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U.K. Court of Appeal Ruling Revitalizes Internal Investigations Privilege

The U.K. Court of Appeal released its highly anticipated decision on Wednesday in *Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd.*,[1] providing clarity on the application of English privilege law in the context of an internal investigation. The decision comes a year after a trial court significantly limited the protection of litigation privilege (similar to the U.S. work product protection), and the legal advice privilege (the equivalent of the U.S. attorney-client privilege), in connection with a fraud investigation by the SFO.[2] The ruling this week largely overturns the trial court's cramped reading of the litigation privilege and provides some comfort that attorneys' work in connection with internal investigations will not become an open book. Indeed, in its opinion, the Court of Appeal acknowledged that it is "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 the legal professional privilege for the work product and consequences of their investigation."[3]

The dispute in *ENRC* arose after the SFO commenced an investigation in 2011 into allegations of fraud and corruption in connection with the company's mining operations in Kazakhstan and Africa. Prior to that time, ENRC had initiated its own internal review after receiving allegations of fraud from a whistle blower in 2010. Two years after commencing its own investigation, the SFO issued formal notices to compel the production of interview notes and forensic accountant materials related to ENRC's earlier internal review. ENRC challenged the notices, arguing that the documents were covered under the litigation and legal advice privileges.

Application of the Litigation Privilege

The Court of Appeals first reviewed whether interview notes created by ENRC's attorneys and material prepared by forensic accountants in connection with ENRC's internal investigation satisfied the requirements for the litigation privilege to apply. The trial court ruled that the litigation privilege did not apply to the interview notes and the documents created by the forensic accountants because they were created when criminal prosecution was a "mere possibility" rather than "a real likelihood." The trial court also rejected ENRC's position that the SFO's letter of August 11, 2011, which expressed concern about allegations of wrongdoing and urged ENRC to "consider carefully" the SFO's self-reporting guidelines while conducting its internal investigation, gave rise to a sufficient likelihood of litigation.[4]

In its opinion, the Court of Appeal soundly rejected the trial court's conclusions, stating that "when the SFO specifically makes clear to the company the prospect of its criminal prosecution …, and legal advisers are engaged to deal with that situation, as in the present case, there is a clear ground for contending that criminal prosecution is in reasonable contemplation."[5] While not "every SFO manifestation of concern" may give rise to criminal prosecution, the Court reasoned that the SFO had specifically made clear to ENRC that there could be a criminal prosecution and that ENRC engaged legal advisers in response.[6] Together, those facts were sufficient to suggest that a criminal prosecution was in "reasonable contemplation."[7]

The Court of Appeal also determined that the interview notes and certain draft documents were created for the "dominant purpose" of resisting contemplated criminal proceedings, and thus were subject to the litigation privilege. The Court of Appeals rejected the trial court's determination that the dominant purpose of ENRC's internal investigation was merely to gather factual information, and therefore the interview notes were not subject to the litigation privilege. The Court of Appeal found a dual purpose to ENRC's investigation, one of which was to prepare to address potential criminal allegations.[8] The Court stated "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."[9]

With respect to drafts of a document an attorney anticipates ultimately sharing, in final form, with an opposing party (*e.g.*, a settlement proposal), the Court stated that it could "imagine many circumstances where solicitors may spend much time fine-tuning a response to a claim in order to give their client the best chance of reaching an early settlement," and opined that "discussions surrounding the drafting of such a letter would be as much covered by litigation privilege as any other work done in preparing to defend the claim."[10]

The Court of Appeal was also careful to note that extending the litigation privilege to materials generated by attorneys and their advisors during the course of an internal investigation is necessary to encourage companies to promptly investigate fraud allegations, detect wrongdoing, and make corrections.[11] Legal work conducted during these early stages, the Court recognized, is critical "so as to head off, avoid or even settle" potential litigation, and should be protected.[12]

Unresolved Questions Concerning the Legal Advice Privilege

The Court of Appeal's decision provides needed reassurance to companies conducting dual U.S and U.K. internal investigations that attorney notes and materials created for the purpose of an internal investigation into potential criminal liability should be precluded from discovery by the SFO. Still, the Court acknowledged that English privilege law more broadly, including the legal advice privilege, remains "out of step with the international common law" in some respects, and is still apt to present difficulties in the context of cross-border investigations.[13] Specifically, the Court noted that current precedent does not extend the legal advice privilege to communications between a company's lawyers and employees not explicitly authorized to receive or provide legal advice on behalf of the company. While the Court of Appeal did not have occasion to reach this issue in *ENRC*, it opined that this limitation on legal advice privilege was problematic for large companies, and indicated that the matter will have to be considered by the Supreme Court.

We will continue to monitor how U.K. courts treat legal professional privilege and will examine the full implications of the *ENRC* decision in a subsequent review.

[1] *Serious Fraud Office ("SFO") v. ENRC* [2018] Court of Appeal, Case No. A2/2017/1514, available here.
[2] For a detailed look into the trial court's decision, *see* Steven Tyrrell and Adam Safwat, *The Cooperation Landscape between U.K. and U.S. Regulators*, **Global Investigations Review** (Aug. 9, 2017), https://globalinvestigationsreview.com/chapter/1145430/the-cooperation-landscape-between-uk-and-us-regulators.
[3] *SFO v. ENRC* [2018] Court of Appeal, Case No. A2/2017/1514 at ¶ 116.
[4] *Id*. at ¶ 55.
[5] *Id*. at ¶ 96.
[6] *Id*. at ¶ 96.
[7] *Id*.
[8] *Id*. at ¶ 108.
[9] *Id*. at ¶ 109.
[10] *Id*. at ¶ 102.
[11] *Id*. at ¶ 116.
[12] *Id*. at ¶ 102.
[13] *Id*. at ¶¶ 123-30.

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