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PRIVILEGE

Three attorneys from Boies Schiller Flexner LLP discuss a recent ruling from England's Court of Appeal making it easier for companies to protect their written materials and investigate potential wrongdoing comprehensively and from an early stage.

INSIGHT: Lessons on Privilege from Landmark English Ruling



By Matthew Getz, Scott R. Wilson, and Prateek Swaika

In a major recalibration of England's laws regarding litigation privilege, England's Court of Appeal has recently ruled in *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited* (2018) EWCA Civ 2006, that interview memoranda and forensic accountant reports prepared for a company conducting an internal investigation are protected by litigation privilege (see box below).

Earlier English judgments, including particularly the lower court's judgment—which has now been overruled—indicated that such memos and reports would not generally be privileged if they were created before the prosecutor decided to initiate a prosecution or formal criminal investigation. This ruling reverses those decisions, making it easier for companies to protect their written materials and investigate potential wrongdoing comprehensively and from an early stage.

Important statements of principle from the English Court suggest that companies may gain the protection of privilege over investigative materials even if they are created before a prosecutor is aware of the issues being investigated, as long as the company honestly believes, given the gravity of the issues, that there is a reasonable chance of prosecution. The court also established that documents created for the purpose of *avoiding* prosecution will be protected by privilege.

This ruling will have a particular impact on interview memos, the status of which had been unclear in English law until recently.

From a U.S. point of view, the ruling brings English litigation privilege more in line with the U.S. attorney work-product doctrine, at least in the context of internal investigations. However, companies facing cross-border government investigations must nonetheless take care to avoid waiving these protections inadvertently through their cooperation with one or other set of prosecutors.

Background

The matters leading up to this decision began in 2009/2010, when the company (ENRC) became aware of allegations of criminality at companies it was acquiring. Then, in late 2010, a whistleblower alerted the company to allegations of corruption, fraud, and bribery at its Kazakh operations, leading ENRC to start investigations in earnest. Reports in the media and Parliament

led the U.K.'s Serious Fraud Office (SFO) to take an interest, and it contacted ENRC in August 2011.

Over the next 18 months, ENRC and the SFO held a number of meetings, and ENRC shared a certain amount of information about its investigations with the SFO. By March 2013, however, the SFO was dissatisfied with the progress of the matter and issued compulsory notices to individuals associated with ENRC requiring the production of various documents (known as ''Section 2 Notices'', after a provision of the Criminal Justice Act 1987). These notices sought, among other things, statements and evidence provided by ENRC's employees and officers including memoranda of interviews conducted with ENRC's solicitors, and reviews of books and records by a firm of forensic accountants. ENRC asserted that all documents were subject to litigation privilege and refused to hand them over. The SFO maintained that there was no such entitlement to litigation privilege, and commenced civil proceedings in February 2016 to compel ENRC to provide the materials.

In an earlier judgment, the High Court of Justice (the court at first instance) accepted ENRC's submission that most of the documents had been created for the purpose of trying to settle or forestall criminal litigation, but found that litigation privilege would not apply to a document solely because it was created for that reason. Further, even though it was clear at least from the time the SFO contacted ENRC in August 2011 that there was an investigation underway, the judge held that an investigation by the SFO was not ''litigation'', but a preliminary step taken prior to a decision to prosecute. Only once the SFO formally declared that a criminal investigation had begun—which the SFO could only do once it had substantial evidence that a crime had been committed—could a company benefit from litigation privilege.

ENRC also argued that the documents were protected by another type of legal professional privilege known as legal advice privilege, which is similar but not identical to the U.S. doctrine of attorney-client communications. But the judge found that, in the case of a corporate client and relying on the Court of Appeal case of *Three Rivers DC v Bank of England* (2003) EWCA Civ 474 (known as *Three Rivers (no. 5)*), legal advice privilege only attached to communications between a lawyer and those individuals authorised by the company to obtain the legal advice, not with other officers or employees of the company.

New Decision

In the new ruling, which overturned the lower court's ruling, the court allowed ENRC's appeal regarding litigation privilege. The court determined that litigation was in reasonable contemplation from at least the time the SFO contacted ENRC and probably before. Consequently, most of the documents had been brought into existence for the dominant purpose of resisting or avoiding the contemplated criminal proceedings, which counted as being for the purpose of litigation (the test under English law). Even if some of the documents (principally the forensic accountants' reports) had also had the purpose of investigating the facts to deal with compliance and governance at ENRC, that purpose was clearly subservient to the dominant purpose of preventing or dealing with the contemplated criminal litigation.

