GIBSON DUNN

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COURT OF APPEAL IN LONDON OVERTURNS WIDELY CRITICISED HIGH COURT JUDGMENT IN *SFO V ENRC*

To Our Clients and Friends:

I. Introduction

Today the Court of Appeal of England and Wales issued its judgment in *The Director of the Serious Fraud Office and Eurasian Natural Resources Corporation Limited*[1] regarding the privileged nature of documents created in the context of an internal investigation.

The Court of Appeal reversed the High Court's decision and found that all of the interviews conducted by ENRC's external lawyers were covered by litigation privilege, and so too was the work conducted by the forensic accountancy advisors for the books and records review. The Court of Appeal found that ENRC did in fact reasonably contemplate prosecution when the documents were created. Moreover, while determining that it did not have to decide the issue, the Court of Appeal also stated that it may also have departed from the existing narrow definition of "*client*" for legal advice privilege purposes in the context of corporate investigations.

In the April 2017 High Court decision, Mrs Justice Andrews ruled in favour of the SFO, finding that certain documents (for example, interview memoranda created by external lawyers and work product of third party forensic accountancy advisors for ENRC) were not protected from disclosure to the SFO on the basis of litigation privilege or, in the case of the interview memoranda and other documents, legal advice privilege. The decision was the subject of considerable criticism from the UK legal profession. ENRC appealed the decision and the matter was heard in the Court of Appeal in July 2018. Given the implications of the decision for legal professional privilege generally, the Law Society for England and Wales intervened in the hearing.

Today's judgment, overturning Mrs Justice Andrews' decision, substantially clarifies English law regarding litigation privilege in connection with internal investigations, particularly where companies are on notice of an investigation or fear enforcement action or prosecution.

II. Legal professional privilege in English law

By way of reminder, the English law of privilege has two distinct heads:

> 1) **legal 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. Privilege attaches to all communications that form part of the continuum of the

lawyer/client communication, even if they do not contain a request for legal advice or advice itself.

In a corporate context, the "client" is limited to those individuals authorised to obtain legal advice on the company's behalf.[2] In this respect, English privilege law diverges from its equivalents in many other common law jurisdictions. It was one of the points considered by the Court of Appeal, and on which we comment below; and

2) **litigation privilege** attaches to communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation, but only where:

a) litigation is in progress or in reasonable contemplation;

b) the communications have been made for the sole or dominant purpose of conducting that litigation;

c) the litigation is adversarial, not investigative or inquisitorial.

III. Background and the Judgment under Appeal

In December 2010, ENRC received an email from someone claiming to be a whistle-blower, alleging bribery and corruption in relation to its Kazakh subsidiary. ENRC instructed external lawyers to carry out an investigation. The SFO became involved in August 2011, sending a letter to ENRC notifying it that it was not under formal investigation but that it should consider its position in light of the SFO's then-in-force Self Reporting Guidelines. ENRC's external lawyers conducted interviews with current and former employees, and a forensic accountancy firm carried out a "books and records" review to consider the company's financial crime systems and controls. The SFO did not formally open an investigation into ENRC until April 2013. That investigation remains open today and is focused on allegations of fraud, bribery and corruption.

As part of its investigation, the SFO sought the compulsory production of certain documents under its formal information gathering powers in section 2 of the Criminal Justice Act 1987. A person in receipt of a section 2 notice is not obliged to produce to the SFO material that is subject to legal professional privilege, and ENRC refused to provide certain categories of documents to the SFO, on the basis that they were subject to either or both legal advice privilege or litigation privilege.

The documents ENRC sought to withhold included:

- interview notes taken by ENRC's external counsel of over one hundred witness interviews with current and former employees or officers of ENRC and its subsidiaries;
- materials generated by the forensic accountancy firm as part of its books and records review;

- documents created by ENRC's external solicitors that contain accounts of factual events and which were used to give updates to ENRC's corporate governance committee and Board; and
- a smaller category of miscellaneous other documents.

The SFO brought proceedings against ENRC in the High Court, seeking a declaration that the documents ENRC sought to withhold were not properly protected by privilege.

Mrs Justice Andrews ruled in favour of the SFO, rejecting ENRC's claim to litigation privilege. Having considered all of the evidence, she reached the view that at the time the documents were created, ENRC did not reasonably contemplate criminal prosecution, and even if she were wrong in that finding, she found that ENRC did not create the documents in question for the dominant purpose of defending such prosecution, but instead for compliance and governance reasons. She also took the view that legal advice privilege did not apply to the interview memoranda drafted by external counsel because the interviewees were not individuals properly authorised to give or receive legal advice (i.e. they were not within the narrow definition of "client" in *Three Rivers (No. 5)*).

