Legal professional privilege update: protections and pitfalls

Elizabeth Hyde, Principal Associate, and Natascha Gaut, Senior Associate at Eversheds Sutherland LLP, take a look at the main types of legal professional privilege in the context of the recent decision in SFO v ENRC, and consider what influence that judgment should have on the conduct of internal regulatory investigations

On 5 September 2018, the Court of Appeal handed down its judgment in the appeal from the decision of the High Court in *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd [2017] EWHC 1017 (QB)* and found in favour of ENRC (see *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd [2018] EWCA Civ 2006*).

The Court of Appeal held that various documents generated during the course of ENRC's internal investigation into alleged bribery and financial wrongdoing were in fact covered by legal professional privilege.

Legal professional privilege is clearly very important in the context of both criminal and civil investigations. Companies must take steps to ensure that privilege applies to documents created following an incident, (including witness statements and investigation reports), as such documents could become very damaging for both the organisation and individuals if they were disclosable. The Court of Appeal judgment in *ENRC* provides useful guidance as to the scope and application of legal professional privilege in the context of internal investigations.

Background to SFO v ENRC

To appreciate the full ramifications of the final decision in *ENRC*, it is useful to understand the circumstances of the case and the primary drivers motivating each party.

First instance judgment of the High Court

In *SFO v ENRC*, ENRC received notification of alleged bribery and financial wrongdoing from a whistleblower in respect of certain overseas group companies. At the outset, ENRC did not know whether there was any evidence that it was in fact in breach and, accordingly, lawyers were instructed to carry out a fact-finding investigation. The SFO subsequently sought disclosure of various documents, namely copies of investigation interview notes produced by ENRC's external lawyers, and materials and reports generated by forensic accountants appointed to conduct a books and records review ('the Documents'). ENRC refused to supply the Documents on the basis that they were covered by legal professional privilege.

On 8 May 2017, the High Court rejected ENRC's claims to legal professional privilege in relation to the Documents. The Court found that a criminal investigation by a law enforcement body was not adversarial litigation as it did not necessarily equate to reasonable contemplation of litigation. The Court stated that 'a fear of prosecution on a worst case scenario is not good enough' and said that an investigation must have reached a 'sufficiently adversarial stage' (i.e. the stage at which prosecution is likely to follow), for litigation privilege to apply.

The High Court held further that a document created for the dominant purpose of 'investigating or recording facts', as opposed to the dominant purpose of 'conducting or advising on the conduct of litigation', would mean a claim for litigation privilege in such documents could fail. The High Court went on to state that a prosecution would only become a real prospect once it was discovered 'there is some truth in the accusations or at the very least that there is some material to support the allegations'.

The High Court determined that criminal legal proceedings against ENRC (its subsidiaries or their employees) were not reasonably in contemplation at any material time prior to the creation of the Documents. In any event, the High Court further found that three of the four categories of the Documents were not created for the dominant purpose of litigation, as the information contained in the documents was not produced to form part of a defence brief. Andrews J drew a distinction between the avoidance of a criminal investigation and the conduct of a defence to a criminal prosecution, deciding that the former did not satisfy the 'dominant purpose' element of the test.

Legal professional privilege: a reminder

Legal professional privilege covers, amongst other things, legal advice privilege and litigation privilege:

Legal advice privilege

Protects confidential communications, created for the purpose of giving or receiving legal advice, between a lawyer and a client. Legal advice privilege also protects documents which reflect such communications. Only communications between a client and a lawyer will be protected by legal advice privilege. The term 'client' has been narrowly construed to date (as a result of the decision in *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No. 5) [2003] QB 1556*); in the context of very large companies this usually covers a defined group including directors, the chief executive etc. Communications between a lawyer and third parties (i.e. anyone not deemed 'the client') are not covered by legal advice privilege.

