ALERT MEMORANDUM

Important Court of Appeal Judgment on English Legal Privilege

12 September 2018

On 5 September 2018, in a highly anticipated decision,[1] the English Court of Appeal handed down its judgment in SFO v ENRC. In overturning a controversial earlier ruling by the High Court,[2] the Court of Appeal held that, at the time of preparing certain documents generated during an internal investigation (which included notes of interviews with current and former employees and material generated by forensic accountants), ENRC had reasonably contemplated criminal litigation, and that the documents were created for the dominant purpose of that litigation. As a result, ENRC was permitted to claim litigation privilege over these documents. The Court of Appeal considered itself bound by the narrow approach to legal advice privilege resulting from the Three Rivers No 5[3] line of authorities, but nevertheless saw "*much force*" in criticisms of the narrow approach that had been taken in those earlier cases.

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The Court of Appeal's decision broadens the circumstances in which an organization against which a criminal investigation is contemplated will be able to claim litigation privilege, and in this respect, the decision will be welcomed by organizations wishing to conduct privileged internal investigations into potential criminal conduct. It is particularly welcome that documents prepared with a view to avoiding contemplated litigation will be covered by litigation privilege. However, the narrow approach to legal advice privilege will continue to present some difficulties, particularly for large organizations.

[1] *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited [2018] EWCA Civ 2006*

[2] *Serious Fraud Office (SFO) v Eurasian Natural Resources Corporation Limited [2017] EWHC 1017 (QB)*

[3] *Three Rivers District Council and Others v The Governor and Company of the Bank of England [2003] EWCA Civ 474*

English Legal Privilege

As a reminder, there are two principal types of English legal professional privilege, both of which were at issue in the case:

- *Legal Advice Privilege*: Legal advice privilege protects confidential lawyer-client communications made for the purposes of the giving or obtaining of legal advice.

  As is well known, in a corporate context, English law adopts a narrow definition of "client" for these purposes, being restricted to those employees who are authorized by the organization to seek and receive legal advice from the organization's lawyers (the "Client Group"). This narrow definition emanates from the Court of Appeal's decision in Three Rivers District Council and Others v The Governor and Company of the Bank of England[4] ("Three Rivers No 5") and has been followed in more recent decisions such as The RBS Rights Issue Litigation.[5]

- *Litigation Privilege*: Litigation privilege protects confidential documents created for the dominant purpose of litigation which is in reasonable contemplation.

Factual Background

The underlying case concerns the SFO's long-running investigation into ENRC Ltd ("ENRC"), part of a multinational group of companies operating in the mining and natural resources sector. In December 2010, ENRC received an email complaint from a whistle-blower alleging corruption and financial wrongdoing within an ENRC subsidiary. ENRC instructed external legal counsel to investigate the allegations. It was clear, based on contemporaneous evidence that, shortly after the whistle-blower allegations emerged, ENRC considered itself likely to be "*firmly on the [SFO's] radar*" and that an investigation into ENRC concerning these allegations was expected "*in due course*".[6] As a result of these concerns, there was evidence that ENRC had enhanced its internal "*dawn raid*" procedures.[7]

Subsequently, in April 2011, following media speculation regarding the allegations, ENRC was advised by its external counsel that the conduct being assessed was "*potentially criminal in nature*" and that "*[a]dversarial proceedings may occur…and…both criminal and civil proceedings can be reasonably said to be in contemplation*".[8] By this stage, as part of its investigation, ENRC had instructed forensic accountants to undertake a books and records review.

