



Legal update — October 2018

# Dispute Resolution and Litigation Internal Investigations in the wake of SFO v ENRC

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**As lawyers, we regularly carry out investigations on behalf of our clients on a wide range of issues. Clients approach us with problems, and we come up with solutions to help navigate uncertain waters. The importance of being able to protect the documents created during the investigation from disclosure to third parties is paramount; the subject matter of the investigation is often sensitive and the ramifications potentially severe. If a third party could routinely seek the disclosure of documents created during an investigation, a client would be at a disadvantage; the balance would shift and determining when to tactically deploy certain documents (for example, an expert report) might fall by the way side. The third party would indirectly sit in the driving seat of the investigation. This is exactly the case if lawyers are not involved in the process whatsoever (i.e no documents are protected by privilege).**

The internal investigation, therefore, sits firmly as the first line of defence and is often the first step towards 'getting the house in order.' The relationship between privilege and investigations has always been a favourable one for clients; as lawyers the documents we create are generally protected from disclosure without the client's decision to waive that privilege. However, this area of disclosure has recently been under the microscope and initially it was thought that this position had drastically shifted.

### Investigations and Privilege

Broadly, internal investigations (in all capacities) assist organisations to:

1. Manage the flow of information about an incident to the public;
2. Manage the dissemination of information internally within the organisation;

3. Manage and control any adverse reputational risk; and
4. Manage and control which documents (and when) are disclosed to regulators and third parties.

Carrying out an internal investigation is likely to be an essential and crucial part of an organisation's risk management policy. If an organisation has identified potential exposure, it will require some form of investigation to identify what has happened and what needs to be done (but will not want to reveal its hand to a third party in the process). This is where a lawyer's involvement and the attraction of privilege comes into play.

Privilege is an essential cornerstone of the legal profession. On 12 May 2017 (in the Financial Times), Robert Bourns, the then president of the Law Society, described legal professional privilege as:

*"...a fundamental part of the relationship that solicitors have with their clients, and undermining it threatens the foundations of our justice system... LPP is a fundamental human right guaranteed by the common law and a principle which is central to the administration of justice."*

On 6 June 2017, the Law Society echoed the strength of a client being able to claim privilege over a document:

*"Where LPP properly arises and has not been curtailed by parliament, it cannot be overridden by competing private or public interests in disclosure."*

### Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd [2017] EWHC 1017 (QB)

The claim related to an investigation by the Serious Fraud Office (SFO) into ENRC, and its subsidiaries, officers and employees. The investigation focused on a whistleblower's allegations of fraud, bribery and corruption in certain subsidiaries in Kazakhstan and Africa. ENRC instructed lawyers to carry out an investigation into those allegations. From 2011-2013

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the SFO and ENRC engaged in open dialogue and meetings whilst ENRC's lawyers carried out the internal investigation. The SFO commenced its criminal investigation in 2013. As part of the criminal investigation, the SFO sought to compel ENRC to provide documents to it by using its wide ranging powers of document production. Those powers cannot and do not pierce the protective veil of privilege. As expected, ENRC claimed privilege over certain documents requested by the SFO. The SFO ultimately challenged ENRC's claim for privilege over four categories of documents. The Court was, therefore, asked to consider whether or not those documents were privileged:

*"... whether a document or communication is privileged is to be determined by the Court in the light of the evidence taken as a whole. The mere assertion of privilege, or statement of the purpose for which the document was created, is not in itself determinative, even if the person making the statement is a lawyer, and even if the assertion is made on oath."*

Category 1: Notes taken by ENRC's lawyers of the evidence given to them by ENRC's current (and former) employees, their suppliers and other third parties

ENRC claimed that these documents were subject to litigation privilege and, alternatively, legal advice privilege because the dominant purpose of the interviews was to enable its lawyers to obtain information and provide advice to ENRC in respect of anticipated criminal litigation. ENRC also claimed that the documents were categorised as a 'lawyers' work product' and, therefore, disclosure would reveal the trend of the advice given to ENRC.

Held: No litigation privilege or legal advice privilege attached.

Category 2: The materials generated by a forensic accountant as part a 'books and records' review (that was focussed on identifying controls and systems weaknesses and potential improvements).

ENRC claimed litigation privilege over these documents because the dominant purpose of the documents was to *"identify issues which could likely give rise to intervention and prosecution by law enforcement agencies (specifically the SFO)... and to enable ENRC to obtain advice and assistance in connection with such anticipated litigation."* There was no challenge to ENRC's assertion that the documents were subject to legal advice privilege.

Held: No litigation privilege attached.

Category 3: Documents (including slides/presentations) indicating or containing factual evidence presented to ENRC's board by the partner of the law firm that was conducting ENRC's investigation

ENRC claimed that these documents were protected by legal advice privilege (by their very nature), but a claim to litigation privilege was asserted in the alternative.

Held: No litigation privilege attached. The claim to legal advice privilege succeeded.

