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BRIEFING

LEGAL PROFESSIONAL PRIVILEGE AND INVESTIGATIONS – A GUIDE

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- LEGAL PROFESSIONAL PRIVILEGE CAN ENABLE PARTIES TO RESIST DISCLOSURE OF DOCUMENTS IN THE CONTEXT OF INVESTIGATIONS.
- HOWEVER, SATISFYING THE REQUIREMENTS OF LEGAL ADVICE PRIVILEGE AND LITIGATION PRIVILEGE CAN BE DIFFICULT.

Companies faced with investigation by organisations such as HM Revenue and Customs ("HMRC") or the Serious Fraud Office ("SFO") will be subject to extensive demands for internal documentation. In such cases legal professional privilege is often the only basis for resisting disclosure of the documents sought.

"RECENT DECISIONS BEFORE THE ENGLISH COURTS… HAVE HIGHLIGHTED THE COMPLEXITIES OF LEGAL PROFESSIONAL PRIVILEGE."

Accordingly, it is important when undertaking an internal investigation into matters which are or may be the subject of such external scrutiny to give careful consideration to the ability to rely on legal professional privilege.

Recent decisions before the English courts, in particular in *The RBS Rights Issue Litigation*[1] and *Director of the SFO v Eurasian Natural Resources Corporation Ltd*[2], have highlighted the complexities of legal professional privilege, and given important guidance as to when it will and will not be available.

This note summarises the position following these cases, and sets out practical steps that can be taken to protect the right to legal professional privilege in the course of internal investigations. A conservative approach must be taken to the law in this area. However, permission is being sought to appeal the decision in *SFO v Eurasian Natural Resources Corporation Ltd* and so the position may change in the future.

[1] [2016] EWHC 3161 (Ch)
[2] [2017] EWHC 1017 (QB)

"LEGAL PROFESSIONAL PRIVILEGE REFERS TO THE ENGLISH LAW PRINCIPLE THAT CERTAIN COMMUNICATIONS AND DOCUMENTS SHOULD BE IMMUNE FROM DISCLOSURE OBLIGATIONS THAT MIGHT OTHERWISE BE IMPOSED."

Legal professional privilege – an overview

Legal professional privilege refers to the English law principle that certain communications and documents should be immune from disclosure obligations that might otherwise be imposed.

The underlying purpose of this principle is to allow individuals and companies to seek legal advice and prepare for litigation in an open and honest manner without fear of the resulting communications and documents becoming evidence that may be used against them.

There are essentially two forms of legal professional privilege: legal advice privilege and litigation privilege.

1. Legal advice privilege covers:
- communications between a client and their lawyer; or
- documents created by the client or their lawyer; which were
- sent or created:

    i. on a confidential basis; and
    ii. in order to seek or give legal advice.

2. Litigation privilege covers:
- communications between a client or their lawyer and a third party; or
- documents created by a client, their lawyer, or a third party; which
- were sent or created:

    i. on a confidential basis;
    ii. at a time when litigation is ongoing, pending, or reasonably in prospect; and
    iii. for the dominant purpose of conducting that litigation.

While these requirements appear relatively simple, they raise a number of issues in the context of investigations into potential regulatory breaches or criminal activities.

Issues in relation to legal advice privilege

The key issue in relation to legal advice privilege is that it will only protect communications between a client and their lawyer. In a corporate context, this raises the question of who the "client" is for these purposes, as the corporate entity can only act through the individuals it employs.

The decisions referred to above have confirmed the long-standing, but controversial, position (set out by the Court of Appeal in *Three Rivers District Council and others v Governor and Company of the Bank of England (No 5)*[3]) that employees of a corporate client are only the "client" for the purposes of legal advice privilege if they are authorised to seek and receive legal advice on behalf of the company. This is at odds with the more generous approach taken in many jurisdictions, such as

[3] [2003] QB 1556

Singapore and the US, where any communication between a client entity's employees and its lawyers will be protected by legal advice privilege.

The effect of this is that any work carried out by, records of interviews with, or information provided to a company's lawyers by, employees who are not so authorised will not be covered by legal advice privilege. This is the case even if they come in to existence for the purpose of instructing or enabling the company's lawyers to give legal advice to the company.

This raises obvious difficulties in the context of internal investigations, as it means that even where the investigations are carried out by the company's lawyers, since it is likely that much of their communications will not be with the "client", the work done by the investigators in gathering relevant information will not be protected by legal advice privilege.

It is possible that documents produced by the company's lawyers recording communications or discussions with employees may be privileged on the basis that they are the "work product" of the client entity's lawyers. However, this will only be the case if disclosing the document would reveal or indicate the tenor or nature of the lawyer's legal advice. It will not, for example, cover notes of interviews which are mere transcripts with no legal analysis.

