

## Protecting the business

### Legal professional privilege

#### Case law update

On 5 September 2018, the Court of Appeal handed down its judgment<sup>1</sup> 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. 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 provides useful guidance as to the scope and application of Legal Professional Privilege in the context of internal investigations (in both a criminal and civil context).

#### 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 *Three Rivers (No. 5)*<sup>2</sup> case); 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 the following test applies, namely that: (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 (No.6)*<sup>3</sup>

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<sup>1</sup> *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006.

<sup>2</sup> *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No. 5)* [2003] QB 1556

<sup>3</sup> *Three Rivers District Council v Governor & Company of the Bank of England (No. 6)* CA ([2004] EWCA Civ 218)

## Background to SFO v ENRC:

### First instance judgment of the High Court

In *SFO v ENRC*, ENRC received notification of alleged bribery and financial wrongdoing from a whistle blower in respect of certain overseas group companies. At the outset ENRC did not know whether there was any evidence that they were in breach and accordingly they instructed lawyers 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 them on the basis they were covered by Legal Professional Privilege.

On the 8 May 2017, the High Court rejected ENRC's claims to Legal Professional Privilege in relation to the Documents. The High 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 '*a fear of prosecution on a worst case scenario is not good enough*' and 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.

The approach adopted by the High Court in *SFO v ENRC* was later followed in the case of *R v Jukes*<sup>4</sup>. 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 that 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 legal privilege. Will a similar approach be adopted in health and safety cases following the Court of Appeal's Judgement in *SFO v ENRC*? The next section of this article examines the Court of Appeal's Judgment.

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<sup>4</sup> *R (for and on behalf of the Health and Safety Executive) v Paul Jukes* [2018] EWCA Crim 176

## Court of appeal judgment

### SFO v ENRC and the Law Society

#### 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 to ENRC encouraging ENRC 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 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 a whole.

However, the Court of Appeal did declare that the High Court's distinction between civil and criminal proceedings to be *"illusory"*. Commenting specifically on *Jukes*, the Court of Appeal stated 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'*.



## Legal Advice Privilege

Legal Advice Privilege only protects those communications as between the legal adviser and those employees of the corporate client authorised to seek and receive such legal advice (ie '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 decided that this question fell beyond the scope of the present appeal and that it would, in any event, require final determination by the Supreme Court.

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

## How does this sit with HSE investigations?

Companies will now have a better chance of arguing that documents (including witness statements / investigation reports) created during the course of an investigation following a serious workplace accident are covered by privilege, even where the HSE has not yet commenced formal action. Each case will however turn on its own facts. We have included below some practical recommendations which in-house lawyers may wish to take into account to offer additional protection to their business.

## Practical recommendations

### Establish the terms of reference for your 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 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 in-house lawyer (or external lawyers) as soon as possible recording why both criminal and civil litigation is in anticipation. This note should be kept up to date

### Identify 'the client'

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

### Confidentiality.

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

For further advice on legal professional privilege in the context of criminal investigations, please contact a member of Eversheds Sutherland's EHS team. Our EHS team is ranked in Band 1 in the UK's legal directories for health and safety.

Eversheds Sutherland EHS LinkedIn Group: <https://www.linkedin.com/groups/4097840>

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