SFO v ENRC (Part 2): Litigation Privilege in Internal Investigations Clarified

The English Court of Appeal has overturned a controversial decision of the English High Court which took a narrow and restrictive approach to litigation privilege in the context of alleged corporate wrong-doing and restored the *status quo: The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited* [2018] EWCA Civ 2006.

Our Comments

The English Court of Appeal has, in this important and closely-watched decision, restored the orthodox position on litigation privilege in the context of alleged corporate wrong-doing.

This move is much welcomed. It re-affirms that a client dealing with such allegations may freely and candidly consult his lawyer and obtain legal advice in confidence, and that what he tells his lawyer will not be disclosed without his consent, so that he will not be incentivised to hold back the truth.

This update takes a look at the English Court of Appeal's decision.

Background

The issues in the appeal arose in connection with a criminal investigation by the UK Serious Fraud Office ("**SFO**") into alleged fraud, bribery, corruption and financial wrong-doing by Eurasian Natural Resources Corporation Ltd ("**ENRC**") and/or its subsidiaries.

The SFO sought to compel the production of copies of notes taken by ENRC's external counsel of interviews with ENRC's employees and former employees as well as materials and reports generated by forensic accountants appointed by ENRC to conduct a books and records review ("**Documents**"). The Documents had been generated following a whistle-blower's allegations of corruption and financial wrong-doing.

The key issue was whether the Documents were subject to legal professional privilege. The Director of the SFO sought declarations that they were not so privileged.

The English High Court's Decision

The English High Court essentially granted the declarations sought. (Please click here for our update on the High Court's decision.)

It held that, save for one category of documents which is not relevant for our present purposes, the Documents were not subject to either litigation privilege or legal advice privilege (i.e., the sub-heads of legal professional privilege).

The High Court found that ENRC failed to satisfy the first two elements of the test for litigation privilege, which provides that the privilege applies only where: (a) litigation is in progress or is in contemplation; (b) the relevant communication was made for the sole or dominant purpose of conducting that litigation; and (c) the litigation is adversarial, and not investigative or inquisitorial.

The High Court took the view that:

- Criminal legal proceedings against ENRC, its subsidiaries or their employees were not reasonably in contemplation at any material time prior to the creation of the Documents;
- Three of the four categories of the Documents had not been created for the dominant purpose of litigation as the information contained in them was not produced to conduct or prepare for litigation, but rather to avoid it. The High Court judge drew a distinction between the avoidance of a criminal investigation and the conduct of a defence to a criminal prosecution, and considered that the former did not meet the "dominant purpose" element of the test; and
- ENRC had always intended to show the materials to the SFO.

The High Court also held that legal advice privilege did not apply to the interview notes because, following an earlier English Court of Appeal decision in *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No. 5)* [2003] QB 1556 ("***Three Rivers No. 5***"), the interview notes did not record communications between lawyers and "the client", i.e., the persons authorised to seek and obtain legal advice on behalf of the corporation in question.

ENRC appealed to the English Court of Appeal.

The English Court of Appeal's Decision

The English Court of Appeal allowed the appeal in relation to litigation privilege, but dismissed it on legal advice privilege.

Litigation privilege

Focusing on the High Court's findings in relation to reasonable contemplation of litigation and the "dominant purpose" elements of the test for litigation privilege, the Court of Appeal concluded that the High Court was wrong in both finding that a criminal prosecution was not reasonably in contemplation at the relevant time and that the Documents had not been created for the dominant purpose of litigation.

Reasonable contemplation of litigation

After reviewing the evidence put before the High Court, the Court of Appeal found that the contemporaneous evidence submitted by ENRC demonstrated that "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".

While the Court of Appeal was "not sure that every SFO manifestation of concern would properly be regarded as adversarial litigation", where (as here) the SFO had made clear to the company the prospect of a criminal prosecution, and legal advisers had been engaged to deal with the situation, there was a clear ground for contending that criminal prosecution was in reasonable contemplation.

