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English High Court Decision Further Curtails Application of Legal Privilege in Internal Investigations

Corporations should take steps to ensure their internal investigations are not used against them in English litigation.

A recent decision in an English court could have important consequences for internal corporate investigations. The decision in *Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 contains a severely restrictive approach to the applicability of legal privilege to internal investigations unless conducted for the dominant purpose of defending against criminal prosecutions. This could be a real concern since prosecutions are a rarity in the context of white-collar corporate enforcement actions. Following the decision in the *RBS Rights Issue Litigation*, which likewise took a restrictive view of the applicability of legal privilege to internal investigations, this case indicates an important trend that may present significant issues in the conduct of investigations.

The Decision

The decision is the first to consider the position of litigation privilege in the context of internal investigations for the purpose of engaging in discussions with, and responding to, the UK Serious Fraud Office (SFO). In August 2011, the SFO entered into a lengthy period of dialogue with Eurasian Natural Resources Corporation (ENRC) regarding alleged violations of the UK Bribery Act. After those discussions broke down, the SFO sought a declaration from the court that certain documents generated between 2011 and 2013 (during investigations undertaken by ENRC's solicitors and forensic accountants) were not, as ENRC maintained, subject to legal professional privilege — either legal advice privilege or litigation privilege. Both of these concepts are discussed below.

ENRC sought to prevent disclosure of four disputed categories of documents:

- Notes that ENRC's then legal advisers took of the evidence individuals gave them when asked about the events being investigated
- Materials that forensic accountants generated as part of "books and records" reviews ENRC carried out with a focus on identifying controls and systems weaknesses and potential improvements
- Documents indicating or containing the factual evidence that ENRC's then legal advisors presented to ENRC's corporate governance committee and/or its board
- Several documents ENRC's replacement legal advisers referred to in a letter to the SFO

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The Court ruled that litigation privilege did not apply to any category and legal advice privilege only applied to the third category above.

Litigation Privilege

Under English law, documents prepared for the dominant purpose of litigation which is "reasonably in contemplation" will be privileged, even if not part of a communication with a legal advisor. The Court held that one of the conditions for litigation privilege is that the litigation in question must be "adversarial, not investigative or inquisitorial." The Court noted that the purpose of litigation privilege is to enable someone to prepare for the conduct of reasonably anticipated litigation. The party claiming litigation privilege must show that the circumstances rendered litigation a "real likelihood rather than a mere possibility." This is an objective test, albeit the Court must consider the actual state of mind of the party claiming litigation privilege.

Investigations Distinct From Prosecutions

ENRC argued that an SFO criminal investigation should be treated as adversarial litigation. The Court disagreed. An SFO investigation is a preliminary step distinct from and prior to any decision to prosecute. The reasonable contemplation of a criminal investigation does not necessarily equate to the reasonable contemplation of a prosecution, and each case will turn on its facts.

The Court noted criminal proceedings were different from civil proceedings, as the latter might be commenced (and therefore reasonably in contemplation) even without a proper foundation. Accordingly, criminal proceedings "cannot be reasonably contemplated unless the prospective defendant knows enough about what the investigation is likely to unearth or has unearthed to appreciate that it is realistic to expect a prosecutor to be satisfied that it has enough material to stand a good chance of securing a conviction." On the facts, the Court did not accept that anyone regarded a prosecution of ENRC as anything more than a possibility, or even that ENRC believed that evidence implicating it in wrongdoing was likely to emerge from an investigation.

Dominant Purpose of Preventing Prosecution

The Court held that none of the disputed documents was created for the dominant purpose of deployment in, or obtaining legal advice relating to the conduct of, criminal proceedings. Taking legal advice in relation to the conduct of future contemplated criminal litigation (*e.g.,* preparing a defence brief) was not even a subsidiary purpose of the creation of those documents, let alone the dominant purpose.

The Court rejected ENRC's submission that litigation privilege extends to third-party documents created in order to obtain legal advice as to how best to avoid contemplated litigation. The judge held that equipping yourself with evidence to enable you to conduct your defence (*e.g.,* considering evidence and tactics) free from the risk that your opponent will discover how you are preparing yourself is entirely different to equipping yourself with evidence that you hope may enable you (or your legal advisers) to persuade your opponent not to commence proceedings against you in the first place.

Legal Advice Privilege

The Court reaffirmed the long-standing proposition under English law that legal advice privilege attaches to all communications passing between the client and its lawyers acting in their professional capacity, in connection with the provision of legal advice, without the need for litigation to be contemplated.

However, the Court held that case law did not support the contention that, if the lawyer is carrying out or directing a fact-finding or evidence gathering exercise even if litigation is not in contemplation, the fruits of his or her labours should be privileged from disclosure, independent of any communication, simply

because the purpose of the exercise is to enable the lawyer to give advice. A document that would not be privileged if not made by a lawyer does not acquire privilege simply because he or she has created it. Rather, to attract privilege, such documents must betray the trend of legal advice given on the client's behalf.