It was in August 2011 that the SFO first made contact with ENRC. In a letter to ENRC's then General Counsel (the "August 2011 Letter"), the SFO explained that, following a review of "*recent intelligence [and] media reports concerning allegations of corruption and wrongdoing by [ENRC]"*, ENRC was invited to consider the SFO's self-reporting guidelines (as in force at the time) whilst undertaking its internal investigation. The SFO also proposed a meeting between the parties. Importantly, the letter confirmed that the SFO was not, at that time, carrying out a criminal investigation into ENRC. [9]

Following the August 2011 Letter, ENRC continued with its investigation, including conducting interviews with current and former staff and a forensic review of books and records by its accountants. In parallel, ENRC sought to

[4] *Three Rivers District Council and Others v The Governor and Company of the Bank of England [2003] EWCA Civ 474*

[5] *The RBS Rights Issue Litigation [2016] EWHC 3161 (Ch)*

[6] *SFO v ENRC (CA),* ⁋ 9

[7] *SFO v ENRC (CA),* ⁋ 9

[8] *SFO v ENRC (CA),*⁋ 13

[9] *SFO v ENRC (CA),*⁋ 17

engage with the SFO and provide updates on the progress of its investigation.[10]

By early January 2013, however, the SFO had expressed its concerns with what it perceived to be a lack of progress in ENRC's investigation, and indicated that, unless ENRC reported its investigation findings to the SFO shortly, the SFO would open a formal criminal investigation into ENRC.[11] Although ENRC provided a report of its findings to the SFO, in April 2013, the SFO announced that it had opened a formal criminal investigation into ENRC, and subsequently issued Section 2 Notices to ENRC and its legal advisers requesting the production of the documents underpinning its investigation report (including notes of interviews with witnesses and material generated by ENRC's accountants).[12] ENRC asserted privilege over these documents, an assertion which was challenged by the SFO, setting the stage for the present litigation.

The High Court's Decision

On 12 May 2017, the High Court handed down the first instance judgment on whether or not the disputed documents were covered by legal privilege.[13] In rejecting the majority of ENRC's claims to privilege, the High Court adopted a narrow interpretation of both the "*adversarial proceedings*" and "*dominant purpose*" aspects of the requirements for litigation privilege. Amongst other findings, the High Court held that:

a) a criminal investigation by the SFO does not constitute adversarial proceedings for the purposes of litigation privilege (rather, the High Court characterized it as a preliminary step that comes before any decision to prosecute);[14] and

b) documents created for the purpose of avoiding litigation did not meet the "*dominant purpose*" test and were not therefore covered by litigation privilege.[15]

The High Court also upheld the narrow approach to legal advice privilege that had been taken in The RBS Rights Issue Litigation, holding that that decision was "*plainly right*".[16]

The High Court's judgment proved controversial: in a letter to the Financial Times, the President of the Law Society of England and Wales described the outcome of the decision as "*deeply alarming*".[17] The Law Society was subsequently granted permission to intervene in the Court of Appeal proceedings, and its stance was publicly supported by a number of legal practitioners in the UK and elsewhere.

The Court of Appeal's Decision

There were various categories of disputed documents under consideration by the Court of Appeal (the "Documents"). Of principal relevance were: (i) notes of interviews conducted during the investigation by ENRC's external legal counsel with current and former ENRC employees, created between August 2011 and March 2013; and (ii) material generated by ENRC's external forensic accountants during their review of ENRC's books and records related to the underlying allegations, created between May 2011 and January 2013.

[10] *SFO v ENRC (CA)*,¶ 18-34

[11] *SFO v ENRC (CA)*,¶ 35

[12] *SFO v ENRC (CA),* ¶ 42

[13] *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Limited [2017] EWHC 1017 (QB)*

[14] *SFO v ENRC (HC),* ¶ 150

[15] *SFO v ENRC (HC),* ¶ 164-166

[16] *Serious Fraud Office (SFO) v Eurasian Natural Resources Corporation Limited [2017] EWHC 1017 (QB)*, ¶ 93

[17] Law Society will defend legal professional privilege, Financial Times, May 12, 2017, https://www.ft.com/content/437c3586-3647-11e7-bce4-9023f8c0fd2e

The Court of Appeal identified a range of issues for consideration. In relation to litigation privilege, the Court of Appeal's most significant findings related the following issues:

a) Was the High Court correct to find that, at no stage before the Documents had been created, criminal legal proceedings against ENRC or its subsidiaries/employees were reasonably in contemplation (the "Reasonable Contemplation Issue")?

b) Was the High Court correct to determine that none of the Documents was brought into existence for the dominant purpose of resisting contemplated criminal proceedings against ENRC or its subsidiaries or their employees (the "Dominant Purpose Issue")?

