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KIRKLAND ALERT

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Legal Privilege in Internal Investigations and the SFO's Compulsory Powers of Production: Two Cases in Two Days

Introduction

On 5 September 2018, the U.K. Court of Appeal handed down judgment in the highly anticipated case of *SFO v. ENRC*.[1] The decision overturned much of the controversial first instance decision of the High Court in May 2017,[2] which had dramatically narrowed the scope of legal professional privilege, particularly in relation to internal investigations, exposing documents created in the course of such investigations to the risk of disclosure in civil and/or criminal proceedings.

High Court decision restricting privilege overturned

One day later, the High Court ruled in *R (KBR Inc.) v. SFO*[3] that the U.K. Serious Fraud Office (SFO) can: (1) compel U.K. companies to produce documents overseas; and (2) compel foreign companies to produce documents held overseas provided a "sufficient connection" exists between the company and the U.K.

Whilst *SFO v. ENRC* limited the SFO's ability to compel the production of internal investigation documents, *R (KBR Inc.) v. SFO* saw the SFO's fortunes reversed as the High Court confirmed that the SFO can, without using Mutual Legal Assistance (MLA) procedures, compel the production of documents located overseas, including from entirely foreign companies. It is unknown whether either case will be appealed.

SFO v. ENRC — Court of Appeal decision in landmark privilege ruling

Background

Eurasian Natural Resources Corporation Limited (ENRC) instructed independent counsel to conduct an internal investigation following receipt of a whistleblower complaint in December 2010 alleging corruption and fraud. Following press coverage of the whistleblower allegations, the SFO contacted ENRC in August 2011 urging consideration of the SFO's self-reporting guidelines, and indicating a wish to discuss ENRC's governance and compliance programme and its response to the reported allegations. Following a number of meetings and communications between ENRC, its legal advisers and the SFO, on 25 April 2013, the SFO announced a criminal investigation into ENRC and sought disclosure of various documents from the internal investigation. These included: (1) notes of interviews prepared by external counsel; (2) materials from a related books and records review; and (3) various presentations (the Documents). ENRC refused to comply with the SFO requests, asserting privilege over the Documents.

First Instance Decision

The High Court concluded that none of the Documents were protected by litigation privilege, stating that they had been created at too early a stage for criminal proceedings to be in reasonable contemplation. The High Court held that criminal proceedings could not be said to be reasonably contemplated unless the prospective defendant has enough information to appreciate that a prosecutor may realistically be assessing a prosecution decision. The High Court further found that the Documents had not been created with the dominant purpose of use in such litigation. Furthermore, legal advice privilege would not attach to most of the Documents given the narrow interpretation of "client" in *Three Rivers (No. 5)*[4], which held that the "client" (in a corporate context) is limited to those authorised to seek and receive legal advice on behalf of the company.

Court of Appeal suggests legal advice privilege is out of step with international common law

Appeal

The Court of Appeal overturned almost the entirety of the first instance decision. On the facts of the case, including the nature and extent of communications with the SFO,[5] criminal proceedings were considered to be in reasonable contemplation by ENRC from the time it engaged independent legal advisors — over two years before the SFO announced its investigation.[6] Moreover, the Documents were found to have been created for the dominant purpose of use in litigation and litigation privilege therefore applied as the Court held that "in both the civil and criminal context, legal advice given so as 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."[7]

Key Takeaways

1. Whether litigation privilege will apply to the products of an internal investigation remains a fact-specific analysis.

2. However, an investigation can be protected by litigation privilege at a very early stage, including prior to any self-report to the authorities.

3. Documents prepared to avoid or settle contemplated litigation can be protected by litigation privilege.

4. 'Dominant purpose' is a question of fact. Litigation privilege should be subject to regular review in light of the Court's comments that "even if litigation was not the dominant purpose of the investigation at its very inception, it is clear from the evidence that it swiftly became the dominant purpose."[8]

5. A broadening of legal advice privilege? Given its findings in respect of litigation privilege, the Court did not deal with legal advice privilege. However, the Court commented that the current narrow interpretation of the "client" in *Three Rivers (No. 5)* was outdated and placed large and multinational companies at a disadvantage. The Court suggested that legal advice privilege should be extended to communications with all employees authorised to communicate with a company's lawyers (rather than a small subset as determined in *Three*

Rivers (No. 5)). The Court indicated that this issue could only realistically be considered by the Supreme Court.

The SFO's compulsory powers of production have "an element of extraterritorial application"

R (KBR Inc) v. SFO **— The extraterritorial scope of the SFO's compulsory powers of production**

Background

The SFO (pursuant to its powers under Section 2 of the Criminal Justice Act 1987 (Section 2)) served a notice (the Notice) on KBR Inc., a U.S. company, seeking the production of documents relevant to SFO's ongoing bribery investigation into KBR Inc.'s U.K. subsidiary, KBR Ltd. KBR Inc. does not itself have U.K. operations. KBR Inc. challenged the Notice on three grounds:

1. KBR Inc. argued that the SFO's Section 2 powers did not have extraterritorial effect;

2. The SFO made an error of law in serving the Notice as opposed to using the MLA process to request the documents from the U.S. authorities; and

3. The Notice was not properly served on KBR Inc.

The Court found in favour of the SFO on all three grounds, and the Notice was upheld. The Court's decision in respect of the first of these three grounds is of most interest (and drew the most judicial comment).

