

Client Update

English High Court Rejects Claim of Litigation Privilege over Internal Investigation Materials

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On 8 May 2017, the English High Court handed down judgment in *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd*¹ holding that documents prepared by lawyers and forensic accountants instructed by lawyers during an internal investigation into bribery and corruption issues were not covered by litigation privilege.

The decision raises important considerations for companies, their legal advisers and other professional advisers when conducting internal investigations, particularly in relation to witness interviews. Where legal advice privilege (as narrowly construed in the *RBS*² case and confirmed by this decision) does not apply, in-house counsel, external lawyers and other professional advisers should not assume that interview notes and other documents are privileged simply because the company has commenced an internal investigation into allegations of corporate wrongdoing or because a Serious Fraud Office (“SFO”) investigation is expected or, indeed, has commenced in relation to such allegations.

This is the first known case in which the English courts have considered a claim for litigation privilege over documents created in the course of an internal investigation, on the basis that a criminal investigation or prosecution was contemplated. The defendant has indicated that it will apply to the Court of Appeal for permission to appeal.

Matters of privilege very much turn on the specific facts in question and this decision is no exception. It is clear that it must be read in the context of the particular categories of documents over which privilege was claimed and their

¹ [2017] EWHC 1017 (QB)

² *Re The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch)

purpose, as well as the evidence presented as to the company's anticipation of adversarial proceedings.

We have distilled the following general points that emerge from the judgment:

- **Self-reporting to the SFO does not by itself trigger litigation privilege**
- **Anticipation of a formal SFO investigation does not by itself suffice:** An investigation by the SFO is not adversarial litigation for the purposes of establishing whether litigation privilege applies to documents. Consequently, documents created during an internal investigation will not be protected by litigation privilege unless it can be shown that the company reasonably contemplated that it would actually be prosecuted; the commencement, or real likelihood, of a formal criminal investigation alone is not sufficient.
- **Identification of wrongdoing is required for litigation privilege:** Litigation privilege arises in an internal investigation at the point at which the company has discovered evidence supporting the criminal allegation and, objectively, makes a prosecution 'reasonably in prospect'.
- **Dominant purpose test must be satisfied:** Even if prosecution is reasonably contemplated, the company must also demonstrate that the dominant purpose for which the document was created was to defend a future criminal prosecution, and was not merely part of a fact-finding exercise.
- **Evidence that prosecution was contemplated is essential:** The party asserting litigation privilege will need to present evidence proving when prosecution was in fact contemplated as a real likelihood, potentially including contemporaneous communications from senior management.
- **Legal advice privilege narrowly applied:** Unless and until recent precedents (notably *RBS*) are overturned by the Supreme Court or Parliament, legal advice privilege will only protect communications between the company's external lawyers and a narrow class of employees specifically authorised to seek or receive legal advice on behalf of the company, for the purpose of giving or receiving legal advice.³ This was held not to include employees or other individuals who were authorised by the company to provide the external lawyers with information for a fact-finding exercise.

In the event, the court did not need to rule on any documents created after the SFO had opened its criminal investigation into ENRC, since all disputed documents were in fact created before that point.

³ <http://www.debevoise.com/insights/publications/2016/12/english-high-court-rejects-claims-of-privilege>

The principles emerging from the decision present very real problems for companies that are grappling with allegations of corporate wrongdoing, including by conducting internal investigations and self-reporting their findings to the SFO. Setting the threshold for litigation privilege in that context at the level of ‘real likelihood of prosecution’ is problematic as a matter of practice and principle. The realities of investigating such allegations usually entail the incremental accumulation and assessment of evidence, which can make it difficult to pinpoint precisely when sufficient criminal wrongdoing is identified for litigation privilege to be triggered. In a situation where the company has decided not to self-report or cooperate through the voluntary production of materials, but instead requires the SFO to prove its case, how can an assertion of litigation privilege now even be made without automatically alerting the SFO to the existence of incriminating evidence created through the internal investigation?

Any reliable objective determination of the likelihood of prosecution by the company itself is often fraught with difficulties, given that it depends on prosecutorial assessments of evidential and public interest tests. Second-guessing how a prosecutor—who will likely have access to evidence and witnesses the company does not—will apply those tests can be an almost impossible undertaking. The company may not be aware of more than circumstantial evidence but genuinely fear potential prosecution following from the investigation. To deprive a company in such circumstances of the protections of litigation privilege could lead to a harsh and unfair outcome. We would welcome further consideration and clarification of these issues at the appellate level.

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Please do not hesitate to contact us with any questions.