To Our Clients and Friends

Memorandum

Maintaining Privilege In Internal Investigations Into Criminal Conduct: SFO v ENRC

Executive Summary

On 5 September 2018, the English Court of Appeal handed down its judgment in the *Serious Fraud Office ("**SFO**") v Eurasian Natural Resources Corporation Limited ("**ENRC**")* case overturning the controversial first instance decision of Mrs. Justice Andrews concerning the application of legal professional privilege to communications produced during the course of internal investigations.[1] The first instance decision had raised concern that documents created during the course of internal investigations into potential criminal conduct (including bribery and corruption) may not be covered by litigation privilege if they were created prior to a prosecutor having decided that there was sufficient evidence to charge.

The Court of Appeal has now overturned that decision, meaning that such documents may be protected by litigation privilege regardless as to whether a prosecutor has decided to pursue criminal proceedings. In order for litigation privilege to apply, the beneficiary will need to demonstrate that there was a reasonable prospect of a criminal prosecution, that legal advisers had been engaged to deal with that situation and that the documents were created for the dominant purpose of heading off, avoiding or settling the contemplated proceedings. In arriving at its decision, the Court of Appeal commented that "*[i]t is…obviously in the public interest that companies should be prepared to investigate allegations […] prior to going to a prosecutor such as the SFO, without losing the benefit of legal professional privilege for the work product and consequences of their investigation. Were they to do so, the temptation might well be not to investigate at all, for fear of being forced to reveal what had been uncovered […]*".[2]

Background

In December 2010, ENRC received allegations of fraud, bribery and corruption in connection with its Kazak-based operations from a whistle-blower. In response, ENRC instructed external legal counsel to investigate and report on the veracity of those allegations. The investigation included interviewing 80 employees, instructing forensic accountants to analyse the relevant accounting records and reviewing approximately 500,000 electronic documents and 89 binders of hard copy documents.

During the course of the investigation, ENRC contacted the SFO to discuss the ongoing investigation and the potential to self-report. Following media reports, the SFO wrote to ENRC in August 2011 requesting that ENRC consider carefully the SFO's Self-Reporting Guidelines, but noted that the SFO was *"not*

1 [2017] EWHC 1017 (QB).

2 [2018] EWCA Civ 2006, 116.

carrying out a criminal investigation into ENRC at [that] stage". In 2013, the relationship between ENRC and the SFO broke down and the SFO commenced a criminal investigation. As part of that investigation, the SFO requested that ENRC disclose various documents prepared during the course of ENRC's own internal investigation. ENRC refused to provide those documents, arguing that they were protected by legal professional privilege.

Under English law, legal professional privilege is split into two types: advice privilege and litigation privilege. Advice privilege applies to confidential communications between a client and its lawyers (acting in their professional capacity) in connection with the provision of legal advice. Litigation privilege applies to communications between clients and their lawyers and third parties if the dominant purpose of that communication is in connection with existing or reasonably contemplated adversarial litigation.

ENRC claimed that the following four categories of documents were privileged and, therefore, protected from disclosure: (i) 80 notes of interview between external legal counsel and employees, former employees, third parties and officers of ENRC; (ii) materials generated by a forensic accounting firm for the purposes of carrying out a review of the books and records of certain subsidiaries of ENRC; (iii) documents containing factual evidence presented to ENRC's Nomination and Corporate Governance Committee; and (iv) 17 documents referred to in a letter to external legal counsel, of which four e-mail communications were between a Swiss-qualified lawyer acting as ENRC's Head of Mergers and Acquisitions and a senior ENRC executive.

First Instance Decision

The SFO disagreed with ENRC's assertion of privilege and issued a Part 8 Claim in the High Court seeking a declaration that they were not documents that ENRC *"would be entitled to refuse to disclose or produce on grounds of legal professional privilege*".[3] The Part 8 claim came before Mrs. Justice Andrews and raised a number of issues with respect to the application of legal professional privilege. With respect to litigation privilege, the High Court was required to decide: (i) whether the dominant purpose for ENRC conducting the investigation was the contemplation of anticipated litigation; and (ii) whether the SFO's criminal investigation constituted an "*adversarial litigation*" to which litigation privilege could apply.

Based upon the evidence before her, Mrs. Justice Andrews held that ENRC had failed to establish that there was a real likelihood (as opposed to a mere possibility) of litigation at the time that the relevant documents were produced and, as a result, litigation privilege could not apply. In this regard, the judge held that "*[w]hilst […] an SFO investigation was imminent […] [s]uch an investigation is not adversarial litigation…"*.[4] In the judge's view, the relevant "*adversarial litigation*" was the subsequent criminal proceedings that might result from the then contemplated SFO investigation. However, the judge noted that, unlike civil proceedings, in order for criminal proceedings to be commenced, a prosecutor must first be "*satisfied that there is a sufficient evidential basis for prosecution and the public interest test is also met"*.[5] In these circumstances, the judge held that *"there is no evidence that [ENRC] was ever aware that it had any such problem, or of anything more tangible than a fear that one might emerge"*.[6] As a result,

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3 [2017] EWHC 1017 (QB), 5.

4 [2017] EWHC 1017 (QB), 151.

5 [2017] EWHC 1017 (QB), 160.

