Putting Privilege Back into UK Investigations: the ENRC Appeal

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In a judgment on 5 September 2018[1] that will provide significant relief to companies and their legal advisers, the Court of Appeal has overturned a High Court decision[2] which found that documents prepared by lawyers (primarily interview memoranda) and forensic accountants instructed by lawyers during an internal investigation into bribery and corruption issues were not protected by litigation privilege.[3] The following general points emerge from the judgment:

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- First and foremost, the Court of Appeal has fundamentally reset the point at which litigation privilege applies. In the instant case, it held that criminal proceedings were reasonably contemplated at a very early stage when the company commenced its internal investigation, following whistleblower allegations and adverse media reports, and "*certainly*" by the time it received a letter from the Serious Fraud Office ("SFO") referencing the allegations against the company and indicating the clear prospect of prosecution in the absence of a self-report. The Court clarified that while not "*every SFO manifestation of concern*" would necessarily satisfy the test, here the SFO had specifically made the prospect of prosecution clear to the company, which had engaged lawyers to deal with that situation.

- Importantly, the Court resolved some of the practical difficulties created by the first instance judgment in determining the level of knowledge and certainty of prosecution required to invoke litigation privilege. A company does not need to know the full details of what may be unearthed or be certain that prosecution is likely. As the Court stated, "*the fact that there is uncertainty does not mean that, in colloquial terms, the writing may not be clearly written on the wall*". The Court injected a dose of pragmatism into the analysis and contrasted the position of an international

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

2 *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited* [2017] EWHC 1017 (QB)

3 See our previous client updates on a series of cases regarding legal professional privilege: https://www.debevoise.com/insights/publications/2016/12/english-high-court-rejects-claims-of-privilege, https://www.debevoise.com/insights/publications/2017/05/english-high-court-rejects and https://www.debevoise.com/insights/publications/2018/02/litigation-privilege-internal-investigations

corporation with that of an individual suspect: while a suspect will of course know whether he has committed the crime, a company often will need to investigate the allegations further before it can say with certainty that prosecution is likely.

- Consistently with these principles, the Court held that a company that is self-reporting to the SFO may rely on litigation privilege in circumstances where prosecution is likely if that self-reporting process does not result in a civil settlement (or a deferred prosecution agreement).

- In another substantial departure from the first instance judgment, the Court held that lawyers' interview notes and forensic accountants' work may fall within "*the zone where the dominant purpose may be to prevent or deal with litigation*". It is difficult to discern the broader principles emerging from the judgment on this point, but it clearly recognises that fact-finding investigations and compliance and remediation reviews can in certain contexts be characterised as being for the dominant purpose of avoiding or defending future criminal proceedings, particularly where the company is contemplating prosecution at the time of that work.

Regarding legal advice privilege, the Court accepted that it was constrained by *Three Rivers (No. 5)*,[4] which had decided that only communications between a company's lawyers and company employees who were tasked with seeking and receiving legal advice on its behalf were privileged (thus excluding internal investigation interview notes with company employees). Only the Supreme Court can now reconsider the law on this issue. However, the Court indicated that had it been able to depart from *Three Rivers (No. 5)*, it would have been in favour of doing so, since English law regarding legal advice privilege now diverges from international common law and the excessively narrow definition of a 'client' makes it considerably more difficult for large companies to obtain privileged legal advice than smaller companies.

While this decision highlights the fact-specific analysis that must be undertaken in each case, it emphatically redraws the boundaries of litigation privilege previously set by the High Court's ruling. It will give companies that are conducting internal investigations into allegations of serious corporate wrongdoing—particularly whilst dealing with SFO scrutiny of those matters—the necessary protections over documents created in the course of those investigations. There is no doubt that the Court's reasoning was in part intended to reverse the possible counter-productive impact of the strictures the High Court had imposed. The Court expressly referred to the "*obvious*" public interest in companies investigating allegations of wrongdoing (prior to approaching the SFO) without losing the protection of privilege, otherwise they might be tempted not to investigate at all for fear of being forced to disclose what they have uncovered.

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

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