Category 4: Documents referred to in a letter by ENRC's replacement legal advisors to the SFO

Of the 17 documents in this category, nine 'comprised' the forensic accountancy reports and six were emails or letters enclosing the forensic accountancy reports (and were argued to be *"secondary evidence of privileged communications"*). ENRC sought to claim litigation privilege over these documents on the basis that they were created to provide advice to ENRC in respect of anticipated criminal investigation. Of interest, the final two documents in this category were email communications between a qualified Swiss lawyer (Mr Beat Ehrensberger - the then head of Mergers and Acquisitions) at ENRC and a senior executive of ENRC. ENRC claimed legal advice privilege over those two documents.

Held: No litigation privilege or legal advice privilege attached.

Litigation Privilege

The Court determined that ENRC could not establish that it was *"aware of circumstances which rendered litigation between itself and the SFO a real likelihood rather than a mere possibility."* The Court drew a distinction between criminal and civil investigations; *"an SFO investigation is a preliminary step taken and generally completed, before any decision to prosecute is taken in accordance with the published guidance after consideration of the results of the investigation."* An investigation is not the same as adversarial litigation:

*"Documents that are generated at a time when there is no more than a general apprehension of future litigation cannot be protected by litigation privilege just because an investigation is, or is believed to be imminent... Knowledge that someone has accused someone within a company's or its subsidiary's organisation of corrupt practices, or of turning a blind eye to corrupt practices, may raise a legitimate fear of prosecution if the allegations turn out to have any substance in them; but prosecution only becomes a real prospect once it is discovered that there is some truth in the accusations, or at the very least that there is some material to support the allegations of corrupt practices"*

The Court determined that the dominant purpose of the investigation (at the outset) was to establish the truth of the whistleblower allegations (so that they could prepare for a future SFO investigation). Litigation privilege did not extend to third party documents which were created to obtain legal advice on avoiding potential or contemplated litigation. The documents produced by the forensic accountants were created to meet compliance requirements - this was not connected to the *"preparation of a defence, or to obtaining legal advice in respect of prospective criminal litigation."*

#### Legal Advice Privilege

A claim for privilege over a lawyer's working papers can only succeed *"if the documents would betray the trend of the legal advice."*

There was no evidence that those who were interviewed were authorised to seek and receive legal advice. Importantly, the Court considered who the true client was. It was accepted that correspondence passing between a lawyer and a client would attract legal advice privilege. However, some of the individuals that ENRC's lawyers were communicating with were simply not authorised to provide the instructions to the lawyers (despite being authorised to provide information). Legal advice privilege only extended to those who were authorised to give and receive advice (and it was acknowledged that these could be different people).

The claim to privilege from Mr Ehrensberger failed because he was acting in his *capacity "not as a lawyer, but as a man of business."*

#### Public Interest

In giving its judgment, the Court commented that:

*"There is a recognised public interest in the SFO being able to go about its business of investigating and prosecuting crime; and the sort of evidence which one would expect to be found in the Disputed Documents is likely to be of considerable value to its current investigation."*

#### Criminal vs Civil Litigation

The Court also helpfully commented that the *"critical difference"* between criminal and civil proceedings was the fact that criminal proceedings required a prosecutor to be satisfied that there was sufficient evidence to mount a prosecution (which included satisfying the public interest test). It was, therefore, right that:

*"Criminal proceedings cannot be reasonably contemplated unless the prospective defendant knows enough about what the investigation is likely to unearth, or has unearthed, to appreciate that it is realistic to*

*expect a prosecutor to be satisfied that it has enough material to stand a good chance of securing a conviction."*

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

Following the above decision ENRC sought permission to appeal from the Court of Appeal. This was granted and the appeal has now been heard. The decision that was originally made by the High Court has been mostly overturned. The Court of Appeal decided that the documents in categories 1,2 and 4 were not covered by litigation privilege, with the exception of two emails from Mr Ehrensberger which were sent in October 2010 as at the time he was acting as a "man of business" and not as a legal advisor. Therefore the emails were not covered by privilege.

The appeal in relation to the documents in category 3 was dismissed and the decision that legal advice privilege is present remains the same. The documents in this category included presentations by external lawyers for the purposes of advising the ENRC team.

As a result of this decision by the Court of Appeal the majority of the documents prepared by ENRC for the purposes of the internal investigation are now protected by legal professional privilege or legal advice privilege, and the SFO will not be entitled to utilise its powers of disclosure to obtain them.

#### **What happens now?**

It is still our recommendation that organisations take the following steps when considering carrying out an internal investigation (in addition to seeking specialist legal advice as early on in the process as possible):

1. Update internal risk management policies;
2. Consider if the purpose of the investigation is related to a criminal or civil investigation;
3. At the outset, clarify, in writing, the purpose of the investigation (including what it seeks to achieve and why advice is needed);
4. Implement a communications protocol; and
5. Train staff to make sure they are aware of the communications protocol and how the investigation is to be carried out.

Whilst there can now be a momentary sigh of relief for those who carry out internal investigations, this is unlikely to be the end of the matter. The majority of the conclusions for this case were fact specific and the viability of privilege will still need to be explored throughout investigations in the future (as a best practice). In particular, the issue of who the client is, for

the purposes of legal advice privilege, has been cited as something which could be considered by the Supreme Court in an appropriate case.

To discuss any element of the judgment, or should you require assistance in managing an investigation or implementing risk management policies please get in touch with us.

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