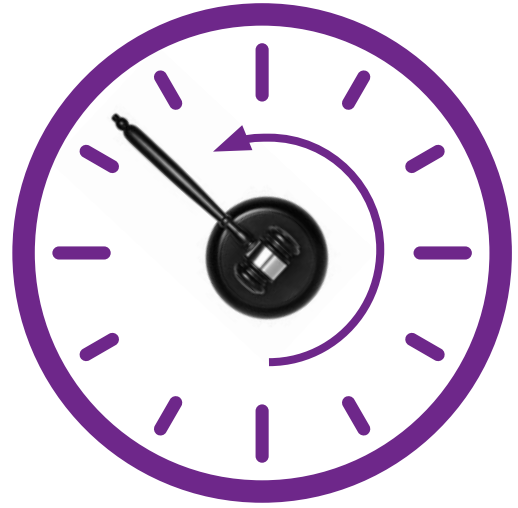


## Restoring the status quo

### Internal investigations and legal professional privilege

October 2018



The UK Court of Appeal (the “**CoA**”) recently delivered an important judgment in a case dealing with internal investigations and legal professional privilege. In *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd*,<sup>1</sup> the Court of Appeal, overturning the first instance decision of the High Court,<sup>2</sup> found that documents prepared during an internal investigation – by a firm of lawyers and by a firm of forensic accountants – were protected by litigation privilege (the “**Judgment**”).

The Judgment provides welcome clarity regarding the scope and application of legal professional privilege in the context of criminal and civil internal investigations.

#### Why is this important?

Documents that attract legal professional privilege are protected from inspection by, or disclosure to, either the court or to any other party. The privilege is one that is recognised by courts across common law jurisdictions. It is a fundamental right<sup>3</sup> underpinned by public interest considerations. Legal professional privilege comprises two subcategories: (1) litigation privilege; and, (2) legal advice privilege.

#### Background

Eurasian Natural Resources Corporation Ltd (“**ENRC**”) had carried out an internal investigation after a whistle-blower had made allegations of corruption and financial wrongdoing in one of its subsidiaries in 2010. Following media reporting of the whistleblowers allegations in August 2011, there ensued ongoing interaction between ENRC and the UK Serious Fraud Office (“**SFO**”). The SFO commenced a criminal investigation into the activities of ENRC in April 2013, and as part of that investigation issued notices to compel production of certain documents, including ENRC’s internal investigation notes and interviews with employees. ENRC resisted production on the basis that the documents were protected by legal professional privilege (specifically,

litigation privilege). The SFO challenged these claims, arguing in part that the documents in dispute had not been generated for the dominant or sole purpose of defending litigation, a key requirement in the test for litigation privilege.

#### High Court

The UK High Court rejected ENRC’s argument that the documents were protected by legal professional privilege. The High Court found that the documents were not so protected because they were not created for the dominant purpose of litigation given that criminal proceedings were not reasonably in contemplation prior to the creation of the documents.

The High Court applied the test for litigation privilege, as set out in the UK Supreme Court decision in *Three Rivers District Council v Governor & Company of the Bank of England (No. 6)* (“*Three Rivers (No. 6)*”).<sup>4</sup> This test provides that litigation privilege only applies where:

- (a) litigation is in progress or is in 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.

<sup>1</sup> [2018] EWCA Civ 2006

<sup>2</sup> [2017] EWHC 1017 (QB)

<sup>3</sup> *Ahern v Mahon* [2008] 4 IR 704 *Miley v. Flood* [2001] 2 IR 50

<sup>4</sup> [2004] UKHL 48

## Court of Appeal

### Litigation Privilege

The CoA disagreed and unanimously upheld ENRC's claim to litigation privilege on the basis that ENRC were "right to say that" legal proceedings "were reasonably in its contemplation" at the relevant time, and that the SFO investigation could be regarded as adversarial litigation. The CoA stated that it is a question of fact as to whether litigation is the dominant purpose. The CoA also rejected the High Court's view that where a document is created with the intention of showing it to the opposing party, that means that it cannot be subject to litigation privilege. The CoA held that legal advice given in order to avoid or settle proceedings was as much protected by litigation privilege as advice given for the purpose of resisting or defending proceedings.

### Legal Advice Privilege

The CoA decided it was unnecessary to consider whether legal advice privilege applied in the present circumstances, given its finding that the disputed documents were already protected by litigation privilege. The Court of Appeal observed that any departure from the position of current guiding authority on legal advice privilege, *Three Rivers (No 5)*, would, in any event, require final determination by the Supreme Court.

### Impact

The Judgment restores the status quo to English law on litigation privilege as applied to internal investigations. This approach remains similar to that adopted in Ireland to-date, such that documents created during internal investigations may attract legal professional privilege; provided that the document is created in contemplation of litigation.

As to what constitutes "litigation" in the UK, the Judgment confirms that the litigation must be adversarial. The Irish courts on the other hand, have held that a broader approach is required. Litigation privilege has been held to apply to documents created in the context of tribunals of inquiry and regulatory investigations<sup>5</sup> (i.e. non-adversarial, such as investigations by the Director of Corporate Enforcement).

What is also of interest to Irish corporations and their advisers, is confirmation that legal advice given to avoid or settle litigation and materials intended to be shown to a regulator

or opponent can be covered by litigation privilege. This is consistent with previous soundings from the Irish High Court that documents intended to be presented to the other side as part of an effort to avoid litigation "still comes into being for the purposes of litigation.....[and] was privileged"<sup>6</sup>.

As noted by Eversheds Sutherland (who acted for the SFO)

*"the views expressed by the Court of Appeal offer an important insight into how English courts might approach similar issues in future cases, and so are relevant to all corporates generally, but are of particular importance to those engaged in internal investigations".*

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<sup>5</sup> Ahern v Mahon [2008] 4 IR 704; Quinn & Ors v IBRC & Ors [2015] IEHC 315; The Director of Corporate Enforcement v Leslie Buckley [2018] IEHC 51.

<sup>6</sup> Horgan v Murray (No 2) [1999] 1 ILRM 257

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