The Court rejected ENRC's submissions that if a company retains a lawyer to carry out investigations in order to provide the company with legal advice, and that require the lawyer to speak to persons other than the directly instructing body within the company, the substance of the lawyer's communications with those persons is governed by legal advice privilege. Following the *RBS Rights Issue Litigation* the Court reasoned that whilst an employee may be authorized to hand over the information to lawyers, the employee does not thereby become part of the confidential lawyer/client relationship; the employee's act in handing over the information cannot be treated as a communication by the company with its lawyers for the purposes of seeking receiving the legal advice. If the party asserting privilege is a corporate entity, legal advice privilege attaches only to communications between the lawyer and those individuals who are authorized to obtain legal advice on that entity's behalf.

The Court accepted that in the context of a company, the person giving the instructions to counsel (*e.g.,* in-house counsel) may not necessarily be the same as the person receiving the advice (*e.g.,* a board member). However, the Court did not accept that any of the persons interviewed were authorized to seek or receive legal advice on behalf of ENRC.

As a sub-category of legal advice privilege, the Court also considered privilege attaching to a lawyer's working papers. In accordance with the general position, these papers will only be privileged if they would betray the tenor of the legal advice given. Thus, a client cannot obtain the protection of legal advice privilege over interview notes that would not be privileged if the client rather than the lawyer had interviewed the witness. On the facts of the case, slides that ENRC's external lawyers prepared for the specific purpose of giving legal advice to the ENRC board, were privileged, even if the slides referred to factual information.

Summary of Decision:

Several key holdings emerge from the judgment:

- Documents prepared for the purpose of a criminal investigation (as opposed to a prosecution) did not attract litigation privilege.
- Documents prepared for the dominant purpose of avoiding a prosecution (as opposed to preparing a defence brief) did not attract litigation privilege.
- The records of a fact-finding or evidence gathering process did not attract legal advice privilege, even if produced by a lawyer, and even if not verbatim records.
- A lawyer's notes and other working papers did not attract legal advice privilege, unless they betrayed the tenor of legal advice.

Distinctions with US Law

This decision furthers the divide between the US and UK on the applicability of privilege in internal investigations. In the US, the idea that a properly structured internal investigation can be covered by privilege is virtually unquestioned. The US Attorney's Manual, the principal guidance document for the Department of Justice (DOJ) in respect of how it conducts investigations and prosecutions, acknowledges

that "[m]any corporations choose to collect information about potential misconduct through lawyers, a process that may confer attorney-client privilege or attorney work product protection on at least some of the information collected."[1] Moreover, prosecutors in the US cannot use a corporation's assertion of privilege — or its failure to waive it — when assessing whether the corporation is eligible for cooperation credit.[2] Since parties seek cooperation credit precisely to avoid criminal proceedings, the necessary implication is that in the US privilege can apply at the preliminary stage of an investigation, before formal proceedings are even contemplated.

The upshot is that work conducted by laywers, or under their direction, are generally protected as privileged under the venerable *Upjohn* case if one of the significant purposes of the investigation is to obtain legal advice.[3] The impetus for that legal advice, be it a criminal investigation, regulatory requirements, or internal corporate policy, does not matter so long as there is some showing that the fact-finding is being conducted to allow lawyers to provide their clients with legal advice.[4] This broad view contrasts sharply with the approach adopted in the ENRC case, in which the purpose of the fact finding must be to prepare for a criminal prosecution that is reasonably in contemplation. As a result, the US approach is significantly broader than the approach established in the UK and is more protective of documents created during the course of an investigation.

Key Take-Aways

Unless overturned on appeal or in subsequent cases, the ENRC decision will severely limit claims in any English proceedings (whether civil or criminal) to privilege over documents created in internal investigations, whether conducted in the UK, US or elsewhere. Accordingly, this is an issue of concern to any organization if the subject matter of an investigation could be relevant to any English proceedings. In particular, the requirement that a criminal prosecution be reasonably contemplated before litigation privilege will apply may incentivize corporations to delay their investigative activities until such an adversarial proceeding becomes likely. These legal principles with the UK highlight the need for corporations to take advice on how best to structure and carry out investigations into potential wrongdoing if there is any prospect of English proceedings, either civil or criminal, and to take great care in conducting them.

Whilst the decision is a difficult one for corporations facing increasing regulatory scrutiny, several considerations could help mitigate risk:

- Consider carefully the potential for criminal proceedings at the outset of your investigation. If you can conclude that the investigation is for the dominant purpose of preparing for criminal proceedings, document that decision clearly, with a view to relying on it as evidence in a challenge in English proceedings.

- Consider whether documents could qualify for legal advice privilege under English law, for example if they betray the trend of legal advice given. In practice, this would mean ensuring that notes reflect substantially more lawyer thought processes than a transcription of an interview.

- Take English legal advice at the outset if there is any prospect of the subject matter being litigated in the English courts whether through a UK enforcement action or civil proceedings (whether the organization would be claimant or defendant); this can help counsel appropriately tailor an investigation to maximize the privilege umbrella.

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Endnotes

1 See U.S. Attorney's Manual: Principles of Federal Prosecution Of Business Organizations, 9-28.000, available at https://www.justice.gov/usam/united-states-attorneys-manual.

2 Id.

3 *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

4 See *In re Kellogg Brown & Root, Inc. et al.*, No. 14-5055, 2014 WL 2895939 (D.C. Cir. June 27, 2014).