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Litigation & Arbitration Group Alert: A Victory for Legal Privilege in Cross-border Investigations – U.S. and U.K. perspectives on the English Court of Appeal's decision in *The Serious Fraud Office v ENRC Limited*.

Regulators in the U.K. and the U.S. are increasingly placing pressure on companies to provide materials considered to be protected by legal privilege. The authorities have focused, in particular, on witness interview memoranda prepared by outside counsel conducting an internal investigation into allegations of wrongdoing. In recent years, in the U.K., the scope of the legal privileges protecting these materials from disclosure has been challenged, curtailing the ability of corporates to resist disclosure of sensitive investigative materials to regulators and to private litigants. This has created a serious divergence between U.K. and U.S. law as to the scope of the legal protections afforded to those materials. See our Client Alerts on the **"RBS Rights Issue Litigation"** and **"SFO v ENRC."**

However, in an important judgment delivered on 5 September 2018 (the "***ENRC* Appeal Judgment**"), the Court of Appeal has taken a substantial step in the direction of reconfirming the application of legal privilege in the context of internal investigations, and thereby significantly reducing – but not eliminating – the divergence in the law of privilege between the U.K. and U.S.[1]

BACKGROUND TO THE APPEAL

Following receipt of an apparent whistleblower report in December 2010, Eurasian Natural Resources Corporation Limited ("**ENRC**"), a multi-national group operating in mining and natural resources, instructed lawyers and forensic accountants to investigate allegations of corruption and financial wrongdoing.

[1] *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited* [2018] EWCA Civ 2006.

In August 2011, following press comment concerning the allegations, the Serious Fraud Office ("**SFO**") contacted ENRC and drew attention to its Self-Reporting Guidelines, while also confirming that it was not, at that stage, initiating a criminal investigation.

After an extended period of investigation by ENRC and its advisers, with periodic communications with the SFO, a formal criminal investigation was initiated in April 2013.

THE DISPUTED DOCUMENTS

The SFO sought disclosure of the following classes of documents (amongst others) (together, the "**Disputed Documents**"):

(i) 184 notes taken by ENRC's lawyers of interviews with employees and former employees (and certain third parties) (the "**Lawyers' Interview Notes**"); and

(ii) materials produced by the forensic accountants (the "**Accountants' Materials**").

ENRC sought to resist the disclosure of the Lawyers' Interview Notes on the basis that they were covered by English law litigation privilege, and alternatively by legal advice privilege. ENRC also argued that the Accountants' Materials were protected by litigation privilege.

LEGAL CONTEXT: LITIGATION PRIVILEGE AND LEGAL ADVICE PRIVILEGE

Under English law, litigation privilege covers communications between parties or their lawyers and third parties, for the purpose of obtaining information or advice in connection with existing or contemplated litigation, but only when the following conditions are satisfied: (i) litigation must be in progress or reasonably in contemplation; (ii) the communications must have been made for the sole or dominant purpose of conducting that litigation; and (iii) the litigation must be adversarial, not investigative or inquisitorial.[2]

Legal advice privilege does not require litigation, or other adversarial proceedings, to be in progress or reasonable contemplation. However, it is more limited than litigation privilege and only extends to confidential communications between a lawyer and their client (not third parties) for the purposes of giving or obtaining legal advice. In addition,

[2] Per Lord Carswell in *Three Rivers District Council and Others v The Governor & Company of the Bank of England (No 6)* [2005] 1 AC 610 ("**Three Rivers (No 6)**"), at paragraph 102.

legal advice privilege may cover "*lawyers' working papers*", including drafts, memoranda and other working papers, made by the lawyer for their own use in advising the client (or for the client's use).

The scope of legal advice privilege was considered by the Court of Appeal in *Three Rivers (No 5)*, in which a highly restrictive approach to identifying the 'client' was approved.[3] In particular, the court held that, in the context of a corporation, the 'client' was limited to those individuals authorised to obtain legal advice on behalf of the corporation. As a result, there was no difference between communications between the corporation's lawyers and employees (other than those authorised as described above) and communications with third parties: neither category would be covered by legal advice privilege.

This narrow approach to legal advice privilege was followed in the *RBS Rights Issue Litigation*.[4] In that case, the Judge held that a substantial number of notes of interviews with current and former employees of RBS, prepared by RBS's lawyers in the context of two internal investigations (including in connection with two subpoenas from the U.S. Securities and Exchange Commission ("**SEC**") and certain allegations made by a former employee), were not protected from disclosure by legal advice privilege.

