STEPHENSON HARWOOD

BANKING AND FINANCIAL SERVICES LITIGATION GROUP WEBCAST SERIES 2018

An update on privilege following the Court of Appeal's judgment in SFO v ENRC [2018] EWCA Civ 2006

Ben Sigler, Partner

Welcome to our webinar on the Court of Appeal's judgment in ***Director of the Serious Fraud Office ("SFO") v Eurasian Natural Resources Corporation Ltd ("ENRC")*** **[2018] EWCA Civ 2006**.

This judgment overturned an earlier, controversial, judgment of Andrews J ***(Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd*** **[2017] EWHC 1017 (QB))**, pursuant to which ENRC was ordered to disclose documents created by external solicitors and forensic accountants in the course of an internal investigation into alleged corruption to the SFO as they were not covered by litigation privilege as ENRC had alleged.

In overturning Andrews J's judgment, the Court of Appeal has restored the previously-understood orthodoxy around the scope of litigation privilege giving companies and their advisors reassurance that documents created in the course of internal investigations into alleged criminality may be capable of being privileged against disclosure.

The facts

In December 2010, ENRC received an email from an apparent whistle-blower alleging corruption and financial wrongdoing at ENRC's Kazakh subsidiary and instructed solicitors in London to investigate the allegations contained in the email. Thereafter, allegations of corruption involving ENRC reached the public domain (in April 2011, an MP wrote to the SFO asking it to investigate ENRC's business in Africa and in August 2011, *The Times* reported on the allegations relating to ENRC's Kazakh subsidiary).

Emails from Spring 2011 demonstrated that, at that time, ENRC's General Counsel and Head of Compliance were concerned about the prospect of an imminent "dawn raid" by the SFO.

By Summer 2011, ENRC's investigation, conducted by its London solicitors, had expanded to cover allegations of corruption in both Kazakhstan and Africa; forensic accountants had been instructed to conduct a "books and records review" and ENRC's solicitors also began conducting interviews with ENRC's current and former employees.

On 10 August 2011, the SFO wrote to ENRC regarding *"recent intelligence and media reports concerning allegations of corruption and wrongdoing [by ENRC]*". The SFO's letter invited ENRC to a meeting to discuss the allegations and urged ENRC to consider its July 2009 Self-Reporting Guidelines. However, the letter concluded by saying that the SFO was, at that stage, not conducting a criminal investigation into ENRC.

Throughout the remainder of 2011, and the entirety of 2012, ENRC's investigation continued. ENRC's solicitors were in regular dialogue with the SFO about its progress, indicating a willingness to share the fruits of their investigation with the SFO, and met with the SFO to provide periodic updates and also provided updates on the investigation to the Board of ENRC.

In March 2013, no formal report from ENRC having been provided in relation to the outcome of its investigation, the SFO served a compulsory notice on ENRC's solicitors under S2 of the Criminal Justice Act 1987 seeking disclosure of documents relevant to its determination of

whether a criminal investigation should be opened into ENRC (which ultimately occurred in April 2013).

ENRC asserted legal professional privilege over the documents disclosure of which had been sought.

The proceedings

In February 2016, the SFO issued a Part 8 Claim against ENRC for a declaration that legal professional privilege did not, in fact, attach to four specific categories of documents disclosure of which had been sought from ENRC's solicitors (together the **"Documents"**):

- **Category 1:** Notes taken by ENRC's solicitors of interviews with current and former employees of ENRC, created between August 2011 and March 2013 (the **"Interview Notes"**);
- **Category 2:** Material generated by the forensic accountants that were instructed to undertake the "books and records review", created between May 2011 and January 2013 (the **"Books and Records Documents"**);
- Category 3: PowerPoint Slides used by ENRC's solicitors to provide briefings on the investigation and legal advice to the Board and Corporate Governance Committee of ENRC (the **"PowerPoint Slides"**); and
- Category 4: Nine reports generated by the forensic accountants and six emails / letters enclosing copies of those reports and two emails dating from October 2010 sent to and from ENRC's Head of Mergers and Acquisitions, which ENRC asserted were drafted for the purpose of seeking legal advice on behalf of ENRC (the **"October 2010 Emails"**).

The judgment at first instance

At first instance, Andrews J granted the declaration sought by the SFO in respect of Categories 1, 2 and 4 holding that legal professional privilege (either legal advice privilege or litigation privilege) did not attach to the Documents.

Litigation privilege

Litigation privilege applies to communications between a client or its lawyer and a third party made in connection with adversarial litigation, provided that: (1) litigation is in progress or in reasonable prospect; and (2) the communications are for the sole or dominant purpose of conducting that litigation.

