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Legal Update
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English Court of Appeal rules that SFO not entitled to internal investigation documents

In a keenly awaited judgment, the Court of Appeal has held that documents prepared during an internal investigation are protected by litigation privilege. It disagreed with many of the factual findings made by Andrews J at first instance which led her to conclude that litigation privilege did not apply in this case.

The Court of Appeal judgment[1] is also interesting for the criticism made by senior members of the judiciary of the judgment of a differently constituted Court of Appeal on the scope of legal advice privilege in Three Rivers (No. 5),[2] a decision which has long been controversial. This Court of Appeal judgment highlights how the law as it stands is out of step with other common law jurisdictions and puts large/multinational corporations in a less advantageous position than smaller entities, emphasising that the law should apply in a like way to parties of all types (whether individuals, small companies or large corporations). The Court of Appeal acknowledge, however, that Three Rivers (No. 5) can only be overturned by the Supreme Court and until then lower courts remain bound to follow it.

Background

Alerted by a whistle-blower to possible fraud, bribery and corruption in its business in late 2010, London-headquartered mining company Eurasian Natural Resources Corporation Limited ("**ENRC**") instructed lawyers and forensic accountants to conduct investigations between 2011 and 2013. A lengthy period of dialogue between ENRC and the SFO commenced in August 2011, with the SFO urging ENRC to consider its self-reporting guidelines, and culminated in the SFO starting an ongoing criminal investigation against ENRC in late April 2013. It issued notices compelling the production of documents, including statements and evidence provided by the company's employees and officers and the work of its forensic accountants, which ENRC resisted on the basis that these documents were protected by legal professional privilege.

The main documents in issue were interview notes, i.e. notes taken by ENRC's lawyers of evidence given to them by employees, former employees, and officers of the company or its subsidiaries who were interviewed between August 2011 and March 2013; and materials generated by forensic accountants as part of a "books and records" review undertaken between May 2011 and January 2013.

The SFO applied to the court for declarations that the documents it sought were not privileged and, in May 2017, Andrews J granted the declarations sought.

ENRC's appeal was heard in July 2018 by Sir Brian Leveson, President of the Queen's Bench Division, Sir Geoffrey Vos, Chancellor of the High Court and Lord Justice McCombe. Their single judgment was handed down on 5 September 2018. They allowed the appeal against Andrews J's declarations that the documents were not covered by litigation privilege but otherwise dismissed the appeal.

Legal Professional Privilege

Legal professional privilege is now considered to be a fundamental right. Documents which are privileged can be withheld from third parties to whom disclosure obligations are otherwise owed, including both civil parties and law enforcement bodies. The client (who has the right to assert privilege) can, however, choose to waive privilege in a document. Regulatory and law enforcement agencies, such as the FCA and SFO, encourage those under investigation to be as open as possible with them, which may include sharing privileged documents. Although they cannot compel

1 [2018] EWCA Civ 2006
2 [2003] QB 1556

such disclosure, the SFO often encourages parties voluntarily to disclose such material as an indicia of cooperation as part of a company's efforts to be offered a Deferred Prosecution Agreement ("**DPA**").

In English law legal professional privilege has two heads: legal advice privilege and litigation privilege. A document may be protected by either head of privilege or by both. In recent years a number of cases have examined the scope of both heads of privilege, notably in the context of internal investigations.

Litigation Privilege

The test for when litigation privilege applies was set out by Lord Carswell in *Three Rivers District Council v Bank of England (No. 6)* [2004] UKHL 48:

> "*Communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation attracts litigation privilege when, at the time of the communication in question, the following conditions are satisfied:*
>
> *(a) litigation is in progress or reasonably in contemplation;*
>
> *(b) the communications are made with the sole or dominant purpose of conducting that anticipated litigation;*
>
> *(c) the litigation must be adversarial, not investigative or inquisitorial.*"

At first instance, Andrews J held that the claim for litigation privilege failed at the first hurdle because ENRC was unable to establish that a prosecution was in reasonable contemplation when the documents were created; but, even if it had been, the documents in issue were not created with the dominant purpose of being used in the conduct of such proceedings.

The Court of Appeal took the view that Andrews J had regarded the case as primarily concerning litigation privilege so they approached it in the same way. They considered two main issues.

Issue 1: was the judge right to determine that, at no stage before all the documents had been created, criminal legal proceedings against ENRC or its subsidiaries or their employees were reasonably in contemplation?

Issue 2: was the judge right to determine that none of the documents was brought into existence for the dominant purpose of resisting contemplated criminal proceedings against ENRC or its subsidiaries or their employees?

The Court of Appeal judged that Issue 1 was "primarily factual" but as Andrews J had not seen ENRC's witnesses cross-examined, the appeal judges considered that they were in as good a position as the judge at first instance had been to evaluate the facts. Having reviewed the contemporaneous documents, they concluded that a criminal prosecution was reasonably in contemplation when the documents were created:

- The whole sub-text of the relationship between ENRC and the SFO was the possibility, if not the likelihood, of prosecution if the self-reporting process did not result in a civil settlement. The judge appeared to have disregarded the evidence of ENRC's solicitor to that effect and it was not open to her to do so.
- Whilst not "every SFO manifestation of concern would properly be regarded as adversarial litigation", when the SFO specifically makes clear to a company the prospect of prosecution and legal advisers are engaged to deal with that, there is clear ground for contending that criminal prosecution is in reasonable contemplation.
- Agreeing with Andrews J that "the reasonable contemplation of a criminal investigation does not necessarily equate to the reasonable contemplation of a prosecution", the Court of Appeal emphasised that each case turns on its own facts. Here, the evidence pointed towards contemplation of a prosecution if the self-reporting process did not succeed in averting it.
- Although a party anticipating a possible prosecution will often need to investigate before it can be certain that a prosecution is likely, uncertainty does not prevent proceedings being in reasonable contemplation.
- The distinction that the judge made between civil and criminal proceedings was "illusory". 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.