Extraterritorial Application of Section 2

The Court held that Section 2 has an "element of extraterritorial application"[9] such that the SFO can compel U.K. companies to produce documents held overseas outside of the MLA process. The Court commented that, if Section 2 did not have such extraterritorial application, companies subject to investigation could frustrate investigations by simply hosting or moving relevant documents and data overseas. The Court further held that Section 2 can also compel a foreign company to produce documents held overseas where there is a "sufficient connection" between the company and the U.K. This will be a fact specific determination, but the Court made clear that the fact that KBR Inc. was a parent company of a U.K. company subject to investigation was insufficient to create a "sufficient connection" between KBR Inc. and the U.K.; so too was the fact that KBR Inc. had previously cooperated to a degree with the SFO and remained willing to do so. However, the Court said that the following factors established a "sufficient connection": (1) payments subject to investigation were approved by KBR Inc.; (2) payments subject to investigation were paid through KBR Inc.'s treasury functions; and (3) a corporate officer of KBR Inc. was located in the U.K. (which in and of itself seems unlikely to have been determinative).

A number of questions remain regarding the extraterritorial application of Section 2 and the "sufficient connection" test. For example, it remains to be seen in what circumstances a "sufficient connection" could exist such that an overseas sister

company, joint venture partner or private equity investor could be compelled to provide documents relevant to the SFO's investigation into another sister company, joint venture vehicle or portfolio company. The extraterritorial application of Section 2 will also be problematic where it would require a foreign company to produce documents in contravention of domestic laws (such as banking secrecy laws). In such circumstances, the foreign company would likely have to argue that it had "reasonable excuse" for not producing the documents (thereby avoid committing an offence under Section 2) or otherwise challenge the SFO on the basis that, in the circumstances, MLA was the appropriate means of the SFO obtaining the documents sought.

Internal investigation documents can be protected by legal privilege

The SFO served the Notice on a representative of KBR Inc. during a scheduled meeting with the SFO in the U.K. to discuss its investigation, a fact the Court observed was "unappealing."[10] This is noteworthy in that its appears to show that the SFO is willing to construct circumstances designed, at least in part, to bring overseas companies into the U.K. for the purpose of potentially serving a notice under Section 2.

Error of Law and Improper Service

In respect of KBR Inc.'s argument that the SFO made an error of law in serving the Notice as opposed to obtaining the documents via MLA, the Court held that the availability of MLA does not curtail the SFO's ability to use its extraterritorial powers of production under Section 2. The Court added that, even where MLA is available, there might be good practical reasons for requesting the documents via Section 2, such as delay or the risk of the MLA request being ignored by the receiving State.

In respect of KBR Inc.'s argument that the Notice was not properly "served", the Court held that Section 2 did not require the Notice to be "served" in civil law terms nor did it require any additional formality beyond giving the Notice to KBR Inc. Further, the individual given the Notice was clearly a representative of KBR Inc., within the jurisdiction in order to represent the company.

Conclusions

Following *SFO v. ENRC*, it is clear that documents created during the course of an internal investigation (such as interview memos) can be protected by legal privilege. It is therefore important that internal investigations are appropriately conceived and carried out. It is also important that a company and its external advisers periodically review its state of knowledge with respect to the investigative facts, the contemplation of related civil and/or criminal proceedings, and the dominant purpose of the investigation.

Following *R (KBR Inc) v. SFO*, it seems likely that the SFO will seek the production of more documents located overseas, both from U.K. and foreign companies. It is important that companies subject to such production requests fully consider, prior to responding, the nature and extent of a request and whether it oversteps the Court's ruling.

[1] [2018] EWCA Civ 2006

[2] [2017] EWHC 1017 (QB)

[3] [2018] EWHC 2012 (Admin)

[4] *Three Rivers District Council and Others v. The Governor and Company of the Bank of England* [2003] EWCA Civ 474 (Three Rivers No 5)

[5] [2018] EWCA Civ 2006, at para 93 - "…it seems to us 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."

[6] Ibid at para 101

[7] Ibid at para 102

[8] Ibid. at para 111

[9] *R (KBR Inc.) v. SFO* at para 64

[10] Ibid at para 100

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

Zachary S. Brez, P.C.
Kirkland & Ellis LLP
New York
www.kirkland.com/zbrez
+1 212 446 4720

Brigham Q. Cannon, P.C.
Kirkland & Ellis LLP
Houston
www.kirkland.com/bcannon
+1 713 836 3629

Asheesh Goel, P.C.
Kirkland & Ellis LLP
Chicago
www.kirkland.com/agoel
+1 312 862 3005

Cori A. Lable
Kirkland & Ellis International LLP
Hong Kong
www.kirkland.com/clable
+852 3761 3592

Kim B. Nemirow, P.C.
Kirkland & Ellis LLP
Chicago
www.kirkland.com/knemirow
+1 312 862 3095

Nick Niles
Kirkland & Ellis LLP
Chicago
www.kirkland.com/nniles
+1 312 862 3364

Abdus Samad Pardesi
Kirkland & Ellis LLP
Chicago
www.kirkland.com/apardesi
+1 312 862 3291

Richard Sharpe
Kirkland & Ellis
Hong Kong
www.kirkland.com/rsharpe
+852 3761 9110

William J. Stuckwisch
Kirkland & Ellis LLP
Washington, D.C.
www.kirkland.com/wstuckwisch
+1 202 879 5023

Marcus Thompson
Kirkland & Ellis International LLP
London
www.kirkland.com/marcusthompson
+44 20 7469 2170

Satnam Tumani
Kirkland & Ellis International LLP
London
www.kirkland.com/stumani
+44 20 7469 2390

Sarah Klein
Kirkland & Ellis International LLP
London
www.kirkland.com/sklein
+44 20 7469 2475

Andrew Butel
Kirkland & Ellis International LLP
London
www.kirkland.com/abutel
+44 20 7469 2271

Tiana Zhang
Kirkland & Ellis International LLP
Shanghai
www.kirkland.com/tzhang
+8621 3857 6305