ENRC appealed the High Court decision.

IV. Today's Court of Appeal judgment

The Court of Appeal today unanimously overturned Mrs Justice Andrews' decision regarding litigation privilege.

Having reached that decision, the Court of Appeal determined that it was not required to decide the points of law relating to legal advice privilege, most notably on the narrow definition of "client". The Court of Appeal indicated that this would need to be a matter to be decided by the Supreme Court in due course. That being said, the Court of Appeal said it saw "much force" in the submissions made by ENRC and the Law Society, and had it been required to decide the point it would have departed from the narrow definition of "client" in *Three Rivers (No. 1`5)*.

Litigation Privilege

The Court of Appeal decided the following key questions regarding litigation privilege:

- *Was the judge right to determine that, at no stage before all the documents that ENRC sought to withhold had been created, criminal legal proceedings against ENRC or its subsidiaries or their employees were reasonably in contemplation?*

This case, while raising points of law of great significance, is one in which the courts' assessment of the facts has weighed heavily on the outcome, and the Court of Appeal took a very different view of the facts to Mrs Justice Andrews. It found that she was wrong to conclude that a criminal prosecution was not reasonably in contemplation by the time the documents that ENRC sought to withhold were created. Mrs Justice Andrews found that ENRC's claim to litigation privilege failed "at the first hurdle" of showing that in August 2011 it was aware of circumstances that rendered litigation between itself and

the SFO a real likelihood rather than a mere possibility. The Court of Appeal found that the factual record demonstrated the opposite, listing a number of factors to support its position, including:

- In December 2010, ENRC received the whistle-blower email alleging corruption and financial wrongdoing and appointed external lawyers to investigate the allegations.

- By March 2011, ENRC's General Counsel had made clear that he thought that ENRC was "*firmly on the SFO's radar*" and that he expected a formal investigation in due course, which was why he had "*upgraded [ENRC's] dawn raid procedures*".

- In April 2011, ENRC's Head of Compliance predicted an "*SFO dawn raid … before summer's over*";

- In April 2011, ENRC's external legal counsel wrote to ENRC's then General Counsel indicating that the internal investigation related to conduct which was potentially criminal in nature, that adversarial proceedings might occur as a result of the internal investigation and that both criminal and civil proceedings can be reasonably said to be in contemplation.

- When the SFO wrote to ENRC on 10 August 2011, it said that the SFO was not carrying out a criminal investigation at that stage, but asked that ENRC consider the SFO's Self-Reporting Guidelines carefully. Those Guidelines expressly stated: "*no prosecutor can ever give an unconditional guarantee that there will not be a prosecution*"; "*professional advisers will have a key role*"; any information received by the SFO would be for the purposes of its powers under the Criminal Justice Act 1987; wherever possible, the investigation would be carried out by the "corporate's" own professional advisers; and participation in the self-reporting process would increase "*the prospect (in appropriate cases) of a civil rather than a criminal outcome*" by reducing the likelihood that the SFO would discover corruption itself .

Rejecting Mrs Justice Andrews' findings, the Court of Appeal agreed with ENRC that criminal legal proceedings were in reasonable contemplation when it initiated its internal investigation in April 2011, and certainly by the time of the SFO's 10 August 2011 letter (regarding the Self-Reporting Guidelines).

Among the more notable passages in today's judgment is the Court of Appeal's observation that "*the whole sub-text of the relationship 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*".

The Court of Appeal made a number of further observations, that will help companies subject to possible investigation with the assessment of whether litigation is in reasonable contemplation:

First, the Court of Appeal noted that not every SFO "manifestation of concern" will be enough to satisfy the test for litigation privilege. However, when the SFO specifically makes clear to a company the prospect of its criminal prosecution and legal advisors are instructed to assist with the situation, as in this case, there will be a clear basis for asserting that a criminal prosecution is in reasonable contemplation.

Second, the Court of Appeal noted that it cannot necessarily be concluded that once an SFO investigation is reasonably in contemplation, so too is a criminal prosecution. However, in this case, the facts pointed towards the contemplation of a prosecution if the company's self-reporting process did not succeed in averting it.

