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BRIEFING

COURT OF APPEAL GIVES BOOST TO LEGAL PROFESSIONAL PRIVILEGE

SEPTEMBER 2018

- ENGLISH COURT OF APPEAL HOLDS THAT DOCUMENTS CREATED IN INTERNAL INVESTIGATION WERE PROTECTED BY LITIGATION PRIVILEGE
- BUT SCOPE OF LEGAL ADVICE PRIVILEGE MUST WAIT FOR ANOTHER DAY

On 5 September 2018, the English Court of Appeal handed down its much-anticipated judgment in *The Director of the Serious Fraud Office ("SFO") v Eurasian Natural Resources Corporation Limited ("ENRC")*[1] on the proper scope of legal professional privilege in the context of internal investigations. The Court allowed ENRC's appeal, determining that documents shared between ENRC and its legal advisors relating to investigations into the allegations of a whistle-blower were privileged. The first instance decision was reported in a WFW briefing from August 2017.

"THERE HAS BEEN A GENERAL TREND IN RECENT ENGLISH CASES TO RESTRICT THE SCOPE OF LEGAL PROFESSIONAL PRIVILEGE."

Legal professional privilege refers to the English law principle that certain confidential communications and documents are immune from disclosure obligations that might otherwise be imposed. There are two forms of legal professional privilege: (i) legal advice privilege, which covers communications between a client and their lawyer; and (ii) litigation privilege, which covers documents created at a time when litigation is ongoing, pending or reasonably in prospect, for the dominant purpose of conducting that litigation. For a more detailed explanation, please see our previous briefing.

There has been a general trend in recent English cases to restrict the scope of legal professional privilege, particularly in light of the controversial position taken by the Court of Appeal in *Three Rivers District Council and other v Governor and Company*

[1] [2018] EWCA Civ 2006

of the Bank of England (No 5)[2]. In that case the Court apparently restricted the protection afforded by legal advice privilege to only those employees of a corporate client who are authorised to seek and receive legal advice on behalf of the company.

"ENRC ASSERTED THAT CERTAIN DOCUMENTS GENERATED DURING INVESTIGATIONS BY ITS SOLICITORS AND FORENSIC ACCOUNTS … WERE THE SUBJECT OF LEGAL ADVICE PRIVILEGE AND/OR LITIGATION PRIVILEGE."

The first instance decision

In *SFO v ENRC*[3], ENRC asserted that certain documents generated during investigations by its solicitors and forensic accountants (the "Documents") were the subject of legal advice privilege and/or litigation privilege. These investigations arose out of an email sent by an apparent whistle-blower alleging corruption and financial wrongdoing. The allegations were subsequently reported by The Times, leading to a letter from the SFO to ENRC which urged ENRC to carefully consider the SFO's self-reporting guidelines. ENRC met with the SFO and a lengthy period of correspondence and meetings between them followed, eventually culminating in the SFO's decision to commence a criminal investigation into ENRC. This led to ENRC asserting legal professional privilege in relation to the Documents, which included the following categories:

1. Notes taken by ENRC's external lawyers (Dechert) of evidence given to them by individuals (including employees and former employees) when asked about the events being investigated;
2. Material generated by forensic accounts (FRA) as part of the "books and records" review they were instructed to undertake;
3. Documents indicating or containing factual evidence presented by a partner at Dechert to ENRC's Nomination and Corporate Governance Committee and/or the ENRC Board; and
4. Documents referred to in a letter to the SFO by ENRC's counsel, including (a) FRA reports; (b) emails or letters enclosing documents relating to FRA's books and records work; and (c) emails between Mr Ehrensberger, a qualified Swiss lawyer employed as ENRC's Head of Mergers and Acquisitions, and a senior ENRC executive (the "Ehrensberger Emails").