It has been suggested that legal advice privilege can be secured for such notes by ensuring that legal analysis is incorporated into them. However, this is likely to make the process of collecting the information much more difficult, and there is in any event no guarantee that it will successfully engage legal advice privilege.

Issues in relation to litigation privilege

In the absence of legal advice privilege, the work done in any internal investigation, and the resulting documents and communications, may be covered by litigation privilege. However, there are a number of potential pitfalls here too.

"WHERE THE RELEVANT REQUIREMENTS FOR LITIGATION PRIVILEGE ARE SATISFIED, LITIGATION PRIVILEGE WILL COVER A MUCH WIDER RANGE OF MATERIAL THAN LEGAL ADVICE PRIVILEGE."

Where the relevant requirements for litigation privilege are satisfied, litigation privilege will cover a much wider range of material than legal advice privilege. This is because it covers communications with and documents produced by third parties (i.e. which are not the client or its lawyers).

However, a number of issues must be considered when determining whether litigation privilege can be relied on in relation to materials and communications produced as part of an internal investigation.

First, the client entity must be able to evidence that litigation was in its reasonable contemplation at the time that the documents or correspondence in question were created. 'Litigation' in this context means 'adversarial proceedings'. This will clearly cover civil litigation proceedings and criminal prosecutions. However, the position in relation to investigations by third parties such as the SFO or HMRC is less clear cut.

In *SFO v Eurasian Natural Resources Corporation Ltd* it was held that the fact that an ongoing investigation by the SFO might lead to a prosecution is not sufficient. In order for litigation privilege to apply to documents created during or prior to such an investigation, the client entity must have known or had very strong evidence that the investigation would uncover facts which would lead to a prosecution. The mere fact

that a prosecution is a possible outcome does not mean that litigation is within the reasonable contemplation of the company.

Second, the dominant purpose for which the document was created must have been the conduct of the anticipated litigation. It is not sufficient that this is one of a number of equally important purposes.

Finally, litigation privilege will not cover documents created with the intention that they will be shown to the investigating entity, for example to demonstrate that the matter has been resolved internally and no external investigation is necessary, irrespective of whether they ultimately are provided to the investigating entity.

All of these points impose significant limitations on the applicability of litigation privilege to investigations. Therefore, if it is intended that any internal investigation or preparations will be covered by litigation privilege then it is important to give very careful consideration to whether the above requirements are satisfied.

"GREAT CARE SHOULD … BE TAKEN IN RELATION TO WHAT DOCUMENTS AND COMMUNICATIONS ARE CREATED IN THE COURSE OF AN INVESTIGATION."

Great care should also be taken in relation to what documents and communications are created in the course of an investigation, as it is clear that there is a significant risk that documents will be held by the courts to fall outside the protection of litigation privilege despite assertions to the contrary. This was the decision reached by the court in relation to the vast majority of the documents which were the subject of the *SFO v Eurasian Natural Resources Corporation Ltd* decision.

Practical considerations

When considering launching or carrying out an internal investigation, or undertaking work in preparation for an external investigation, the following precautions can be taken in order to minimise the risk of documents the client entity wishes to be privileged becoming disclosable:

- Clearly identify the employees of the client entity who are authorised to seek and receive legal advice on its behalf.
- It has been suggested (in non-binding comments in the case law) that only directors and in-house legal counsel, as the "directing mind" of the company, can be so authorised. This point has not yet been decided. However, if it is intended that employees who fall outside of these categories will be authorised to give or receive legal advice, then you should consider producing a formal document recording their authorisation.
- Where you do formally record the individuals authorised to seek and receive legal advice on behalf of the client entity, be sure to keep this authorisation up to date as personnel change or the team expands, or consider authorising a tightly defined class or group of employees rather than specific individuals.
- Bear in mind that communications between the client entity's lawyers and employees who are not authorised to seek and receive legal advice on its behalf will generally not be privileged unless litigation privilege can be relied on.
- If you intend to rely on litigation privilege in relation to an internal investigation, be sure to:
  - record clearly the nature of the litigation that you consider is reasonably in prospect, from when it was in prospect, and the reasons why you consider it is in prospect; and

  - as soon as possible after you determine that litigation is in prospect, issue a document retention notice to all potential custodians of relevant material, as this is required for the purposes of English litigation.
- Be careful as to who provides and/or receives any relevant information or legal advice.
- Unless plainly privileged, ensure that all such written material is prepared on the basis that it may be disclosable to third parties.

FOR MORE INFORMATION

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