Third, the Court of Appeal stated that the fact that a company needs to conduct further enquiries before it can say with certainty that it will be prosecuted does not prevent proceedings being in reasonable contemplation. The Court of Appeal observed that:

> *"An individual suspected of a crime will, of course, know whether he has committed it. An international corporation will be in a different position, but the fact that there is uncertainty does not mean that, in colloquial terms, the writing may not be clearly written on the wall."*

- *Was the judge right to determine that none of the documents that ENRC sought to withhold was brought into existence for the dominant purpose of resisting contemplated criminal proceedings against ENRC or its subsidiaries or their employees?*

The Court of Appeal took the view that Mrs Justice Andrews began her analysis of this issue from the wrong starting point.

The Court of Appeal decided that, 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 purpose of resisting or defending such contemplated proceedings.

Having already decided that ENRC reasonably contemplated criminal proceedings, the Court of Appeal next considered whether it would have been reasonable to regard ENRC's dominant purpose as being to investigate the facts to see what had happened and deal with compliance and governance (which is what the SFO's August 2011 letter urged) or to defend those contemplated criminal proceedings.

The Court of Appeal observed that, although a reputable company will wish to ensure high ethical standards in the conduct of its business for its own sake, the 'stick' used to enforce appropriate standards is the criminal law (and, in some measure, the civil law also). Where there is a clear threat of a criminal investigation the dominant purpose for the investigation of whistle-blower allegations may be to prevent or address the possible litigation.

The Court of Appeal also identified the important public policy imperative that companies should be able to investigate allegations prior to prosecution involvement, without losing the benefit of legal professional privilege. Otherwise, the temptation might well be to not investigate at all.

The Court of Appeal also dismissed Mrs Justice Andrews' finding of fact that there was overwhelming evidence that ENRC created the interview memoranda for the specific purpose of showing them to the SFO, finding that ENRC never actually committed to producing its interview memoranda and associated documentation to the SFO.

- *In the circumstances, which if any of the documents that ENRC sought to withhold are protected by litigation privilege?*

The Court of Appeal found that all of the interviews conducted by ENRC's external lawyers were covered by litigation privilege (which reasoning, it must be assumed, extends to the oral interviews themselves, the memoranda prepared by external counsel memorialising those interviews, as well as external counsel's underlying notes), as was the work conducted by the forensic accountants in connection with the books and records review. These were all fact finding exercises conducted at a time when criminal prosecution was in reasonable contemplation and undertaken for the dominant purpose of resisting or avoiding prosecution.

Legal Advice Privilege

Having overturned the first instance judgment on the litigation privilege issue, the Court of Appeal determined that it did not have to decide whether the documents ENRC sought to withhold were covered by legal advice privilege. However, it did explain how it would have decided that issue.

The Court of Appeal would, it stated, have considered itself bound by the narrow interpretation of "client" in *Three Rivers (No. 5)* – which was the basis on which Mrs Justice Andrews rejected part of ENRC's arguments that the interview memoranda were protected by legal advice privilege. However, the Court of Appeal saw "*much force*" in the arguments made by ENRC and the Law Society that a narrow interpretation is wrong. This following passage is worth quoting at length:

> *"…[L]arge corporations need, as much as small corporations and individuals, to seek and obtain legal advice without fear of intrusion. If legal advice privilege is confined to communications passing between the lawyer and the "client" (in the sense of the instructing individual or those employees of a company authorised to seek and receive legal advice on its behalf), this presents no problem for individuals and many small businesses, since the information about the case will normally be obtained by the lawyer from the individual or board members of the small corporation. That was the position in most of the 19th century cases.* ***In the modern world, however, we have to cater for legal advice sought by large national corporations and indeed multinational ones. In such cases, the 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. 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****. In our view, at least, whatever the rule is, it should be equally applicable to all clients, whatever their size or reach…."*

Adding further force to its view that the matter needs prompt attention, the Court of Appeal acknowledged the submissions made by the Law Society that this aspect of legal advice privilege places English law out of step with other leading common law jurisdictions on this issue. The Court concluded

that, had it been open to it to depart from *Three Rivers (No. 5),* it would have done so. While the narrow definition of "client" remains the law until it is considered by the Supreme Court, the Court of Appeal has recognised the point long argued by large corporations and their lawyers that the narrow definition of "client" in corporate investigations is uncomfortable. This judgment would seem to signal judicial receptiveness to an attempt to have the effect of *Three Rivers (No. 5)* in such contexts distinguished.