While the inquiries into such matters are always fact-specific, it is helpful and of use to companies and practitioners that the court considered these facts supported its determinations:

(a) The whistle-blower email alleged criminality;

(b) ENRC appointed a leading law firm to investigate the allegations;

(c) The law firm told ENRC that the internal investigation related to potentially criminal conduct and that criminal (and civil) proceedings were reasonably in contemplation;

(d) ENRC's general counsel and head of compliance had expressed concern internally about the possibility of SFO interest, months before the SFO first approached ENRC;

(e) Another law firm advising ENRC advised it on the risk of waiving privilege in the documents, thus assuming that the documents were privileged; and

(f) The SFO gave no assurance it would not prosecute.

Of even greater importance may be the court's reasons from policy or principle for holding that litigation privilege protects these documents. It states at paragraph 109:

Although a reputable company will wish to ensure high ethical standards in the conduct of its business for its own sake, it is undeniable that the 'stick' used to enforce appropriate standards is the criminal law and, in some measure, the civil law also. Thus, where there is a clear threat of a criminal investigation, even at one remove from the specific risks posed by the SFO should it start an investigation, the reason for the investigation of whistle-blower allegations must be brought into the zone where the dominant purpose may be to prevent or deal with litigation.

And at paragraph 116:

It is, however, obviously in the public interest that companies should be prepared to investigate allegations from whistle blowers or investigative journalists, prior to going to a prosecutor such as the SFO, without losing the benefit of legal professional privilege for the work product and consequences of their investigation. Were they to do so, the temptation might well be not to investigate at all, for fear of being forced to reveal what had been uncovered whatever might be agreed (or not agreed) with a prosecuting authority.

Based on these statements, it would appear that as long as a company can show that it is concerned about the real possibility of criminal proceedings, it can avail itself of the protections of litigation privilege long before it ever has any contact with prosecutors.

Given the court's conclusions in relation to litigation privilege, it was not necessary for the court to determine the question of legal advice privilege. In any event, the court stated that if it had to do so, it would remain bound by the findings of *Three Rivers (No. 5)*, and would be forced to agree that the interview memos were not protected by legal advice privilege since they were not between lawyer and specified employees tasked with seeking and receiving legal advice (unlike U.S. law, which regards interviews of employees even outside the group of persons designated to obtain legal advice as privileged attorney-client communications under the U.S. Supreme Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), a case that has since lent its name to the standard cautions regarding corporate privilege given by practitioners at the beginning of such interviews. However, the court said that if it was able to, it would be in favor of departing from

Three Rivers (No. 5) as a matter of principle. However, such a departure will need to wait for the Supreme Court of the U.K., either in this case or some other appropriate future case.

Practical Considerations—Impact on Self-Reporting

This decision provides welcome clarification of the English court's position on the application of litigation privilege to documents created as part of internal investigations. The earlier decisions made the task of advising and assisting companies with internal investigations very difficult—some companies had gone to the extreme expedient of not taking any record of their interviews with employees. Now, documents created in the course of internal investigations can attract litigation privilege where the party doing the investigating believes the documents will assist in reasonably contemplated litigation—including to avoid such litigation. The decision also gives comfort to firms considering self-reporting, as it reduces the risk that doing so will render all documents created in that process accessible to civil litigants and investigating authorities.

This decision also helpfully brings the protections of litigation privilege closer to the privileges afforded by the attorney work-product doctrine. Indeed, in some ways litigation privilege is more protective, since there is no way it can be lost on a showing of real need, as can be the case with certain types of attorney work product.

Nonetheless, it is not all plain sailing. Multinational companies in cross-border investigations remain subject to significant risks of losing privilege depending upon how they conduct and report such investigations to government authorities.

For example, even oral proffers to U.S. prosecutors can result in waivers of otherwise protected documents. In a recent order issued in *SEC v. Herrera, Order on Defendants' Motion to Compel Production from Non-Party Law Firm*, *SEC v Herrera, et al.*, No. 17-20301 (S.D. Fl. Dec. 5, 2017), a federal magistrate judge concluded that a law firm had waived privilege over its interview memoranda and interview notes by providing the SEC with ''oral downloads'' of the interviews, which the court concluded were the ''functional equivalent'' of disclosing the memoranda and notes. Therefore, companies operating in the U.S. should seek advice from experienced practitioners to protect the work-product privilege even while cooperating with the authorities.