6 [2017] EWHC 1017 (QB),161.

the judge concluded that she was *"not persuaded that taking legal advice in relation to the conduct of future contemplated criminal litigation was even a subsidiary purpose of the creation of those documents, let alone the dominant purpose"*.[7]

With respect to advice privilege, the judge cited the *Three Rivers (No. 5)*[8] decision and explained that advice privilege only applies to communications between *"the lawyer and those individuals who are authorised to obtain legal advice on that entity's behalf*".[9] Accordingly, the judge held that, as none of the persons interviewed were authorised to seek or receive legal advice by ENRC, they did not constitute the "*client*", and communications were, therefore, not protected from disclosure to the SFO by advice privilege. Similarly, the judge held that that communications between the Head of Mergers and Acquisitions and ENRC executives could not have amounted to legal advice as, despite the fact that the relevant individual was a qualified lawyer, he was acting as a "*man of business*" and not as a lawyer.

Court of Appeal Decision

ENRC appealed the High Court decision on the basis that Mrs. Justice Andrews was wrong to conclude that criminal proceedings against ENRC were not reasonably in contemplation at the relevant time, and to hold that the relevant documents were not brought into existence for the dominant purpose of resisting contemplated criminal proceedings. ENRC also requested the Court of Appeal to provide further guidance and clarification of its previous decision in *Three Rivers (No. 5)* with respect to the scope of advice privilege and, in particular, the definition of "*client*".

The Court of Appeal considered first whether the first instance judge was correct in her decision that criminal legal proceedings had not been reasonably contemplated by ENRC at any point prior to the creation of the documents. In this respect, the Court of Appeal held that the judge had wrongly concluded that "*a criminal prosecution was not reasonably in prospect once the SFO had written its letter of 10th August 2011*",[10] and that the distinction she sought to draw as to when civil and criminal proceedings could be in reasonable contemplation was "*illusory"*.[11] On the basis of the evidence submitted by ENRC, the Court of Appeal held that ENRC had established that, throughout the investigation, ENRC had anticipated that the SFO could at any point investigate, and that that investigation could lead to a criminal prosecution. The Court of Appeal noted that the sub-text of discussions 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*".[12] However, the Court of Appeal went on to provide a general caution that not *"every SFO manifestation of concern would properly be regarded as adversarial litigation, but when the SFO specifically makes clear to the company the prospect of its criminal prosecution (over and above the general principles set out in the Guidelines), and legal advisers are engaged to deal with that situation […] there is a clear ground for contending that criminal prosecution is in reasonable contemplation"*.[13]

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7 [2017] EWHC 1017 (QB), 164.

8 *Three Rivers DC v Bank of England (No 5)* [2003] QB 1556.

9 [2017] EWHC 1017 (QB), 70.

10 [2018] EWCA Civ 2006, 91.

11 [2018] EWCA Civ 2006, 99.

12 [2018] EWCA Civ 2006, 93.

13 [2018] EWCA Civ 2006, 96.

Having decided that criminal proceedings were in reasonable contemplation, the Court of Appeal then needed to consider whether the documents were produced for the dominant purpose of resisting those proceedings. In this regard, the Court of Appeal held that "*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 such contemplated proceedings*."[14] The Court of Appeal then had to decide whether ENRC's dominant purpose in commencing the internal investigation was "*to investigate the facts to see what had happened and deal with compliance and governance or to defend those proceedings*".[15] The Court of Appeal held that "*[a]lthough a reputable company will wish to ensure high ethical standards in the conduct of its business for its own sake, it is undeniable that the 'stick' used to enforce appropriate standards is the criminal law and, in some measure, the civil law also. Thus, 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"*.[16]

Based upon the above findings, the Court of Appeal held that all interviews undertaken by external legal counsel, together with the books and records review, were covered by litigation privilege. The only documents to which litigation privilege did not apply were the two e-mails between the Head of Mergers and Acquisitions and the ENRC executives.

Having decided that the relevant documents were covered by litigation privilege, it was not necessary for the Court of Appeal to provide any further clarification of its decision in *Three Rivers (No. 5)*. However, as the Law Society had been permitted to intervene in the case, the Court of Appeal provided certain observations *obiter dicta*. First, the Court of Appeal noted that *Three Rivers (No. 5)* decided that "*communications between an employee of a corporation and the corporation's lawyers could not attract legal advice privilege unless that employee was tasked with seeking and receiving such advice on behalf of the client"*.[17] The Court of Appeal went on to explain that a decision of the Supreme Court was required in order to depart from that determination, however, if it *"had been open to us to depart from Three Rivers (No. 5), we would have been in favour of doing so"*.[18]

The decision of the Court of Appeal reasserts the principles of lawyer-client confidentiality and gives some comfort to corporations that their internal investigations will be protected. It will allow corporations to continue to react responsibly and sensibly to allegations such as those relevant in this case, without fear of the SFO or similar regulatory bodies privileged internal communications. It does, however, raise additional questions surrounding the appropriateness of the current interpretation of the "*client*" in the sphere of large corporations and whether English law should reconsider its position to align itself with international standards. It has been reported that the SFO may seek leave to appeal to the Supreme Court and there may, therefore, be further updates on this area of the law in the near future.

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14 [2018] EWCA Civ 2006, 102.

15 [2018] EWCA Civ 2006, 108.

16 [2018] EWCA Civ 20018, 109.

17 [2018] EWCA Civ 2006, 123.

18 [2018] EWCA Civ 2006, 124 and 130.

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