THE APPEAL

Litigation Privilege: Was adversarial litigation reasonably in contemplation when the Disputed Documents were created?

In the *ENRC* case, the Judge at first instance (Andrews J) held that it was not.[5] First, Andrews J held that an investigation by the SFO should not be treated as adversarial litigation. Rather, it was "*a preliminary step taken, and generally completed, before any decision to prosecute is taken…. Such an investigation is not adversarial litigation.*"[6]

Second, Andrews J decided that ENRC had failed to demonstrate that it was "*aware of circumstances which rendered litigation between itself and the SFO a real likelihood rather than a mere possibility.*"[7] In other words, while ENRC did anticipate the SFO's investigation, it did not reasonably contemplate prosecution by the SFO.

[3] *Three Rivers District Council and Others v The Governor & Company of the Bank of England (No 5)* [2003] Q.B. 1556 ("**Three Rivers (No 5)**").
[4] [2016] EWHC 3161 (Ch).
[5] *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited Limited* [2017] EWHC 1017 (QB) (the "***ENRC* High Court Judgment**").
[6] Paragraphs 150 to 151 of the *ENRC* High Court Judgment.
[7] Paragraph 149 of the *ENRC* High Court Judgment.

Third, Andrews J drew a distinction between civil and criminal proceedings: "[c]*riminal proceedings cannot be reasonably contemplated unless the prospective defendant knows enough about what the investigation is likely to unearth…, to appreciate that it is realistic to expect a prosecutor to be satisfied that it has enough material to stand a good chance of securing a conviction*."[8] In effect, the threshold for criminal prosecution to be reasonably in prospect was considerably higher than for civil litigation.

The Court of Appeal Judges disagreed with these conclusions.[9] In particular, the court noted that, from a relatively early stage after the whistleblower report in December 2010 – several months before the SFO first made contact in August 2011 – senior managers at ENRC anticipated an SFO investigation, including the likelihood of a dawn raid. Similarly, the court observed that, in April 2011, ENRC's lawyers had written to its (then) General Counsel, saying that the "*internal investigation*…[related] *to conduct that is potentially criminal in nature*" and that "[a]*dversarial proceedings might occur out of the internal investigation and, in our view, both criminal and civil proceedings can be reasonably said to be in contemplation*." Moreover, following the SFO's communication in August 2011, the Court of Appeal considered 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*."

Overall, the court decided that "*criminal legal proceedings against ENRC or its subsidiaries or their employees were reasonably in its contemplation… when it initiated its investigation in April 2011, and certainly by the time it received the SFO's August 2011 letter*."[10]

The Court of Appeal also considered Andrews J's distinction between civil and criminal proceedings to be "*illusory*" and noted that, in fact, "[i]*t 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*."[11]

Litigation Privilege: Were the Disputed Documents created for the dominant purpose of resisting contemplated adversarial litigation?

Andrews J held that they were not, stating that "[a]*t no stage was the purpose of the internal investigation anything to do with the conduct of future criminal proceedings*

[8] Paragraph 160 of the *ENRC* High Court Judgment.
[9] Paragraphs 91 *et seq.* of the *ENRC* Appeal Judgment.
[10] Paragraph 101 of the *ENRC* Appeal Judgment.
[11] Paragraph 99 of the *ENRC* Appeal Judgment.

that might be brought against ENRC…".[12] Rather, the focus of the internal investigation was "*to find out if there was any truth in the whistleblower's allegations…*" and "*on trying to prepare for an investigation by a regulator or other investigatory body (including, but by no means limited to, the SFO).*"[13] Further, even if the dominant purpose of the information in the Disputed Documents related to legal advice about how to deal with the SFO, the Judge decided that such information would not be subject to litigation privilege because "[a]*voidance of a criminal investigation cannot be equated with the conduct of a defence to a criminal prosecution.*"[14]

The Court of Appeal Judges also disagreed with Andrews J on this issue, holding that "[i]*n both the civil and the 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 contemplated proceedings.*"[15] In these 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.*"[16] This applied both to the Lawyers' Interview Notes and the Accountants' Materials.

