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A Victory For Legal Privilege In Cross-Border Investigations

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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.

However, in an important judgment delivered on Sept. 5., 2018, in Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd., the U.K. Court of Appeal took 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.

Background

Following receipt of an apparent whistleblower report in December 2010, Eurasian Natural Resources Corp. Ltd., a multinational group operating in mining and natural resources, instructed lawyers and forensic accountants to investigate allegations of corruption and financial wrongdoing.

In August 2011, following press comment concerning the allegations, the Serious Fraud Office 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 SFO sought disclosure of the following classes of documents, among others (together, the "disputed documents"):

1. One hundred and eighty-four notes taken by ENRC's lawyers of interviews with employees and former employees (and certain third parties); and

2. Materials produced by forensic accountants.

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: (1) litigation must be in progress or reasonably in contemplation; (2) the communications must have been made for the sole or dominant purpose of conducting that litigation; and (3) the litigation must be adversarial, not investigative or inquisitorial.

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.

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. In particular, the court held that, in the context of a corporation, the "client" was limited to those individuals authorized 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 authorized 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 a 2016 decision in the RBS Rights Issue Litigation. In that case, the judge held that a substantial number of notes of interviews with current and former employees of RBS, prepared by RBS' lawyers in the context of two internal investigations (including in connection with two subpoenas from the U.S. Securities and Exchange Commission 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, Judge Geraldine Andrews, held that it was not.

First, Judge Andrews 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."

Second, Judge Andrews decided that, although ENRC did anticipate the SFO's investigation, it did not reasonably contemplate prosecution by the SFO.

Third, Judge Andrews drew a distinction between civil and criminal proceedings, finding (in effect) that 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. 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 advised 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."

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."

The Court of Appeal also dismissed Judge Andrews' distinction between civil and criminal proceedings.

Litigation Privilege: Were the Disputed Documents Created for the Dominant Purpose of Resisting Contemplated Adversarial Litigation?

Judge Andrews held that they were not. 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."

The Court of Appeal judges disagreed with Judge Andrews on this issue also, 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." This applied both to the lawyers' interview notes and the accountants' materials.

The Court of Appeal also reaffirmed 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. Otherwise, "the temptation might well be not to investigate at all, for fear of being forced to reveal what had been uncovered."

Legal Advice Privilege: Was Three Rivers (No 5) Wrongly Decided?

The Court of Appeal questioned the wisdom of the approach in Three Rivers (No 5), which limited legal advice privilege to communications between a lawyer and a narrow group of "client" employees.

In particular, the court observed that this approach "presents no problem for individuals and many small businesses" but, 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 of England and Wales that English law on privilege is now out of step with international common law.

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), which would require a U.K. Supreme Court decision. Unfortunately, it does not appear that the Supreme Court will have the opportunity to consider this issue in the near future, following recent confirmation from the SFO that it does not intend to appeal the Court of Appeal judgment.

The U.S. Perspective

The ENRC appeal judgment is an important step in the direction of harmonizing 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 recognized 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. As our firm 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.

Where U.K. and U.S. law still diverge, however, is in the scope of the protection provided by legal advice privilege: 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.

Conclusions

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 maximize the likelihood that documents will be covered by litigation privilege.

More generally, 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.

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