Andrews J held that litigation privilege did not attach to the Documents as:

- Adversarial litigation was not reasonably in contemplation before the documents were created (i.e. criminal proceedings):
    - In August 2011 (or before) ENRC may have reasonably contemplated a criminal investigation. However, for the purposes of litigation privilege, reasonable contemplation of a criminal investigation (which Andrews J considered did not amount to adversarial litigation) is not the same as reasonable contemplation of criminal prosecution.
    - Andrews J emphasised that, in her view, there was a "critical" difference between civil and criminal proceedings, in that there is *"no inhibition of commencement of civil proceedings where there is no foundation for them."* By contrast, criminal proceedings cannot be commenced unless a prosecutor is satisfied that there is a sufficient evidential basis for prosecution and that the public interest test is met; and, in any event
- Even if litigation had been in reasonable contemplation, the documents were not created for the "dominant purpose" of conducting that litigation:

- The solicitors who generated the Category 1 documents were instructed as *"information gatherers rather than as legal advisers"*;
- Taking legal advice in relation to the conduct of future contemplated criminal litigation was not *"even a subsidiary purpose of the creation of those documents, let alone the dominant purpose"*;
- The dominant purpose of the books and records review *was "plainly to meet compliance requirements or to obtain accountancy advice on remedial steps"*; and
- In November 2011, ENRC's general counsel wrote to the SFO indicating that the product of the internal investigation would be shared with the SFO and, in Andrews J's view, documents created *"with the specific purpose or intention of showing them to the potential adversary in litigation"* were not capable of being subject to litigation privilege.

Legal advice privilege

Legal advice privilege applies to confidential communications passing between lawyer and client in connection with the giving or receiving of legal advice, and covers both documents containing or requesting legal advice and documents which form part of the continuum of communications between lawyer and client as part of the process of giving and receiving legal advice.

Andrews J rejected ENRC's claim to legal advice privilege in respect of the Interview Notes and the October 2011 Emails, holding amongst other things that, following ***Three Rivers District Council and Others v. Governor and Company of the Bank of England* (No. 5) [2003] QB 1556** employees who were interviewed by ENRC's solicitors were not authorised to seek and receive legal advice on behalf of ENRC, and were not therefore, part of the client team, and, accordingly, communications with them, including those recorded by the Interview Notes, were not subject to legal advice privilege.

However, legal advice privilege was held by Andrews J to attach to the PowerPoint Slides as:

- The evidence showed that they were prepared for the purpose of giving legal advice to the Board – as opposed to merely reporting factual findings – and were thus *"plainly privileged"* even though the PowerPoint Slides made reference to factual information that would not otherwise be privileged; and
- Legal advice privilege attached to any record of what the solicitors said at the Board meetings (whether made by a lawyer or not), even if reference was made to information therein which would not otherwise be privileged.

The Court of Appeal's judgment (*Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006)

The Court of Appeal rejected Andrews J's findings on litigation privilege finding that litigation privilege attached to the Documents in Categories 1, 2 and 4 (save for the October 2011 Emails).

Litigation "reasonably in contemplation"

The Court of Appeal held that this was a question of fact and, whilst it is not clear that *"every SFO manifestation of concern would properly be regarded as adversarial litigation", in this case litigation was "in reasonable contemplation when [the SFO] commenced its investigation in April 2011, and certainly by the time it received the SFO's August 2011 letter" emphasising that "the entire subtext of the relationship between ENRC and the SFO was the possibility, if not the likelihood, of prosecution".*

In making this finding the Court of Appeal appeared to place weight on, amongst other things, evidence that ENRC had received advice from its solicitors in April 2011 to the effect that *"both criminal and civil proceedings can be reasonably said to be in contemplation".*

Notably, the Court of Appeal also recognised that an international corporation (as opposed to an individual) will often be uncertain as to the nature and extent of any potential criminal liability, and will need to conduct an investigation before it can say with certainty that proceedings are likely, but this uncertainty would not prevent proceedings being *"in reasonable contemplation".*

The Court of Appeal also rejected Andrews J's distinction between litigation privilege in civil and criminal contexts as *"illusory",* finding that *"it would be wrong for it to be thought that, in a criminal context, a potential defendant is likely to be denied the benefit of litigation privilege when he asks his solicitor to investigate the circumstances of any alleged offence".*

The "dominant purpose" of the internal investigation

The Court of Appeal held, contrary to Andrews J's analysis, that documents created to avoid, as well as resist, proceedings were protected by litigation privilege, and that this was the dominant purpose behind the creation of the Documents in Categories 1, 2 and 4 (save for the October 2011 Emails).