Litigation privilege

Is wider than legal advice privilege and can cover communications with third parties or documents created by third parties (e.g. investigation reports, witness statements etc.), provided all of the following apply:

(a) litigation is in progress or in reasonable contemplation;
(b) the relevant communication was made for the sole or dominant purpose of conducting that litigation; and
(c) the litigation is adversarial, and not investigative or inquisitorial.

This test is typically known as the Three Rivers Test, outlined in *Three Rivers District Council v Governor & Company of the Bank of England (No. 6) CA ([2004] EWCA Civ 218*.

Ultimately, legal advice privilege is dependent on the involvement of a lawyer, whereas litigation privilege is not.

The approach adopted by the High Court in *SFO v ENRC* was later followed in the case of *R (for and on behalf of the Health and Safety Executive) v Paul Jukes [2018] EWCA Crim 176*. In Jukes, a fatality had led the Health and Safety Executive ("HSE") to commence an investigation. Mr Jukes sought to argue that a witness statement, in which he had accepted he was responsible for health and safety at the company, was inadmissible as it was subject to litigation privilege. The Court of Appeal held that, at the time the statement was made, no decision to prosecute had been taken by the HSE and matters were still at an investigatory stage.

The Court of Appeal in Jukes agreed with the analysis of the High Court in *ENRC* as to when a criminal prosecution could be said to be in reasonable contemplation. There was no evidence that, at the time Mr Jukes' statement was prepared, he or the company had sufficient knowledge as to what the investigation would unearth. Therefore, they could not have appreciated at that point that it was realistic to expect the HSE to be satisfied that there was enough material to stand a good chance of securing a conviction. Accordingly, Mr Jukes' statement was not covered by litigation privilege.

Will a similar approach be adopted in health and safety cases following the Court of Appeal's judgment in *SFO v ENRC*? The next section of this article examines the Court of Appeal's judgment.

Court of appeal judgment - litigation privilege

The Court of Appeal in *SFO v ENRC* concluded that the High Court was wrong in its determination that a criminal prosecution was not reasonably in prospect, once the SFO had written its original letter of 10 August 2011.

In the letter the ENRC is encouraged to consider the SFO's self-reporting guidelines whilst undertaking its internal investigation into allegations of bribery and corruption. The Court examined the evidence that had been put to Andrews J in the High Court, and decided that the contemporaneous evidence submitted by ENRC showed that, as at 19 August 2011, ENRC was 'aware of circumstances which rendered litigation between itself and the SFO a real likelihood rather than a mere possibility'.

The Court of Appeal stated that it was 'not sure' that 'every SFO manifestation of concern would properly be regarded as adversarial litigation', or that it 'necessarily followed that once a SFO criminal investigation is reasonably in contemplation, so too is a criminal prosecution'. The facts instead should be looked at as

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a whole.

However, the Court of Appeal did declare the High Court's distinction between civil and criminal proceedings to be "illusory".

Commenting specifically on Jukes, the Court judged that it: 'was not right to suggest a general principle that litigation privilege cannot attach until either a defendant knows the full details of what is likely to be unearthed or a decision to prosecute has been taken. The fact that a formal investigation has not commenced will be one part of the factual matrix, but will not necessarily be determinative'.

The Court of Appeal held that:

(a) the fact that solicitors prepare a document with the ultimate intention of showing that document to the opposing party does not automatically deprive the work undertaken of litigation privilege;

(b) '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 purposes of resisting or defending such contemplated proceedings'; and

(c) litigation privilege would be engaged whenever the factual circumstances are such that 'where there is a clear threat of a criminal investigation, even at one remove from the specific risks posed by the SFO should it start an 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'.

Court of appeal judgment - legal advice privilege

Legal advice privilege only protects those communications between the legal adviser and those employees of the corporate client authorised to seek and receive such legal advice (i.e. 'the client'). ENRC sought to persuade the Court of Appeal to clarify its 2003 decision in *Three Rivers (No. 5)*, which applied a narrow interpretation of 'client'. The Court of Appeal declined to do so, considering that the question fell beyond the scope of the *ENRC* appeal and would, in any event, require final determination by the Supreme Court.