The Court of Appeal further noted that, while a party anticipating possible prosecution might need to make further investigations before it could say with certainty that proceedings are likely, that uncertainty in and of itself would not preclude proceedings from being within reasonable contemplation. In particular, it highlighted that there is no general principle that litigation privilege cannot attach until either the defendant knows the full details of what is likely to be unearthed or a decision to prosecute has been taken.

Dominant purpose of litigation

The Court of Appeal also found that the Documents had been brought into existence for the dominant purpose of resisting contemplated criminal proceedings against ENRC.

In its view, the High Court's decision on this point was flawed in several respects:

- The Court of Appeal disagreed with the High Court judge's view that documents prepared

for the purpose of settling or avoiding (as opposed to resisting or defending) contemplated litigation were not covered by litigation privilege. The Court of Appeal held that legal advice given to head off, avoid or settle reasonably contemplated proceedings (whether civil or criminal) was as much protected by litigation privilege as advice given for the purpose of resisting or defending them.

- The High Court judge had misinterpreted two leading cases on litigation privilege and wrongly concluded that ENRC's dominant purpose, following the whistle-blower allegations, was simply to investigate the facts to ascertain what had transpired and to address compliance and governance, rather than to defend any litigation proceedings. The Court of Appeal noted that the need to investigate the existence of alleged corruption was just a subset of defending the contemplated litigation. Although a reputable company would want to ensure high ethical standards in the conduct of business for its own sake, the "stick" used to enforce appropriate standards is the criminal law (and, to some extent, also the civil law). In the circumstances, where there is a clear threat of a criminal 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 disagreed with the High Court judge's view that the contemporaneous material showed that ENRC always intended or agreed to share the core material they obtained from their interviews and investigations (as opposed to the ultimate report) with the SFO. While ENRC led the SFO to believe it might in future waive privilege in such material, it never actually did so.
- The Court of Appeal also disagreed with the High Court judge's view that a document created with the intention of showing it to the opposing party cannot be subject to litigation privilege. As the Court of Appeal pointed out, solicitors may spend much time fine-tuning a response to a claim to give their clients the best chance of achieving early settlement. The discussions surrounding the drafting of such a letter would be as much covered by litigation privilege as any other work done preparing to defend the claim.

Legal advice privilege

The Court of Appeal noted that it had, in its earlier decision in *Three Rivers No. 5*, decided that communications between an employee of a corporation and that corporation's lawyers would not attract legal advice privilege unless that employee had been tasked with seeking and receiving such advice on behalf of the client.

On that very narrow view of who "the client" is, the Court of Appeal, with marked reluctance, agreed with the High Court judge's decision that the interview notes could not attract legal advice privilege.

The Court of Appeal however added that, had it been open to it to do so, it would, as a matter of principle, have been in favour of departing from *Three Rivers No. 5*, and that this issue was a matter for the UK Supreme Court to decide.

We pause here to highlight that the narrow meaning of "the client" in *Three Rivers No. 5* has, as the Singapore Court of Appeal in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR(R) 357 ("***Skandinaviska***") observed, been "almost universally criticised – and often trenchantly at that" for being "far too restrictive, impractical and unworkable".

In *Skandinaviska*, the Singapore Court of Appeal itself viewed the matter as a "'legal hiccup' at common law" and chose to read *Three Rivers No. 5* as support for the more general principle that, if an employee is not authorised (whether expressly or impliedly) to communicate with the company's solicitors for the purpose of obtaining legal advice, then that communication is not protected by legal advice privilege.

In the present case, the Court of Appeal saw "much force" in counsel's submissions that the definition of "the client" laid down in *Three Rivers No. 5* was "wrong". It also accepted that legal advice is now often sought by large corporations (including multi-national ones) and that such corporations may need their employees with relevant first-hand knowledge to obtain advice from lawyers under the protection of legal advice privilege.

The recognition that the strict definition of "the client" in *Three Rivers No. 5* may be unviable today is encouraging, to say the least. The UK Supreme Court's consideration of this matter will certainly be much anticipated and welcomed.

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