Although ENRC had initially instructed its solicitors to investigate the whistle-blower's allegations, and subsequently the Africa allegations, the Court of Appeal concluded that the investigation "must be brought into the zone where the dominant purpose may be to prevent or deal with litigation". Following ***Re Highgrade Traders [1984] BCLC 151*** the Court of Appeal held that the need to *"investigate the existence of corruption in this case was just a subset of the defence of contemplated legal proceedings."*

Andrews J's finding that the forensic accountant's work product and reports in Categories 2 and 4 were created for *"compliance or remediation"* purposes, and not for the dominant purpose of litigation, was rejected by the Court of Appeal, which observed that *"although a reputable company will wish to ensure high ethical standards in the conduct of its business for its own sake, it is undeniable that the 'stick' used to enforce appropriate standards is the criminal law and, in some measure, the civil law also" adding that the compliance and remediation work "might itself have been intended to avoid or deal with litigation".*

Finally, Andrews J's finding that ENRC brought documents into existence for the specific purpose of their being shown to the SFO was also rejected. The Court of Appeal held that the fact that a document is created with the specific purpose of being shown to the other side in litigation (for example, a response to a claim) does not mean that the advice received in respect of the creation of that document is not privileged: *"[t]he discussions surrounding the drafting of such a letter would be as much covered by litigation privilege as any other work done in preparing to defend the claim."*

Legal advice privilege

The Court of Appeal agreed with Andrews J's interpretation of ***Three Rivers (No. 5)*** as limiting legal advice privilege only to those communications between a lawyer and those persons authorised to seek and receive legal advice on behalf of the client.

Given its findings regarding litigation privilege, it was not necessary for the Court of Appeal to determine whether legal advice privilege attached to the Documents, and therefore whether ***Three Rivers (No. 5)*** was properly decided, which it considered should be deferred to the Supreme Court, in any event (to avoid the existence of conflicting Court of Appeal authorities).

However, the Court of Appeal did indicate that it supported the submissions of counsel for ENRC, and the Law Society, which had intervened in the appeal, that ***Three Rivers (No. 5)*** had been wrongly decided, noting that this decision resulted in larger organisations being in a less advantageous position than individuals and small businesses: *"If legal advice privilege*

is confined to communications passing between the lawyer and the "client" (in the sense of the instructing individual or those employees of a company authorised to seek and receive legal advice on its behalf), this presents no problem for individuals and many small businesses, since the information about the case will normally be obtained by the lawyer from the individual or board members of the small corporation… however, we have to cater for legal advice sought by large national corporations and indeed multinational ones. In such cases, the information upon which legal advice is sought is unlikely to be in the hands of the main board or those it appoints to seek and receive legal advice. If a multi-national corporation cannot ask its lawyers to obtain the information it needs to advise that corporation from the corporation's employees with relevant first-hand knowledge under the protection of legal advice privilege, that corporation will be in a less advantageous position than a smaller entity seeking such advice."

Practical implications of the Court of Appeal's judgment

The Court of Appeal's judgment will be well received by in-house counsel and external legal advisors alike, where dealing with internal investigations into criminal and regulatory issues.

Litigation privilege

The judgment affords significantly more comfort than Andrews J's controversial ruling regarding the potential availability of litigation privilege in the context of internal investigations, recognising, entirely sensibly, that the public interest is best served in permitting companies to investigate allegations of wrongdoing with the protection of legal professional privilege, and that, if such protections are not available, companies might be tempted not to investigate such allegations at all, contrary to the SFO's policy of encouraging companies to self-report, supported by the availability of Deferred Prosecution Agreements.

Perhaps most critically, the judgment clarifies that the fact that a company has not yet comprehensively established the veracity of allegations of wrongdoing will not prevent it from asserting that litigation is in reasonable contemplation.

However, it must be borne in mind that the facts of this case are exceptional. At the time the whistle-blower's allegations came to light, ENRC was a FTSE 100 company. Allegations of corruption were widely aired in the press and were the subject of a letter from an MP to the SFO. For a year and a half ENRC was in dialogue with the SFO about self-reporting. On these singular facts, it is perhaps unsurprising that ENRC had reason to contemplate legal proceedings from a relatively early stage in its investigation.

Most cases, where an allegation of criminality emerges, bear little or no resemblance to these facts. Therefore, despite the comfort which the Court of Appeal's judgment offers, the question of when criminal litigation is in *"reasonable contemplation"* so as to trigger the protection of litigation privilege, will, in the vast majority of cases, continue to require careful thought.

