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KIRKLAND ALERT

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SFO v. ENRC: UK Litigation Privilege Protection Reinvigorated for Investigations

Introduction

High Court decision restricting privilege overturned

On 5 September 2018, the Court of Appeal of England and Wales 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.

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)*,[3] 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.

Appeal

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

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,[4] criminal proceedings were considered to be in reasonable contemplation by ENRC from the time it engaged independent legal advisers — over two years before the SFO announced its investigation.[5] 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."

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, with appropriate involvement of legal advisers. 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.

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*."[7]

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.

[1] [2018] EWCA Civ 2006

[2] [2017] EWHC 1017 (QB)

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

[4] [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."

[5] Ibid at para 101

[6] Ibid at para 102

[7] Ibid. at para 111

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