lawyers; and

- Internal communications between senior managers, including an in-house lawyer.

Recapping the High Court Decision:

The High Court took the view that none of the documents were covered by litigation privilege because (i) ENRC was unable to demonstrate that it was "aware of circumstances which rendered litigation between itself and the SFO a real likelihood rather than a mere possibility"; and (ii) even if a prosecution had been reasonably in contemplation, the documents were not created for the "dominant purpose" of such litigation: while ENRC anticipated an SFO investigation was imminent, that investigation was not "litigation".

Further, the High Court found that many of the documents were not covered by legal advice privilege, as (i) many of the lawyers' fact finding notes did not "betray the tenor of the legal advice" and (ii) many had not been provided by the "client" those being persons authorised to obtain legal advice on the company's behalf. Out of everything, only the presentations to ENRC's committee and/or board by its external lawyers were covered by legal advice privilege.

The Court of Appeal Decision:

The Court of Appeal overturned the High Court decision with respect to litigation privilege, allowing much greater scope for its practical application.

The Court of Appeal concluded that:

- the sub-text of the relationship between ENRC and the SFO indicated prosecution was possible, if not likely, if engagement in the SFO self-reporting process did not succeed in averting it;
- prosecution could be said to be in reasonable contemplation in a case where a firm engages lawyers to carry out an internal investigation and before the SFO had commenced a prosecution;
- documents created for the purpose of settling or heading off a prosecution could attract privilege;
- uncertainty as to the facts necessitating further internal investigation does not in itself prevent proceedings being in reasonable contemplation. The fact that there was uncertainty did not mean that "the writing may not be clearly written on the wall";
- the same threshold for "reasonable contemplation" should apply to both civil and criminal proceedings;
- where there is a clear threat of a criminal investigation, an internal investigation of whistle-blower allegations must be brought into the zone of being created for the "dominant purpose" of preventing or resisting litigation;
- the books and records review conducted by the external forensic accountants formed part of the internal investigation, from at the latest when the forensic accountants were instructed by the external lawyers, and so the "dominant purpose" test was met, and as such is covered by litigation privilege.

However, the Court of Appeal did not take the opportunity to depart from its earlier decision in *Three Rivers (No.5)*, in respect of legal advice privilege. The Court of Appeal:

- felt constrained to agreed with the High Court that communications between an employee and external lawyers could not attract legal advice privilege unless that employee was part of the defined and narrow "client" group authorised to seek and receive such advice on behalf of ENRC, due to constraints of previous decisions of the Court of Appeal;
- however, noted that the *Three Rivers (No.5)* position was out of step with international common law on this issue, and it made clear that it was in favour of broadening legal advice privilege as the current position put large multi/national corporations at a significant disadvantage to small corporations, in terms of lawyers obtaining information from employees with first-hand knowledge under the protection of legal advice privilege, but concluded that would be a matter for the Supreme Court.

Client Tips

Internal investigations where there is a risk of regulatory investigation is a prime example of when a firm's external lawyers should be engaged early to advise on how best to try to protect privilege from the outset, including giving and taking instructions, engaging consultants and experts, and manage reporting processes.

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