At first instance, Andrews J found that only the documents in Category 3 were privileged. Of the Category 1 documents, there was no evidence that any of the persons interviewed were authorised to seek and receive legal advice on behalf of ENRC and in respect of the Ehrensberger Emails, Mr Ehrensberger was engaged by ENRC as a "man of business" rather than as a lawyer. As to litigation privilege, she considered that ENRC was unable to show that it was aware of circumstances which rendered litigation between itself and the SFO a real likelihood rather than a mere possibility and, even if ENRC had contemplated criminal proceedings, none of the documents were created for the dominant purpose of deployment in such proceedings.

This was widely regarded as a controversial decision as it appeared to create disclosure obligations which varied depending upon the context and the investigating body. It also made internal investigations where the SFO were involved, or were likely to become involved, very difficult to conduct.

[2] [2003] QB 1556
[3] [2017] EWHC 1017 (QB)

The Court of Appeal's decision

That decision has now been overturned by the Court of Appeal, largely as a result of its findings in relation to litigation privilege. In particular, the Court held that, based on the contemporaneous documents, criminal legal proceedings against ENRC were reasonably in contemplation when the majority of the documents were created, and that they were brought into existence for the dominant purpose of resisting those contemplated criminal proceedings.

In reaching this decision, the Court noted that:

- not every SFO manifestation of concern will be regarded as adversarial litigation, nor will every reasonable contemplation of an SFO criminal investigation mean that a criminal prosecution is also in contemplation - each case will turn on its facts;
- whilst a party will often need to make further investigations before it can say with certainty that proceedings are likely, that uncertainty will not necessarily prevent proceedings being in reasonable contemplation;
- the fact that lawyers prepare a document with the ultimate intention of showing that document to the opposing party does not automatically deprive the preparatory legal work that they have undertaken of litigation privilege (although in this case, it was an important factor that ENRC never actually agreed to disclose the materials it created in the course of its investigations to the SFO); and
- in both the civil and criminal context, legal advice given so as to avoid or settle contemplated proceedings is as much protected by litigation privilege as advice given for the purpose of resisting or defending such contemplated proceedings.

Because litigation privilege was claimed in relation to all categories of documents subject to appeal, other than the Ehrensberger Emails, the Court's decision on the ambit of legal advice privilege or the true meaning of *Three Rivers (No. 5)* was far less important. However, it commented that:

- large corporations need, as much as small corporations and individuals, to seek and obtain legal advice without fear of intrusion and the rule on legal advice privilege should be equally applicable to all clients, whatever their size and reach; and
- English law is out of step with the international common law on this issue and it is desirable for the common law in different countries to remain aligned.

"LARGE CORPORATIONS NEED, AS MUCH AS SMALL CORPORATIONS AND INDIVIDUALS, TO SEEK AND OBTAIN LEGAL ADVICE WITHOUT FEAR OF INTRUSION."

Importantly, the Court concluded with the following:

If, therefore, it had been open to us to depart from Three Rivers (No. 5), we would have been in favour of doing so…however, we do not think that is open to us, so it is a matter that will have to be considered again by the Supreme Court in this or an appropriate future case.

Conclusion

This judgment will be widely welcomed as a step back from the increasingly restrictive approach to the scope of legal professional privilege that has held sway in recent years and realigns the disclosure obligations in the context of investigations by the SFO with those in other contexts.

In particular, the Court of Appeal has made a number of helpful comments as to when adversarial proceedings are to be reasonably contemplated in a criminal and/or investigatory setting which will provide reassurance to corporates and their in-house counsel when engaging external advisors.

"IT IS UNFORTUNATE THAT THE COURT DID NOT ALSO FEEL ABLE TO CLARIFY THE DECISION IN *THREE RIVERS (NO. 5)*."

At the same time, it is unfortunate that the Court did not also feel able to clarify the decision in *Three Rivers (No. 5)*. Even if this case does not proceed to the Supreme Court for the final word on the matter, it is to be hoped that the lower courts will nevertheless take their lead from the Court of Appeal in taking a more liberal and practical approach to legal advice privilege.

FOR MORE INFORMATION

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Publication code number: Europe\62752668v1