The UK High Court has handed down a significant decision on legal privilege in the case of the Serious Fraud Office v Eurasian Natural Resources Corporation (ENRC) [2017] EWHC 1017 (QB).

The case is particularly significant for companies responding to enquiries from criminal prosecutors. But it also has broader implications for companies seeking to withhold documents on the basis of litigation privilege.

The Serious Fraud Office (SFO), which is currently investigating ENRC, challenged the company’s claim that certain documents the SFO had requested could be withheld because of privilege. Save in one limited respect, the judge rejected all of ENRC’s claims to privilege.

Significantly, the Court held: (i) a criminal investigation by the SFO should not be treated as adversarial litigation for the purpose of litigation privilege (the judge’s reasoning was that 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); and (ii) although litigation privilege applies to documents prepared for the sole or dominant purpose of conducting litigation, it does not apply to documents prepared to avoid litigation.

The materials in question included interview notes produced by external lawyers and materials produced by forensic experts: (i) during an internal investigation into whistleblower allegations of corruption; and (ii) throughout the course of ENRC’s subsequent engagement with the SFO in a self-reporting process.

We look at five expected consequences of this decision.

1. UK regulators and prosecutors may be more likely to challenge privilege
Until now, there had been a diversity of views as to whether or not documents prepared in the context of investigations following the engagement of a prosecutor or regulator fell within the scope of litigation privilege. This decision significantly narrows the scope for debate on this point. We can expect UK enforcement agencies to seek to take a firmer stance on this issue - particularly the SFO which is known for taking a robust stance on privilege claims.

One key advantage of litigation privilege over legal advice privilege is it extends to protect work product produced by, and communications with, individuals outside the ‘client’ group - such as external experts and company employees who are not involved in instructing lawyers or receiving legal advice, providing the dominant purpose is in respect of litigation. UK regulators and prosecutors may now seek to argue that the work of third parties engaged to assist lawyers in investigating (such as forensic accountants) is not privileged if it is produced before they have made a charging decision.

2. This case could impact pre-action negotiations in civil litigation too
Of particular concern is the potential impact of this decision on pre-action conduct. Parties will often engage in lengthy discussions before a claim is issued, and a prospective defendant, in particular, may want to put itself in a position to ‘avoid’ litigation – for example, by instructing a forensic accountant to prepare material to help it assess what a reasonable pre-action settlement might be. Documents of this nature might fairly be thought to be documents prepared 'in contemplation' and for the dominant purpose of litigation.
However, on one reading of the ENRC decision, the accountant’s work product would not be covered by litigation privilege on the basis that the dominant purpose of the instruction was to avoid litigation – not to conduct it. On the other hand, engaging an expert to advise on the quantum of a Part 36 or similar offer made once proceedings have commenced would still be privileged. Such a thin distinction between the two positions seems artificial and would appear contrary to the court’s policy of supporting early resolution of disputes. This distinction is also not generally how litigation privilege has been viewed.

3. Claiming litigation privilege is particularly difficult if the extent of the problem is unknown or unclear
The ENRC decision may also make it more challenging for organisations who suspect there may be a problem (e.g. from a whistleblower allegation) but need to find out whether there is in fact any cause for concern. It seems that even if prosecutors have started investigating, this may not be enough for litigation privilege to be engaged.

The ENRC decision suggests that it may be possible to claim litigation privilege only from the point at which a company believes there is a real likelihood of prosecution/sanction and that the work from that point is being done to prepare for it. This would arguably put those who find a problem early on in a potentially better position than those who believe there is nothing of concern but are nonetheless prosecuted.

It is difficult to understand why a company that believes there is no case to answer should be denied the protection of litigation privilege when they are seeking to persuade an authority not to prosecute, but may rely on the privilege once charged and preparing their defence - even though the steps taken in each phase may be similar.

Ultimately, the question of whether litigation is reasonably contemplated at the relevant time and whether a document is created for the dominant purpose of litigation goes to the state of mind of those instructing the lawyers. The ENRC decision appears to impose a higher standard for claiming litigation privilege when faced with criminal, as opposed to civil, proceedings, and suggests that a company being investigated needs to second guess what a prosecutor might do based on the information available at any given time. There may be cases where the enforcing authority itself has either expressly or by implication suggested during the investigation phase that breaches of law have or may have occurred. But the ENRC decision would seem to put the onus on the defendant company to assess the question of whether a prosecutor believes (or if it had all the information would believe) that the applicable threshold to prosecute has been met before the company can be satisfied litigation privilege applies. In some cases, it may be very difficult for a company to make such an assessment, particularly during the early stages of an incident. On the other hand, there may be cases where the facts are such that it is clear to the company from the outset that a criminal prosecution is likely to be initiated.

4. The issue will ultimately be determined on the evidence
Whether or not a document is in fact protected by litigation privilege will ultimately come down to the evidence surrounding the circumstances in which that document was created. Evidence will usually be required from the lawyer and the client. Consequently, the ENRC decision (and the RBS decision referred to below, which covered similar ground) turned, to an extent, on the evidence e.g. the state of mind of those instructing the lawyers and the content of the documents themselves. ENRC faced an uphill battle on their evidence as they did not have witness statements from some of the key individuals involved. It may be that a person is simply unable to demonstrate a significant enough apprehension of prosecution/regulatory sanction if the evidence shows that they did not believe at the time that the case against them was sufficiently strong. On the other hand, there will be cases where the state of mind of the person concerned is such that they clearly anticipate from the outset of an investigation that a criminal prosecution is a likely outcome of the investigation.

5. Legal advice/working papers privilege is still available, and ENRC is to appeal
In assessing ENRC’s claims to legal advice privilege, the judge followed the December 2016 decision of Hildyard J in The RBS Rights Issue Litigation, which applied the narrow definition of ‘client’ set out in Three Rivers 5. Hildyard J held that certain notes of interviews with employees, prepared by lawyers, were not subject to legal advice privilege because those employees were not authorised to instruct lawyers or receive legal advice — and so the conversations the notes recorded were not communications between a lawyer and a client for the purposes of privilege. In that case, the judge was also not satisfied, on the evidence, that the notes should be protected as lawyers working papers showing a trend of legal advice.

There is now little prospect of arguing in the High Court that the decision in RBS was wrongly decided, although the judge in the ENRC case did not express a view on Hilyard J’s proposition that the ‘client’ for the purposes of legal advice privilege is the ‘directing mind and will’ of a corporate.

We understand that the judge’s decision in the ENRC case is to be appealed. If permission is granted, the appeal would provide an opportunity for the Court of Appeal, and ultimately the Supreme Court, to consider the question of who is the ‘client’ in the context of a corporation (the judge did not give permission for a “leapfrog” appeal of her decision to the Supreme Court). We will continue to monitor this case.

For now, however, we are left with the restrictive view of the ‘client’ for the purposes of legal advice privilege. Solicitors’ working papers may also still be withheld from production, but only where they betray the tenor of advice given.

If you would like to discuss these points, or any other investigations or litigation related matter, please do get in touch with your usual Freshfields contact.
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