

Privilege restored – the Court of Appeal’s decision in SFO v ENRC

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Last week, the Court of Appeal partially overturned a controversial High Court decision in the case of *SFO v ENRC*¹, which had caused concern by dramatically narrowing the scope of legal professional privilege in internal investigations.

This decision has been welcomed and will give comfort to corporations wishing to conduct an internal investigation. In the aftermath of the High Court decision, there had been concern that if a corporate conducted an internal investigation to get to the bottom of alleged wrongdoing, it could potentially make matters worse by creating materials that could be disclosable in future civil or criminal proceedings. Such a position placed corporates, and particularly large corporates, who wanted to remediate an issue in a difficult position. The Court of Appeal have essentially returned the position to the status quo that existed prior to the High Court ruling in *ENRC* and opened the door for a future expansion of the law of privilege.

Background to the case

In 2011, following a whistle-blower report, Eurasian Natural Resources Corporation Limited (“ENRC”) began an internal investigation into alleged corruption and fraud in its Kazakh and African operations. The SFO opened a criminal investigation into ENRC in April 2013, and sought disclosure of various documents created by ENRC’s lawyers and accountants during the internal investigation. These included notes of fact-finding interviews (with ENRC employees and others), materials relating to ‘books and records’ reviews, and presentations given to ENRC’s board and governance committee about the investigation’s findings. ENRC refused to comply, arguing that the documents were covered by litigation privilege² or legal advice privilege³. The SFO subsequently sought a declaration from the High Court that the documents were not privileged.

¹ [2018] EWCA Civ 2006

² Litigation privilege applies to communications between lawyers and clients (or by either with third parties) for the ‘dominant purpose’ of civil or criminal litigation, which must be reasonably contemplated or ongoing.

³ Legal advice privilege applies to confidential communications between lawyers and clients for the purpose of giving or receiving legal advice.

The High Court's decision: a restrictive interpretation of litigation privilege

The High Court found that none of the documents were covered by litigation privilege. In the High Court's view, the documents had been created at too early a stage for criminal proceedings to be reasonably contemplated, and had not been prepared for the 'dominant purpose' of such proceedings – the SFO investigation, while contemplated, did not qualify as 'litigation'. The High Court also found that very few of the documents were covered by legal advice privilege. In the High Court's view, the information in most of the documents was provided for the purpose of fact-finding, rather than to obtain legal advice, and had in any case not been provided by persons in the 'client group' (those authorised by ENRC to seek or receive legal advice).

This decision caused great concern in the corporate and legal worlds, due to the restrictions it imposed on litigation privilege. Internal investigations often generate documents (such as interview records) containing highly sensitive information from people outside the client group, which are therefore not covered by legal advice privilege. The High Court's decision meant that such documents were also unlikely to be covered by litigation privilege, given that many internal investigations are carried out well in advance of any proceedings that might arise. As a result, the decision made it far easier for investigating authorities to obtain documents generated by an internal investigation. The High Court also took the view that there was a higher threshold for 'reasonable contemplation' of criminal proceedings than for civil proceedings, with the unfortunate consequence that those facing a criminal investigation would have been less protected by litigation privilege than those facing a civil investigation.

The Court of Appeal's decision: litigation privilege restored

Following an appeal by ENRC, the Court of Appeal last week almost entirely overturned the High Court's decision, concluding that the High Court erred both in law and in its interpretation of the facts of the case.

The Court of Appeal concluded that criminal proceedings were reasonably contemplated in this case from the point at which ENRC engaged lawyers to conduct an internal investigation, well before the SFO opened its own investigation. Comments made by the SFO and the sub-text of ENRC's interactions with the SFO made clear that criminal proceedings were possible, if not likely, unless the matter was settled. The same threshold for 'reasonable contemplation' should apply to both civil and criminal proceedings. It was also clear to the Court of Appeal that the documents had been created for the dominant purpose of resisting or avoiding such proceedings. Litigation privilege therefore applied.

On legal advice privilege, the Court of Appeal agreed with the High Court that – under current English law – such privilege could only cover information received from ENRC (or persons it authorised to seek or receive legal advice). However, the Court of Appeal noted that this position was out of step with international common law, and made clear that it was in favour of broadening legal advice privilege (e.g. to cover lawyers' communications with other employees of their client), although doing so would be a matter for the Supreme Court to consider (whether in this or an appropriate future case). Whether such strong criticism dissuades the SFO or indeed potential appellants in other cases from bringing such a challenge remains to be seen.

Conclusions

The Court of Appeal made clear that their decision turned on the facts of the case. Whether or not litigation privilege is applicable in an internal investigation will be fact-specific, and corporates should instruct external counsel early and receive advice regarding the preservation of privilege. If litigation privilege is considered to apply, this should be documented so there is an audit trail. There should continue to be a designated client group and investigation reports should be drafted by external counsel.

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