In relation to legal advice privilege, amongst other observations, the Court of Appeal addressed the scope of the Three Rivers No 5 decision and the status of former employees in relation to communications in the context of a corporate investigation.

A. Litigation Privilege

- The Reasonable Contemplation Issue

In overturning the High Court's findings, the Court of Appeal held that criminal legal proceedings against ENRC were in reasonable contemplation at the time that the Documents were created.[18] In so ruling, the Court of Appeal noted, in particular, the following features of the evidence before it:[19]

a) upon being made aware of the whistle-blower allegations in December 2010, ENRC had instructed legal counsel to investigate the allegations;

b) ENRC's external lawyers had, in April 2011, advised ENRC that criminal (and/or civil) proceedings could be reasonably said to be in contemplation;

c) from December 2010 onward, ENRC clearly perceived that, given the substance of the allegations, it was likely to be a target for investigation by the SFO; and

d) following the SFO's August 2011 Letter, 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.

Although the Court of Appeal found definitively that ENRC satisfied the reasonable contemplation test by the time of the SFO's August 2011 Letter, it did not identify the point at which ENRC first satisfied the test. Although the Court made the more general statement that "*when the SFO specifically makes clear to the company the prospect of its criminal prosecution…and legal advisers are engaged to deal with that situation… there is a clear ground for contending that criminal prosecution is in reasonable contemplation*",[20] it subsequently suggested that ENRC had been "*right*" to argue that the test was satisfied when it initiated its internal investigation in April 2011, before the SFO had made any contact with ENRC.[21] This leaves open the possibility that, in the context of a contemplated criminal investigation by the SFO, the reasonable prospect test may be satisfied before the SFO has made contact with the company in question and raised the possibility of a criminal investigation.

The Court of Appeal made a number of further observations on the proper application of the

[18] *SFO v ENRC (CA)*,¶ 91
[19] *SFO v ENRC (CA)*,¶ 92
[20] *SFO v ENRC (CA)*,¶ 96
[21] *SFO v ENRC (CA)*,¶ 101

reasonable contemplation test in the context of an investigation by the SFO.

1. The fact that a company has received formal legal advice that litigation is in reasonable contemplation does not automatically result in the reasonable contemplation test being satisfied, [22] reinforcing the principle that the reasonable prospect test is one of substance rather than form, and eliminating the scope for legal advisers to "*cloak*" otherwise non-privileged investigation material under the guise of privilege through carefully timed and crafted legal advice.

2. It is not inevitable that, once a criminal investigation by the SFO is in reasonable contemplation, so too is a criminal prosecution. On the facts, however, the documents and evidence clearly pointed towards the contemplation of a prosecution if ENRC's engagement with the SFO did not succeed in averting a criminal investigation.[23]

3. Whilst a party anticipating possible prosecution will often need to make further investigations before it can say with certainty that proceedings are likely, such uncertainty does not prevent the reasonable contemplation test being satisfied.[24]

4. The High Court's earlier distinction between the circumstances in which the reasonable contemplation test could be satisfied in relation to criminal and civil proceedings was "*illusory*". The Court considered that the threat of criminal prosecution on the facts was "extremely serious", despite the fact that (i) the Bribery Act 2010 had yet to come into force at the time of the alleged criminality; and (ii) difficulties can often arise in criminal prosecutions in respect of conduct undertaken overseas.[25]

- The Dominant Purpose Issue

The Court of Appeal held that the Documents were brought into the existence for the dominant purpose of resisting or avoiding contemplated criminal proceedings against ENRC. In making this ruling, the Court of Appeal rejected a distinction made by the High Court between civil and criminal proceedings, clarifying that in both the civil and criminal context, legal advice is given so as to defeat, avoid, or reasonably settle contemplated proceedings is as much protected by litigation privilege as advice given for the purpose of resisting or defencing such contemplated proceedings.[26]

The Court of Appeal made two further noteworthy observations in relation to the Dominant Purpose Issue:

1. Where there is a clear threat of a criminal investigation, the reason for the investigation of a whistle-blower allegation must be "*brought into the zone*" where the dominant purpose may be to prevent or deal with the litigation.[27]