Indeed, the prudent course may often be for companies to proceed on the basis that litigation privilege will not apply to documents created in the course of an investigation, although it may well be arguable to the contrary, particularly where, for example, the relevant authorities are unaware of the allegations being investigated.

Legal advice privilege

That the Court of Appeal considered itself unable to depart from ***Three Rivers (No. 5)*** is unsurprising, but the Court of Appeal's indication that it would have made a contrary finding on the ambit of legal advice privilege had it been able to do so is noteworthy. So long as ***Three Rivers (No. 5)***, as understood and applied by the Court of Appeal in ENRC, remains authoritative, companies must take great care in identifying the group of individuals who will act as the *"client"* for the purpose of giving instructions and receiving legal advice, at the outset of any investigation.

Only communications between the *"client"* group and legal advisors will be protected by legal advice privilege (albeit they may instead be protected by litigation privilege, as was held to be the case in respect of the Interview Notes) and factual summaries of any investigation can be protected by legal advice privilege (as the PowerPoint slides were found to be in ENRC) only where they form part of the continuum of legal advice which is being provided.

However, if the SFO's application for permission to appeal to the Supreme Court is granted, it is possible that the question of the proper ambit of legal advice privilege, in a corporate context, will be determined conclusively in the near future.

Evidence / actions supporting any claim to privilege

Finally, the Court of Appeal's judgment reinforces that carefully documenting: (1) the composition of the *"client"* team; and (2) the basis on which a party considers litigation to be in reasonable contemplation; at the outset of an investigation is critical in substantiating any claim to privilege. It also reinforces the view, articulated by Vos J in ***Bilta (UK) Ltd v Royal Bank Of Scotland Plc & Anor [2017] EWHC 3535 (Ch)***, that early instruction of external counsel may support any claim to litigation privilege, albeit it will not be determinative thereof.

Postscript – confusion restored?

Whilst practitioners were still celebrating the restoration of the status quo by the Court of Appeal in ***ENRC***, Arnold J's judgment in ***The Financial Reporting Council v Sports Direct International plc [2018] EWHC 2284 (Ch)***, published only a matter of days later, ensured that the status quo regarding legal professional privilege was short-lived.

In short, Sports Direct International PLC **("Sports Direct")** was ordered to disclose to the Financial Reporting Council **("FRC")** documents which SDI had successfully demonstrated were covered by legal professional privilege, on the basis that such documents would be disclosed solely for the purposes of the FRC conducting an investigation into Sports Direct's auditor.

Surprisingly, Arnold J considered that such an order did not represent an infringement of Sport Direct's privilege in these documents.

A detailed analysis of Arnold J's decision is beyond the scope of this webinar and can be found here: **https://www.shlegal.com/insights/frc-v-sports-direct**

However, its practical implications are concerning, as, amongst other things, it raises the possibility:

- of the privileged documents obtained by the FRC potentially being:
- relied on in the course of proceedings against Sport Direct's auditor, thereby potentially becoming public; and
- shared with other regulators via relevant gateways; and
- that this decision may be considered to set a precedent which other regulators may seek to follow.

This judgment, which, like Andrews J's judgment in ***ENRC***, is considered highly controversial, is also subject to appeal, and we can therefore expect further significant developments in the law of privilege in the near future.

Update as of 2 October 2018

On 2 October 2018, the SFO confirmed that it was no longer seeking leave to appeal to the Supreme Court in ***ENRC***.

Therefore the approach to identifying legal advice privilege specified in ***Three Rivers (No. 5)*** will remain good law for the foreseeable future.

Judgments referred to in this webcast

Links to the judgments referred to in this webinar can be found below:

Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd **[2018] EWCA Civ 2006 –** **https://www.bailii.org/ew/cases/EWCA/Civ/2018/2006.html**

Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd **[2017] EWHC 1017 (QB) -** **https://www.bailii.org/ew/cases/EWHC/QB/2017/1017.html**

Three Rivers District Council and Others v. Governor and Company of the Bank of England (No. 5) **[2003] QB 1556** - **https://www.bailii.org/ew/cases/EWCA/Civ/2003/474.html**

The Financial Reporting Council v Sports Direct International plc **[2018] EWHC 2284 (Ch) - https://www.frc.org.uk/getattachment/7625670e-05a9-49ec-ba2e-8051248790de/FRC-v-SDI-judgment-Final.pdf**

Bilta (UK) Ltd v Royal Bank Of Scotland Plc & Anor **[2017] EWHC 3535 (Ch) - https://www.bailii.org/ew/cases/EWHC/Ch/2017/3535.html**