English law, unlike U.S. law, permits a party to disclose a privileged document to a third party, including a regulator or prosecutor, and retain privilege in the document, as long as the communication is confidential. However, although the SFO has the power to receive documents in confidence and agree to keep them confidential, in practice it does not do so—so a company providing a privileged document or part thereof to the SFO runs a the very real risk of losing any protection over that document. Further, even where privileged documents are shared on a confidential basis, protection may still be lost if any reliance, broadly considered, is placed on those documents. For example in the case of *Property Alliance Group Ltd. v The Royal Bank of Scotland Plc* (2015) EWHC 1557 (Ch), a bank had shared privileged documents about its internal investigation with the Financial Services Authority (now the Financial Conduct Authority) on a confidential basis—but the bank had made a statement in court referring to some results of its investigation, so the relevant documents were held to have lost their privileged status.

The Upshot of Contemporaneous Evidence

The decision highlights the importance of contemporaneous evidence to record the likelihood of litigation and the fact that an internal investigation is being carried out with that purpose in mind. As noted, ENRC supported its claim to privilege by producing contemporaneous documents which showed that ENRC was aware of circumstances which rendered litigation between itself and the SFO a real likelihood rather than a mere possibility. It is advisable that companies engaging in internal investigations make such contemporaneous internal records, and record the point in time at which it is understood that litigation became reasonably in prospect or was contemplated. While a party anticipating possible prosecution will often need to make further investigations before it can say with certainty that proceedings are likely, this ruling makes clear that such uncertainty does not in itself prevent proceedings from being in reasonable contemplation.

Firms should also consider whether they are creating documents for the dominant purpose of litigation, and record the decision-making process in writing. If there is a risk that privilege might not apply, firms should weigh the pros and cons of creating potentially disclosable documents.

Engaging litigation counsel can be a significant factor in determining privilege. If circumstances giving rise to anticipated litigation are properly documented and supported by contemporaneous evidence, firms can be less wary of engaging with regulators in consultation with their legal advisers, who are not only able to advise in privileged circumstances, but can, by their very presence, help evidence that the dominant purpose of an investigation is litigation.

Solicitors can also help scope the investigation appropriately, and can advise on the practical steps to be taken to maximise the chance of documents created during an investigation surviving a future request for disclosure.

Author Information

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LITIGATION PRIVILEGE

Litigation privilege allows a litigant to prepare for litigation without fear that documents created for that purpose will have to be disclosed. It only arises once litigation or other adversarial proceedings are reasonably in prospect or have been commenced. From that moment, it covers a) confidential communications; b) between any of a client, its lawyer and a third party (including employees of the client); c) which are for the sole or dominant purpose of preparing for or dealing with the litigation.

Documents created before adversarial proceedings are reasonably in prospect will not attract litigation privilege (although they may attract legal advice privilege).

Definition of Litigation

Litigation privilege can normally be claimed in proceedings where judicial functions are exercised by the court or a tribunal, e.g., proceedings in the High Court, Crown (criminal) Court, employment tribunal and, in many circumstances, arbitration. In proceedings which are merely fact-gathering (such as public inquiries or statutory investigations) or before administrative tribunals, the generally held view is that litigation privilege cannot be claimed.

Sole/Dominant Purpose Test

Provided that the sole or dominant purpose for which a communication is created is the litigation or contemplated litigation, it will come within the scope of litigation privilege. If there is a dual purpose, and it cannot be established that the litigation purpose was dominant (rather than a secondary or equal purpose), litigation privilege will not apply. The English Court will look at the purpose of the document objectively, taking into account all the circumstances. The English "dominant purpose" test is a higher threshold than the standard applied most commonly in the U.S. to the attorney work product doctrine, that is, the documents must have been created "because of" the prospect of litigation – even if a non-litigation purpose is also present.

When Litigation Is Reasonably in Prospect or Contemplated

In order for litigation to be reasonably in prospect or contemplated, there must be a real likelihood rather than a mere possibility of adversarial legal proceedings commencing, although the chance need not be greater than 50%. Mere apprehension of what might happen is not enough. However, it does not matter if the litigation never commences. Litigation can be subject to contingencies, so long as there is sufficient prospect of those contingencies occurring.

Communications With Third Parties

Litigation privilege attaches to communications with third parties.