2. The fact that lawyers prepare a document with the ultimate intention of showing that document to the opposing party did not, in the Court's judgment, automatically

[22] *SFO v ENRC (CA)*,¶ 95
[23] *SFO v ENRC (CA)*,¶ 97
[24] *SFO v ENRC (CA)*,¶ 98
[25] *SFO v ENRC (CA)*,¶ 99
[26] *SFO v ENRC (CA)*,¶ 108
[27] *SFO v ENRC (CA)*,¶ 109

deprive the preparatory legal work that they have undertaken of litigation privilege.[28]

B. Legal Advice Privilege

Having reached the conclusion that, by virtue of the rulings on the Reasonable Prospect and Dominant Purpose Issues, ENRC could validly assert litigation privilege over the Documents, the questions concerning legal advice privilege were rendered "*less important*" in the context of the present proceedings.[29] In this regard, the Court of Appeal took the view that, if the ambit of Three Rivers No 5 is to be authoritatively decided differently from the weight of existing opinion, such a decision would need to be made by the U.K. Supreme Court.[30] Consequently, to the extent it was necessary to decide the point in the present case, the Court of Appeal upheld the currently prevailing narrow interpretation of Three Rivers No 5, namely, that communications between an employee of a corporation and the corporation's lawyers could not attract privilege unless that employee was included within the Client Group.[31]

That did not stop the Court of Appeal, however, from clearly stating that, had it been empowered to do so, it would have departed from Three Rivers No 5, finding "much force" in the arguments advanced by ENRC and the Law Society that Three Rivers No 5 was wrongly decided.[32]

In making this *obiter* statement, the Court of Appeal noted that large corporations need, as much as small corporations and individuals, to seek and obtain legal advice without fear of intrusion. In the modern world, it was necessary to cater for the practical reality that, in large national and multinational corporations, 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, noting that if a multinational corporation cannot ask its lawyers to obtain the information it needs to advise that corporation from the corporation's employees with 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.[33]

Amongst other findings in the judgment, of particular significance to those engaged in internal investigations is the Court of Appeal's finding that under the present law of legal advice privilege, information obtained from former employees was deemed to have been obtained from a third-party, and therefore cannot be covered by legal advice privilege.[34]

Practical Implications

In relation to litigation privilege, organizations will welcome the broader interpretation given by the Court of Appeal to the reasonable contemplation and dominant purpose tests. The Court of Appeal's ruling clearly rejects the apparent narrowing of the High Court decision of the circumstances in which litigation privilege may be claimed by organizations wishing to assert privilege over internal investigation material in the context of a criminal investigation by the SFO. This is particularly the case where:

1. the organization has engaged external lawyers to conduct an investigation;

2. there is credible contemporaneous evidence that the organization expects at some point to be the subject of a criminal investigation; and

[28] *SFO v ENRC (CA)*,¶ 112
[29] *SFO v ENRC (CA)*,¶ 123
[30] *SFO v ENRC (CA)*,¶ 124
[31] *SFO v ENRC (CA)*,¶ 123
[32] *SFO v ENRC (CA)*,¶ 124
[33] *SFO v ENRC (CA)*,¶ 127
[34] *SFO v ENRC (CA)*,¶ 138-140

3. the organization's lawyers have provided credible and justifiable advice that they consider litigation to be in reasonable contemplation.

However, notwithstanding these points, whether or not privilege can be claimed in any case remains a fact-specific question. As noted above, the Court of Appeal's judgment does not specify precisely when ENRC was deemed to have satisfied the reasonable contemplation test, and it is unclear whether the Court to have considered it to have done so prior to, or following, the SFO's initial contact with the company. As a result, in situations where the SFO has not expressly stated that it is contemplating a criminal prosecution, organizations should continue to exercise caution in communicating with those outside the Client Group, or allowing such individuals to generate material which would not otherwise be covered by legal advice privilege.