On the application of the dominant purpose test (Issue 2), the Court of Appeal said that the exercise of determining dominant purpose in each case is a determination of fact. When summarising the relevant legal principles, Andrews J had effectively stated that documents created in order to obtain legal advice on how best to avoid contemplated litigation were not covered by litigation privilege. The Court of Appeal disagreed.

> *"Legal advice given to head off, avoid or even settle reasonably contemplated proceedings is as much protected by litigation privilege as advice given for the purpose of resisting or defending such contemplated proceedings".*

Andrews J found that ENRC's dominant purpose in the investigation was to investigate the facts to see what had happened and to deal with issues of compliance and governance. Unpacking the words "compliance" and "governance", the Court of Appeal point out that the stick used to enforce appropriate compliance and governance standards is the criminal, and sometimes the civil, law.

> *"Thus, where there is a clear threat of a criminal investigation, even at one remove from the specific risks posed by the SFO should it start an investigation, the reason for the investigation of whistle-blower allegations must be brought into the zone where the dominant purpose may be to prevent or deal with litigation."*

The Court of Appeal also disagreed with the judge's conclusion that there was overwhelming evidence that the notes of interviews with employees and third parties taken by ENRC's solicitors were created for the specific purpose of being shown to the SFO, and therefore could not be privileged. Rather, ENRC never actually agreed to disclose the materials it created in the course of its investigation to the SFO. Indeed, the repeated requests by the SFO for full and frank disclosure seemed to the Court of Appeal to have been a plea for privilege to be waived.

The Court of Appeal concluded that not only was a criminal prosecution reasonably in ENRC's contemplation when it initiated its investigation but the judge ought to have determined that the documents sought were brought into existence for the dominant purpose of resisting or avoiding those or some other proceedings.

Legal Advice Privilege

Legal advice privilege protects confidential communications between a lawyer, acting in his professional capacity as a lawyer, and his client for the purpose of giving or seeking legal advice or assistance; this includes advice as to what should prudently and sensibly be done in the relevant legal context. Where the client is a company or corporation which acts through its employees, it is often assumed that all employees' communications with the company's solicitors will be privileged (particularly where the employees are in senior positions). But the decision in Three Rivers (No. 5) made clear that this is not necessarily so.

The Court of Appeal in ENRC found themselves bound by the decision in Three Rivers (No. 5) and

> *"...would have determined that Three Rivers (No. 5) decided that communications between an employee of a corporation and the corporation's lawyers could not attract legal advice privilege unless that employee was tasked with seeking and receiving such advice on behalf of the client... . "*

ENRC and the Law Society, which intervened in the appeal, submitted that Three Rivers (No. 5) is wrong. The Court of Appeal saw much force in that submission, saying that, if it had been open to them to depart from Three Rivers (No. 5) they would have been in favour of doing so. The Court noted that English law is out of step with the international common law on this issue.

They highlighted the fact that large corporations need to be able to seek and obtain confidential legal advice without fear of disclosure just as much as individuals and small corporations. If legal advice is confined to communications between lawyer and "client" (in the sense of the instructing individual or those employees authorised to seek and receive legal advice on the company's behalf) this is no problem for individuals and small businesses but does not work for large and multinational corporations, where the information upon which legal advice is needed is unlikely to be in the hands of the main board or those it appoints to seek and receive legal advice.

However, the Court of Appeal was clear that even if Three Rivers (No. 5) no longer applied, as the law currently stands interviews with third parties, including former employees, would not be covered by legal advice privilege.

The Court of Appeal also confirmed that emails sent by a qualified lawyer acting in a business rather than a legal role did not attract legal advice privilege.

A public policy issue?

It is also interesting to note that the Court of Appeal felt there was a public policy issue at stake, commenting that it is "*obviously in the public interest that companies should be prepared to investigate allegations … prior to going to a prosecutor such as the SFO, without losing the benefit of legal professional privilege for the work product and consequences of their investigation*". If privilege did not attach in such circumstances, the Court said, "*the temptation might well be not to investigate at all*". This represents the Court of Appeal endorsing the statutory regime of DPAs, in respect of which we note that Sir Brian Leveson, one of the appeal tribunal panel, is the judge who has reviewed the DPAs approved to date. Whilst this point of public policy is not one that appears to have been made in submissions by the parties' legal teams, the Court of Appeal deemed it important enough to include explicitly in the judgment.

It was reported that the SFO is considering an appeal to the Supreme Court.

Comments

Whilst the legal press are describing this ruling as a victory for legal privilege, it is important to remember that the Court of Appeal emphasised that whether litigation privilege applied in this case was a question of fact and ENRC's words and actions were scrutinised before the claim to privilege was upheld.

ENRC's appeal succeeded on litigation privilege alone. The Court of Appeal said that its decision on litigation privilege made the question of legal advice privilege less important. Less important for ENRC, certainly, but not for large/multinational corporations undertaking internal investigations in circumstances where litigation privilege does not apply.

If you have any questions or comments in relation to the above, please contact Susan Rosser, Alistair Graham, Sam Eastwood, Jason Hungerford or Chris Roberts, or your usual Mayer Brown contact.

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