Internal Investigations Protected By Privilege Once More?

**English Court of Appeal reaffirms privilege over internal investigation documents prepared in contemplation of litigation.**

In a much anticipated decision, the Court of Appeal has reaffirmed legal privilege protection for documents prepared during internal investigations (e.g., interview notes, forensic accounting analysis) whose dominant purpose is preparing for litigation reasonably in contemplation, and on the facts confirmed that this can occur even in the early stages of a government investigation.

This decision affirms that English law remains in line with other jurisdictions, including the work-product privilege in the United States, and should permit corporates to conduct internal investigations in anticipation of litigation without fear that external counsel will be required to turn over interview notes or other documents to authorities or to adversaries in collateral litigation.

Corporates should bear in mind the following practical tips:

• **Consider possible litigation.** Corporates should place critical importance on considering at a very early stage in any investigation whether the investigation can be characterised as being for the dominant purpose of defending actual or anticipated litigation. Previous cases demonstrate that obtaining external advice is strong evidence in this regard. Companies should also consider documenting the dominant purpose in external engagement letters, Board or Audit Committee resolutions, or other materials.

• **Be wary of multiple purposes.** The dominant purpose test remains vital to attracting Litigation Privilege, and will depend on a close analysis of the facts. Corporates should consider carefully where documents are also prepared for other purposes (such as compliance, business, or financial purposes), as this could prevent privilege from applying.

• **Consider legal advice privilege.** The Court of Appeal expressed the view that Legal Advice Privilege might also apply, but declined to rule on this given contrary binding authority. However, even here the Court of Appeal took a more reserved position on whether information obtained from ex-employees could qualify. Therefore, corporates should take extra care when obtaining information from ex-employees as this may complicate parallel claims of Legal Advice Privilege.

Given the seniority of the Court of Appeal bench, it remains to be seen whether the applicant (the UK Serious Fraud Office (SFO)) will take this to the Supreme Court or whether clarity from the highest appellate level must await a future case.

**Background**

The Court of Appeal has allowed an appeal in Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd [2018] EWCA Civ 2006 against the first instance decision of Andrews J. The decision confirms the application of legal professional privilege to internal investigations while also giving a pointer to how the law may develop in the future. The case arises out of an investigation by the SFO into Eurasian Natural Resources Corporation (ENRC). The SFO had sought declarations that certain documents generated during internal investigations undertaken by ENRC’s solicitors and forensic accountants were not subject to legal professional privilege, either Legal Advice Privilege or Litigation Privilege. Andrews J granted the majority of the declarations and ENRC appealed. For the factual background see Latham’s previous blog post and Client Alert on the first instance decision.
Where do we stand now?

This case is a welcome clarification that Litigation Privilege can apply to documents produced during an internal investigation provided that litigation (here, criminal proceedings) is reasonably in contemplation and that those documents are produced with the dominant intention of preventing or dealing with that litigation. In that sense, the decision does not represent new law. However, on its facts, the case demonstrates emphatically when parties can assert that criminal proceedings are reasonably in contemplation. This will be of comfort to corporates operating within England and Wales or who may find themselves before an English court (where English privilege rules will apply).

Issues in the appeal

The Court of Appeal considered nine issues, falling into two categories:

1. A) Did Litigation Privilege apply to the documents in question?
2. B) Did Legal Advice Privilege apply in any case?

Regarding the issues falling within the second category, the Court was asked to rule on Three Rivers District Council and others v Governor and Company of the Bank of England (No. 5) [2003] QB 1556 (Three Rivers (No. 5)) and its status as binding precedent.

The Court of Appeal allowed ENRC’s appeal on the category A issues, and found it unnecessary to decide issues in category B.

The Court of Appeal’s treatment of the issues

Category A: Litigation Privilege

“Reasonably in contemplation”

The first question was whether criminal legal proceedings against ENRC or its subsidiaries or their employees were reasonably in contemplation. The court ruled that this was a factual question that turned on witness evidence. The court also noted that as there had been no cross-examination the Court of Appeal was in as good a position as the first instance judge to examine the evidence and evaluate the facts. The court found that the contemporaneous documents showed that the “whole subtext 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 then made a number of general observations:

1. 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, there is a clear ground for contending that a criminal prosecution is in reasonable contemplation.
2. Not every SFO criminal investigation reasonably in contemplation will result in a criminal prosecution being equally in contemplation. But, in this case, the documents and evidence pointed clearly towards the contemplation of a prosecution if the self-reporting process did not succeed in averting such a prosecution.
3. A party may need to make further investigations before it can say with certainty that proceedings were likely, and this uncertainty does not necessarily point against a real likelihood of prosecution. There is no 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 lack of a formal investigation is part of the factual matrix but is not necessarily determinative.
4. A distinction between civil and criminal proceedings is “illusory”. Even if facts remain subject to investigation, the threat of criminal prosecution can be (as here) serious, making prosecution even more likely to be reasonably contemplated.

“Dominant purpose”

The court considered whether the documents had been brought into existence for the dominant purpose of resisting contemplated criminal proceedings and found — again on the facts — that the documents had, noting:
1. The fact that solicitors prepare a document with the intention of showing that document to the opposing party does not automatically deprive preparatory work of litigation privilege: “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”.

2. If (as here) the threat is of a criminal investigation and at one remove from a criminal prosecution, nonetheless, this might be sufficient grounds on the facts for the dominant purpose to be to prevent or deal with litigation.

3. Even if litigation had not been the dominant purpose of the investigation at the outset it might (as here) quickly become so, in particular if lawyers explicitly advise that criminal and civil proceedings could be said to be in contemplation.

Category B: Legal Advice Privilege

Given the court’s conclusions on Litigation Privilege, its views on Legal Advice Privilege are non-binding precedent. However, the court had the benefit of full argument and gave its views on how it would have determined these points, in particular whether Three Rivers (No. 5) was good law. On these points the Court of Appeal considered:

1. It would have been in favour of departing from the decision in Three Rivers (No. 5) that communication between an employee of a corporation and the corporation’s lawyers could not attract legal advice unless that employee was tasked with seeking and receiving such advice on behalf of the client as “large corporations need, as much as small corporations and individuals, to seek and obtain legal advice without fear of intrusion”.

2. It would have had difficulty accepting that Legal Advice Privilege requires information to be obtained for the dominant purpose of obtaining legal advice. This qualification is unnecessary as the privilege can only be claimed when legal advice is being sought or given. However, the court considered it would “not be appropriate” to reach any final conclusion on this.

3. Information obtained from ex-employees fell into the same category as information obtained from third parties. The court indicated that this might mean such information might not be covered by Legal Advice Privilege but left the issue open for the Supreme Court to consider if and when it reconsidered Three Rivers (No. 5).

4. The Court did not resolve the issue of whether lawyers’ working papers are covered by Legal Advice Privilege and considered that the issue would be better left to the Supreme Court.

This decision comes from a strong Court of Appeal comprising distinguished senior judges. Their indication that Three Rivers (No 5) was wrongly decided is powerful and will not escape the Supreme Court’s attention. Corporates will also be relieved to see that the recent trend of divergence in respect of privilege under English law and in other common law jurisdictions, such as Hong Kong and Singapore which did not follow Three Rivers (No. 5), appears to be in reverse and management of cross-border investigations may become less complicated in this respect.

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