Moreover, even in circumstances where the reasonable contemplation and dominant purpose tests can be clearly satisfied, the practical impact of the Court of Appeal's judgment in the current investigatory landscape remains to be seen. The facts of the ENRC case concern alleged criminal conduct which took place prior to a number of important developments in affecting SFO policy and practice, including:

1. *The revision of the SFO's Corporate Self-Reporting Guidance*. In contrast to the guidance in force during ENRC's initial engagement with the SFO, the SFO's revised Self-Reporting guidelines (which came into force in October 2012) expressly require self-reporting companies to disclose to the SFO "*all supporting evidence relating to any internal investigation*".[35]

2. *The increased expectations of early engagement and transparency promulgated by the SFO since 2012*. Under the directorship of Sir David Green QC, and in keeping with the heightened transparency requirements under the revised self-reporting guidelines, the SFO has sought to publicly reinforce the importance of transparent engagement by organizations seeking to benefit from their cooperation with the SFO. In this regard, senior SFO officials have expressly highlighted attempts by organizations to structure internal investigations so that the underlying investigation material is privileged from the SFO as behaviour which will not meet these increased expectations of cooperation.[36]

3. *The introduction of Deferred Prosecution Agreements ("DPAs") in England and Wales in February 2014*. Whether or not the SFO invites an organization to enter into a DPA will depend on the level of that organization's compliance with the SFO's DPA Code of Practice. In this regard, one of the factors the SFO may (and, in practice, will) take into account in deciding whether to invite an organization to enter into DPA negotiations is whether they have demonstrated sufficient "*co-operation*", which will include "*identifying relevant witnesses, disclosing their accounts and the documents shown to them. Where practicable it will involve making the witnesses available for interview when requested. It will further include providing*

[35] SFO Guidance on Corporate Self-Reporting, October 2012 (https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/)

[36] See, for example, *Ben Morgan, Joint Head of Bribery and Corruption, speaking at the Annual Anti Bribery & Corruption Forum, 29 October 2015* (https://www.sfo.gov.uk/2015/10/29/ben-morgan-at-the-annual-anti-bribery-corruption-forum/).

> *a report in respect of any internal investigation including source documents*".[37]

The net effect of these (and other) intervening developments is that, as compared with the circumstances in which ENRC found itself in 2012, there is now, in practical terms, much more limited scope for a company wishing to adopt (or preserve the right to adopt) a cooperative stance during a SFO investigation to maintain a claim for privilege over material generated during its internal investigation. Indeed, the Court of Appeal observed that, had a Court been asked to approve a DPA between ENRC and the SFO, ENRC's failure to disclose the material generated during its investigation would "*undoubtedly have counted against it*".[38]

As a result, notwithstanding the increased scope for a claim to litigation privilege over internal investigation material arising out of the Court of Appeal's judgment, when faced with evidence of potential criminal misconduct, organizations seeking to adopt a fully cooperative stance with the SFO (whether with the intention of avoiding prosecution, seeking a DPA, or being subject to a more lenient financial penalty upon any criminal conviction) may still, in many cases, choose not to seek to assert a claim to privilege over the evidence underpinning its internal investigation.

A further - and perhaps ironic - implication of the Court of Appeal's ruling is that the exercise of claiming litigation privilege, insofar as it requires an organization to establish that it had been advised of the prospect of litigation, may increase the circumstances in which that organization will be required to waive privilege over the advice it has received to support a claim to privilege over separate material. Additionally, if the validity of that advice is disputed by the SFO, an organization may face difficulties in establishing the credibility of the advice it received without deploying further advice or, alternatively, surrendering the very material it is seeking to protect (i.e. the underling investigation material).

In relation to legal advice privilege, despite the Court of Appeal's commentary on the Three Rivers No 5 line of authorities, in circumstances where litigation privilege cannot be claimed, large organizations will still face challenges in asserting legal advice privilege, particularly in relation to notes prepared of witness interviews conducted in the context of internal investigations. It seems inevitable that this issue will come before the U.K. Supreme Court before long, although whether this occurs in connection with the ENRC litigation remains to be seen.

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[37] Deferred Prosecution Agreements Code of Practice, ¶ 2.8.2(i)

[38] *SFO v ENRC (CA),* ¶ 117