English Court Questions the Application of Litigation Privilege in Criminal Investigations

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On 8 May 2017, the English High Court of Justice handed down judgment in *The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd*,[1] which could significantly limit the application of litigation privilege in criminal investigations. The judgment resolves the SFO's claim challenging ENRC's assertion of litigation privilege over certain documents created in the context of ENRC's internal investigation of issues in Kazakhstan and its diligence of potential acquisitions in Africa. The judgment is the first judicial consideration of litigation privilege in the context of voluntary disclosures to the SFO pursuant to the SFO's 2009 and 2012 guidance on cooperation in overseas corruption investigations. If upheld and broadly applied, the judgment could significantly limit the circumstances in which a company conducting an internal investigation prior to initiation of formal criminal proceedings could successfully claim litigation privilege over work product generated during the investigation. The judgment also follows the approach adopted in the recent RBS Rights litigation[2] decision regarding legal advice privilege, in which it was held that interviews conducted by the bank's external lawyers with its employees were not covered by legal advice privilege as the employees in question did not form part of the "client" for privilege purposes.

ENRC has sought leave from the Court of Appeal to appeal the decision.

Background

Between August 2011 and April 2013, the SFO and ENRC, a multinational natural resources company headquartered in the U.K., were engaged in a dialogue regarding allegations of fraud, bribery and corruption in Kazakhstan and an African country. During this period, ENRC was conducting internal investigations and transactional due diligence into the allegations under the supervision of an external law firm. In April 2013, the SFO terminated the discussions and commenced a criminal investigation into the activities of ENRC. Under section 2(3) of the Criminal Justice Act 1987, the SFO issued notices against ENRC and various other third parties to compel the production of documents. Upon receipt of the notices, ENRC contended that four categories of documents were privileged and would not produce them (the Disputed Documents).

- **Category 1**: Interview notes prepared by ENRC's external legal counsel of interviews of numerous individuals, including former and current employees of ENRC, and the officers of ENRC and its subsidiaries and suppliers, relating to the events being investigated. The notes were created prior to the SFO commencing the criminal investigation in April 2013. ENRC claimed that these documents were subject to litigation privilege, as the dominant purpose of the interviews was to enable ENRC's external legal counsel to obtain relevant information in order to advise ENRC in connection with the anticipated adversarial criminal litigation. Alternatively, ENRC claimed that the documents could be characterised as lawyers' work product, and disclosure of such would reveal the trend of legal advice being provided to ENRC.
- **Category 2**: Documents generated by forensic accountants during the same time period as part of a books and records review that sought to identify systems and controls weaknesses and potential improvements. ENRC claimed that the documents were protected by litigation privilege as the "dominant purpose of the reports was to identify issues which could likely give rise to intervention and prosecution by law enforcement agencies, with a particular focus on books and records offences, and to enable ENRC to obtain advice and assistance in connection with such anticipated litigation."

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

English Court Questions the Application of Litigation Privilege in Criminal Investigations

- **Category 3**: Documents indicating or containing the factual information presented by ENRC's external legal counsel to the ENRC board in relation to the investigation. ENRC's primary case was that these documents were subject to legal advice privilege.
- **Category 4**: Documents referred to in a letter sent to the SFO, including forensic accountant materials as outlined in Category 2 and two emails between ENRC's Head of Mergers and Acquisitions (Head of M&A) and senior ENRC executives. The Head of M&A was a qualified Swiss lawyer. ENRC claimed that litigation privilege applied to the forensic accountant materials and that the Head of M&A, as a qualified lawyer, was acting in the role of a lawyer and therefore subject to legal advice privilege.

The Decision

The judge held that privilege only applied to the Category 3 documents, which were subject to legal advice privilege. All of ENRC's other claims of privilege were rejected.

Litigation Privilege

The judgment adopted the established principle that litigation privilege attaches to communications between parties or their solicitors and third parties that are created for the purpose of obtaining information or advice in connection with existing or contemplated litigation when at the time of the communication: (i) litigation is in progress or reasonably in contemplation; (ii) communications are made with the sole or dominant purpose of conducting the anticipated litigation; and (iii) the litigation must be adversarial, not investigative or inquisitorial.[3]

However, in rejecting ENRC's claims for litigation privilege, Mrs Justice Andrews:

- Adopted analysis from an Australian case[4] that noted that, in defining the scope of litigation privilege, there is a distinction between a document created that "will not be shown to the other party […] and a document brought into existence during the course of litigation for the purpose of settling the litigation, which is intended to be shown to the other party."
- Drew a distinction between criminal investigations and prosecutions, contending that "the reasonable contemplation of a criminal investigation does not necessarily equate to the reasonable contemplation of a prosecution." The court also held that "the investigation and the inception of a prosecution cannot be characterised as part and parcel of one continuous amorphous process."
- Held that a mere suspicion that the company may have a compliance problem, even where the company has opted to engage external experts to conduct an internal investigation, is insufficient to give rise to a reasonable contemplation of prosecution, noting that unless a person who anticipates an investigation is aware of circumstances which, once uncovered by the investigation, makes a prosecution likely, it cannot be concluded that the real risk of an investigation translates to a real risk of a prosecution.
- Rejected the argument that a criminal investigation by the SFO should be treated as adversarial litigation. The judge held that the SFO's investigation was a preliminary step and generally completed before any decision is taken to prosecute.
- Rejected the argument that litigation privilege should extend to third-party documents created in order to obtain legal advice as to how best to persuade the SFO to decline prosecution.
- Held that even if ENRC could satisfy the requirement that prosecution had been reasonably in contemplation, the documents over which litigation privilege was claimed were not created with the dominant purpose of being used in the conduct of the litigation.

Legal Advice Privilege

The judgment adopted the established principle that legal advice privilege attaches to confidential communications passing between the client and its lawyers, acting in their professional capacity, in connection with the provision of legal advice.

Mrs Justice Andrews accepted that with regards to the Category 3 documents, the presentations prepared by ENRC's external legal counsel for the specific purpose of giving legal advice to ENRC were privileged, even if they referred to factual information or findings. However, in rejecting ENRC's claims that legal advice privilege applied to the other Disputed Documents, Mrs Justice Andrews:

- Rejected the argument that the substance of communications between a solicitor, retained by a company to carry out an internal investigation in order to provide legal advice to the company, and persons who are not the instructing body of the company, could be governed by legal advice privilege. It was held that such fact-findings interviews were not part of the confidential lawyer-client relationship.
- Held that there was no evidence that any of the people interviewed were authorised to seek and receive legal advice on behalf of ENRC and the communications between the individuals and ENRC's external legal counsel were not communications in the course of conveying instructions to counsel on behalf of the corporate client.

[3] *Three Rivers* (No. 6) [2004] UKHL 48

[4] Federal Court of Australia, *Bailey v Beagle Management Pty* [2001] FCA 185

English Court Questions the Application of Litigation Privilege in Criminal Investigations

- Held that regarding the communications involving ENRC's Head of M&A, at the time these documents were created, he was acting as a "man of business" as opposed to a lawyer. Substantial weight was put on the nature of the Head of M&A's role, which was primarily focused on strategic planning and the execution of transactions, as opposed to being legally focused.

The Future

Although a first instance decision that does not bind higher courts in England and Wales, the judgment could dramatically impact the practice of internal investigations in the U.K., particularly those that are undertaken to address whistleblower allegations or compliance concerns absent a formal inquiry from an external regulator. As a result, if and until an appeal is granted and the decision overturned, companies should be careful when planning internal investigation activity from the outset and seek advice from experienced counsel as to the way in which investigations could be structured.