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CASE COMMENT

The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited

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The United Kingdom's Serious Fraud Office may have lost the battle in its challenge of Eurasian Natural Resources Corporation (ENRC)'s claim of privilege in the Court of Appeal, but the war isn't over yet.

On 5 September 2018, the Court of Appeal of England and Wales issued its judgment in *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited*[1] regarding the privileged nature of documents created in the context of an internal investigation.

Legal professional privilege in English law

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

1. *Legal advice privilege*, which 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.

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1 [2018] EWCA Civ 2006.

In a corporate context, the 'client' is limited to those individuals authorised to obtain legal advice on the company's behalf (see *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 5)* [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 – see comment below.

2. *Litigation privilege*, which 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:
   - litigation is in progress or in reasonable contemplation;
   - the communications have been made for the sole or dominant purpose of conducting that litigation;
   - the litigation is adversarial, not investigative or inquisitorial.

Background and the judgment under appeal

In December 2010, ENRC received an email from someone claiming to be a whistleblower, alleging bribery and corruption in relation to its Kazakh subsidiary. ENRC instructed external lawyers to carry out an investigation. The Serious Fraud Office (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 the 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.

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 100 witness interviews with current and former employees or officers of ENRC and its subsidiaries;

2 [2003] EWCA Civ 474.

- 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, 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. The High Court ruled in favour of the SFO, rejecting ENRC's claim to litigation and advice privilege. ENRC appealed the High Court decision to the Court of Appeal and won.

Court of Appeal judgment

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

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 had a very different view of the facts than the High Court. The Court of Appeal found that the factual record demonstrated a number of factors in support of litigation privilege, including:

- in December 2010, ENRC received the whistleblower 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 that 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; and
- 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.

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 the *ENRC* 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:

1. 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 advisers 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.
2. 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.
3. 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 criminal 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 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 the High Court's 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 recording 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 the High Court 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.

Who has really won? The SFO response to the judgment

In cases where a company is cooperating with the SFO, it is common to receive a request from the SFO to waive privilege over the internal investigation interviews. Historically companies have been told that doing so would weigh in favour of an invitation being extended to enter in Deferred Prosecution Agreement (DPA) discussions, but that a refusal would be neutral.[3] In late 2018, the SFO has redrawn the battle lines, perhaps responding to the prospect of well-founded claims of privilege now being easier. Instead, the SFO has suggested that assertion of privilege may now be seen as inconsistent with cooperation.[4] Possibly ironically it is the ENRC judgment that is believed to be the basis for this changed position where Sir Brian Leveson, the President of the Queen's Bench Division, states at paragraph 117:

> 'In any event, to determine whether a DPA is in the interests of justice, and whether the terms of the particular DPA are fair, reasonable and proportionate, the court must examine the company's conduct and the extent to which it cooperated with the SFO. *Such an examination will consider whether the company was willing to waive any privilege attaching to documents produced during internal investigations, so that it could share those documents with the SFO…*'

3 See speech of 29 March 2016 by Alun Milford, then SFO General Counsel, in which he stated: *'If a company's assertion of privilege is well-made out, then we will not hold that against the company: to do otherwise would be inconsistent with the substantive protection privilege offers.*' https://www.sfo.gov.uk/2016/03/29/speech-compliance-professionals/ accessed on 11 February 2019.

4 See speech of Matthew Wagstaff, SFO's joint head of bribery and corruption, at Second Annual Global Investigations Review Live London Winter Conference, 6 December 2018: https://globalinvestigationsreview.com/article/1177673/waiving-privilege-shows-willingness-to-cooperate-sfo-official-says accessed 11 February 2019.

We would suggest this paragraph does not lend support to assertion of privilege being treated as a negative factor, disfavouring a DPA. If it was the only judicial assessment of the impact of asserting privilege, it might leave open that interpretation. However, Leveson P also approved all four DPAs entered into by the SFO, including two where the companies asserted privilege over the first accounts. Those assertions of privilege were not held to be inconsistent with cooperation. The SFO's response to the ENRC judgment is therefore curious and threatens the peace won in the Court of Appeal. As it is the SFO that determines whether to offer the opportunity to enter a DPA in the first place, the practical effect is that there is a risk that it will in the future withhold invitations to enter into DPA discussions from companies who assert privilege. Given that the request for disclosure of interviews will be made at the beginning of an engagement with the SFO, it is unlikely that a company wanting to demonstrate cooperation would be prepared, as its first step, to bring a claim for judicial review in the Administrative Court, challenging the unreasonableness of the SFO's request for waiver of privilege. A company will either be forced to concede early or risk delaying a decision while cooperating in other respects only to be told later their cooperation has been insufficient to merit an invitation to enter DPA discussions. In taking this position and redrawing old battle lines, the SFO may come to find that it has provided companies considering self-reporting a further factor militating against doing so. It would seem the war is not yet over.