Given the Court of Appeal's reasoning in this respect, a company faced with a document production demand from the SFO that is not able to rely on litigation privilege as a basis for withholding the documents may feel emboldened to assert legal advice privilege. The SFO would have a number of options open in the face of a refusal to produce. Least attractive is a prosecution for failing to produce. It is a blunt instrument and an authoritative, reasoned judgment is not going to be received in the context of a trial for summary conviction. Although an appeal might well reach the High Court (or higher), the criminal conviction of a company or individual in order to access those appeal mechanisms would be draconian, given the way today's judgment could be said to put a dent in the strength of legal advice privilege in the context of global corporate investigations. It is as much in the SFO's interest to see the issue resolved as it is for companies and individual employees who receive production demands. In these circumstances, our view is that a company in this position would have good prospects of agreeing with the SFO a process for properly and fairly adjudicating a claim to privilege in such a context, with the interests of justice being the guiding principle. The routes to judicial clarity would be an application by the company for judicial review of a production demand, an on-notice application by the SFO for a search warrant in the Crown Court (where a High Court or Appeal Court judge could sit) with attendant appellate processes available, or as in the ENRC case, an application by the SFO to the High Court for declaratory relief.

V. Key Implications for Companies conducting Investigations into Potential Wrongdoing

This judgment is lengthy and detailed, and will be the subject of intense discussion in the coming months. Key initial takeaways for our clients and friends considering investigations into serious potential wrongdoing are the following:

- The precise factual background is critical to the assessment of whether litigation is in reasonable contemplation, and whether any given communication is for the dominant purpose of such litigation. Here, two senior courts have reached diametrically opposed views on the facts. In each investigation, careful consideration should be given to the underlying evidence relating to any allegations (if known), the realistic likelihood of proceedings, and the company's strategy regarding information gathering, interviews and document creation determined accordingly. This consideration should be undertaken at the earliest stage possible, in consultation with legal counsel. It should then be kept under review, and refreshed as the company's appreciation of the underlying facts evolves, and as the posture of the investigating authority emerges.

- A company should ensure that it keeps a record of its decision-making in this respect, so as to be able to support subsequent assertions of litigation privilege, should it be necessary to do so. Again, the record-keeping strategy in this respect should be determined at an early stage of the investigation, in consultation with legal counsel.

- It is not strictly necessary, on the Court of Appeal's reasoning, for an enforcement authority even to be involved in order for litigation to be in reasonable contemplation. When determining its communications and investigation strategy in relation to whistle-blower or other self-identified allegations, a company should carefully consider which authority or authorities might investigate and/or prosecute any wrongdoing identified, and factor this into its litigation privilege assessment. Conversely, the fact that an enforcement agency has expressed an interest in a matter does not necessarily herald litigation, and may not necessarily extend the protection of litigation privilege to communications as part of the investigation. Indeed, even reasonable contemplation of an investigation by an enforcement authority will not on its own satisfy the test of reasonable contemplation of litigation.

- Uncertainty as to whether litigation will arise is not itself an obstacle to the reasonable contemplation of litigation, and therefore, the protection of litigation privilege. It is open to a company to conduct further enquiries to get greater clarity regarding the likelihood of prosecution. Again, the precise facts will be critical to the determination.

- Where litigation is in reasonable prospect, interviews with current and former employees may be conducted by legal counsel, and memorialised in interview notes, under protection of litigation privilege; moreover, requests from authorities for the production of such notes may be resisted on the basis of privilege. An interesting question will arise where privileged notes have been shared with authorities to date in reliance on Mrs Justice Andrews' judgment, as to whether they may legitimately be clawed back from the authorities.

- The narrow definition of "client" for legal advice privilege purposes has been substantially weakened by this judgment. However, it remains the prevailing law until overturned by the Supreme Court. Companies should continue to be wary of potential loss of privilege due to communications going beyond the group of persons instructing legal advisers. However, companies may consider that the prospect of successfully challenging a rejection of a claim to legal advice privilege by an investigating authority have been substantially improved by today's judgment.

VI. Further discussion

The impact of today's judgment will be amongst the issues considered in detail by our partner, Sacha Harber-Kelly (formerly of the SFO) and other Gibson Dunn partners on 17 September 2018, in our forthcoming webcast: *"Ten Years After Siemens: The Evolving Landscape of Global Anti-Corruption Enforcement"*. To register please click here.

[1] [2018] EWCA Civ 2006

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

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Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these developments. If you would like to discuss this alert in greater detail, please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following members of the firm's disputes practice:

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