The Court of Appeal also re-affirmed the clear public interest that corporations should be prepared to investigate allegations from whistleblowers or investigative journalists (prior to involving a prosecutor, such as the SFO), without losing the benefit of legal professional privilege in respect of the work product of the investigation. Otherwise, "*the temptation might well be not to investigate at all, for fear of being forced to reveal what had been uncovered…*".[17]

Legal Advice Privilege: Was Three Rivers (No 5) wrongly decided?

Given the Court of Appeal's decision that litigation privilege protected the Disputed Documents from disclosure, the court did not need to address whether the judgment in *Three Rivers (No 5)*, which limited legal advice privilege to communications between a lawyer and a narrow group of 'client' employees (*i.e.*, those authorised to obtain legal advice on behalf of the company), was correctly decided. Nonetheless, the Court of Appeal questioned the wisdom of this approach.

[12] Paragraph 169 of the *ENRC* High Court Judgment.
[13] Paragraph 165 of the *ENRC* High Court Judgment.
[14] Paragraph 166 of the *ENRC* High Court Judgment.
[15] Paragraph 102 of the *ENRC* Appeal Judgment.
[16] Paragraph 109 of the *ENRC* Appeal Judgment.
[17] Paragraph 116 of the *ENRC* Appeal Judgment.

The Court of Appeal noted an important inconsistency resulting from the narrow approach to the identification of the 'client' in *Three Rivers (No 5)*.[18] The court observed that this approach "*presents no problem for individuals and many small businesses, since the information about the case will normally be obtained by the lawyer from the individual or board members of the small corporation. That was the position in most of the 19th century cases.*" However, in the modern world, in the context of large national and international corporates, "*information upon which legal advice is sought is unlikely to be in the hands of the main board or those it appoints to seek and receive legal advice.*" Following the approach in *Three Rivers (No 5)* leads, therefore, to a peculiar discrepancy: "*If a multi-national corporation cannot ask its lawyers to obtain the information it needs to advise that corporation from the corporation's employees with relevant first-hand knowledge under the protection of legal advice privilege, that corporation will be in a less advantageous position than a smaller entity seeking such advice.*" The Court of Appeal's view was that "*whatever the rule is, it should be equally applicable to all clients, whatever their size or reach.*"

Relatedly, the Court of Appeal agreed with the submission by the Law Society that English law on privilege is now out of step with international common law. The Judges opined that, particularly in the context of multi-national companies operating in numerous common law jurisdictions, it was "*undoubtedly desirable*" for there to be alignment in approaches to legal privilege.[19]

However, despite these comments, the Court of Appeal Judges did not consider that it was within their power to depart from *Three Rivers (No 5)* – although they would have been in favour of doing so – holding that "*it is a matter that will have to be considered again by the Supreme Court in this or an appropriate future case.*"[20]

THE U.S. PERSPECTIVE

The *ENRC* Appeal Judgment is an important step in the direction of harmonising U.K. and U.S. law on the legal protections applicable to work performed by outside counsel and forensic accountants in corporate internal investigations. U.S. courts have long recognised that materials prepared by outside counsel (and forensic accountants retained by them), investigating a whistleblower's complaint, are prepared "*in anticipation of litigation*" and are, therefore, protected under the attorney work product doctrine - the legal privilege most analogous to English litigation privilege.[21] As Milbank

[18] Paragraph 127 of the *ENRC* Appeal Judgment.
[19] Paragraph 129 of the *ENRC* Appeal Judgment.
[20] Paragraph 130 of the *ENRC* Appeal Judgment.
[21] See, *e.g., United States v. Adlman*, 134 F.3d 1195 (2d Cir. 1998).

successfully argued in a recent case, this legal protection even extends to investigative materials prepared before any regulator has first contacted the company, which is often the case when companies conduct an internal investigation and only later self-report the matter to regulators or respond to regulators' requests for documents.[22] It is therefore significant that the Court of Appeal in *ENRC* held that litigation privilege extended to materials prepared before the SFO first contacted the company.

Where U.K. and U.S. law still diverge, however, is in the scope of the protection provided by legal advice privilege under the *Three Rivers (No. 5)* decision, which was criticised – but not overruled – in the *ENRC* Appeal Judgment. Under the U.S. attorney-client privilege doctrine, the seminal decision *Upjohn Co. v. United States* established that confidential communications with company employees interviewed by counsel in connection with an internal investigation are covered by the legal privilege because "*the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice*."[23] The fact that a communication is with an employee who is not authorised to obtain legal advice on behalf of the company does not impair the privilege claim, as in *Three Rivers (No. 5)*. Likewise, the fact that a non-lawyer or third party is included in the communication does not waive the privilege if "*the communication* [was] *made in confidence for the purpose of obtaining legal advice from the lawyer*."[24] Thus, the Accountants' Materials in *ENRC* would typically be protected from disclosure under the U.S. attorney-client privilege.