"Ultimately, the decision of the Court of Appeal in SFO v ENRC is welcome in that companies will now have a better chance of arguing that documents, (including witness statements and investigation reports), created during the course of an investigation following a serious workplace accident or incident are covered by privilege even where the HSE or other regulator has not yet commenced formal action"

Towards the end of the judgment, having considered the submissions of the Law Society, intervener in the appeal, the Court added that '[if] it had been open to us to depart from *Three Rivers (No. 5)*, we would have been in favour of doing so.' (i.e. adopting a wider interpretation of the definition of the client).

Post SFO v ENRC: WH Holding Ltd v E20 Stadium LLP

West Ham Holding Ltd was in a dispute with its landlord, E20 Stadium LLP, (see *WH Holding Ltd v E20 Stadium LLP [2018] EWCA Civ 2652*) regarding the number of seats that they were entitled to use at the London Olympic Stadium.

This appeal related to the disclosure of six emails which had been circulated between E20 board members and E20 stakeholders. E20 argued that the emails did not need to be disclosed because they were composed with the dominant purpose of discussing a commercial proposal for the settlement of a dispute at a time when litigation was in reasonable contemplation and were therefore covered by litigation privilege.

The Court of Appeal rejected E20's arguments and held that the emails were not made for the dominant purpose of conducting litigation as they related to formulating and finalising a purely commercial settlement. Here, the Court considered the *SFO v ENRC* decision and confirmed that this was not intended to broaden the recognised categories of litigation privilege and did not extend the scope "to purely commercial discussions".

The Court held that this case could be distinguished on its facts from *SFO v ENRC* as the "disputed documents in that case all fell within the recognised categories of advice or information going to the merits of the contemplated litigation".

In the case of *Jet2.com Limited v Civil Aviation Authority [2019] EWHC 336,* the judge held that the dominant purpose test applied to legal advice privilege. The judgment is a concern as there is now a risk the dominant purpose test will be applied at first instance. It also suggests that if an email is sent to a mix of lawyers and non-lawyers, it may not be privileged even if copied to lawyers for the purposes of giving legal advice

The CAA has permission to appeal the case and so we may gain greater clarity on this next year.

Practical recommendations

Ultimately, the decision of the Court of Appeal in *SFO v ENRC* is welcome in that companies will now have a better chance of arguing that documents, (including witness statements and investigation reports), created during the course of an investigation following a serious workplace accident or incident are covered by privilege, even where the HSE or other regulator has not yet commenced formal action. Each case will, however, turn on its own facts.

Below are some practical recommendations that Compliance Officers and risk management executives may wish to take into account to offer additional protection to their businesses.

Establish the terms of reference for the investigation

The investigation should be for the dominant purpose of dealing with anticipated litigation and not for the main purpose of internal reporting reasons or because it is standard company procedure;

Privilege email

the legal team should send an email immediately upon receipt of notification of a health and safety or other regulatory incident, instructing the internal team to obtain witness statements, expert reports etc. and to carry out their internal investigation, noting that civil and/or criminal litigation is anticipated.

Use of external lawyers

Engaging external lawyers may indicate that litigation is contemplated. Ensure your external lawyer's records of instruction are comprehensive

File note

A detailed file note should be created by the Compliance Officer, risk executive, or by external lawyers, as soon as possible recording why both criminal and civil litigation is in anticipation. This note should be kept up to date as the investigation proceeds.

Email content

Minimise the number of people copied into emails, and keep emails on commercial advice separate from those on legal advice.

Identify 'the client'

Take care to identify who the client is at the outset of the investigation (e.g. board of directors/chief executive etc.)

Confidentiality

Ensure that no one discusses the content of any investigation report or witness statement with anyone outside the defined group of individuals that would be classed as your internal client.

Jurisdiction

The law of privilege exists in most jurisdictions but its application varies widely. When conducting an internal investigation involving multiple jurisdictions, businesses should ensure that privilege can be claimed before the courts in each relevant jurisdiction.

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