It may be that the *ENRC* Appeal Judgment's clarification of the scope of litigation privilege will effectively minimize the discrepancy between the different approaches in the U.S. and U.K., at least where there are facts supporting a finding that criminal and/or civil proceedings can reasonably be said to be "*in contemplation*." However, counsel conducting cross-border investigations where there is a potential for U.K. regulatory interest or litigation should take care to document the facts supporting that conclusion, in order to maximise the likelihood that documents will be covered by litigation privilege.

[22] See *In re American Realty Capital Properties, Inc. Litigation*, 15 Civ. 40 (AKH) (Aug. 14, 2017). See also *Patel v. L-3 Commc'ns Holdings, Inc.*, 2016 WL 4030704 (S.D.N.Y. July 25, 2016) (company self-reported findings of an internal investigation to the SEC after the investigation revealed evidence of intentional wrongdoing; government regulators served document subpoenas on the company thereafter).
[23] 449 U.S. 383, 390 (1981).
[24] *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (extending the attorney-client privilege to communications with an outside accountant assisting counsel in the investigation).

CONCLUSIONS AND PRACTICAL ADVICE

It is possible that one of the next areas of litigation in the U.K. around this issue will be whether the practice of providing "*oral downloads*" of witness interviews to regulatory authorities constitutes a privilege waiver. In the U.S., although government prosecutors are directed not to seek privilege waivers from entities under investigation, companies are nonetheless expected to provide to the appropriate regulators "*all relevant facts*" about individuals involved in misconduct if the company seeks credit for its cooperation.[25] One practice that is commonly deployed to maximise cooperation credit is that of providing regulators with oral summaries (or "*downloads*") of witness interviews without providing the interview memoranda themselves.

However, this practice has recently come under judicial scrutiny. In a decision last year which attracted considerable attention, a judge in the Southern District of Florida held that the company's provision of "*oral downloads*" to the SEC amounted to a waiver of the attorney work product privilege because the downloads in question were tantamount to providing the physical interview notes or memoranda themselves.[26] Accordingly, the court held that the interview notes and memoranda for witnesses which were subject to a "*download*" had to be disclosed to the defendants, who were former employees of the company which had cooperated with the SEC.

In the U.K., the same practice has also been criticised in a recent case where the SFO was given oral proffers of interviews conducted by company counsel with four executives suspected of wrongdoing.[27] Ultimately, the company entered into a deferred prosecution agreement, but several executives were criminally charged, including one whose interview had been the subject of the oral proffers. Although the court decided that the question of whether the oral proffers amounted to a waiver of privilege was not properly before it, the court noted its displeasure with the SFO's failure to seek disclosure of the interview memoranda from the company. The court's concerns stemmed in part from its view that the memoranda were not privileged under the *ENRC* High Court Judgment and that, in any event, it was likely that there had been a waiver of privilege as a result of the oral downloads. It remains to be seen whether, following the *ENRC* Appeal Judgment, this practice will be the subject of further U.K. litigation.

As we noted at the outset, civil and criminal regulators are increasingly placing pressure on companies to provide information obtained during an internal investigation that could (at least) risk an argument that privilege has been waived. Notably, at least one U.K. court has lauded a company for its "*extraordinary cooperation*" with the SFO,

[25] See United States Attorneys Manual, 9-28.720.
[26] *SEC v. Herrera*, 324 F.R.D. 258, 260 (S.D.Fla. 2017).
[27] See *R (on the application of AL) v Serious Fraud Office v XYZ Ltd, ABC LLP, MS, DJ* [2018] EWHC 856 (Admin).

which included a limited waiver of privilege in connection with interview memoranda from the investigation.[28]

In light of this atmosphere, company counsel will have to be mindful of the developing law of privilege on both sides of the Atlantic and will have to design and conduct an internal investigation in a manner best suited to achieve the company's goal of cooperation, while also affording maximum protections to the privilege.

[28] See, *e.g.*, *Serious Fraud Office v Rolls-Royce plc and Rolls-Royce Energy Systems Inc* [2017] Lloyd's Rep. F.C. 249.

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