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Structuring Investigations In Light Of UK Privilege Case

By **Mark Beeley and Rebecca Dipple** (September 12, 2018, 3:16 PM EDT)

Mark Beeley

Rebecca Dipple

The English Court of Appeal's much-anticipated decision on legal professional privilege in Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd.[1] contains mixed news for companies conducting internal investigations. While the decision provides some clarity regarding the availability of litigation privilege in the context of criminal investigations, the court held that it was unable to depart from the controversial decision in Three Rivers (No. 5),[2] which defined the "client" narrowly for the purposes of legal advice privilege. This means that companies, especially large corporations and multinational corporate groups, will continue to face difficulties in obtaining the information they need to investigate suspected wrongdoing, without losing the benefit of legal advice privilege under English law.

In this article, we consider how companies might structure investigations — where there's the possibility of future U.K. litigation or regulatory proceedings — in order to navigate the complexities of the English rules on privilege, in the light of the appeal decision in ENRC.

Background

The proceedings concerned certain documents generated by lawyers and forensic accountants instructed by Eurasian Natural Resources Corporation Ltd. to carry out internal investigations into anonymous allegations of corruption in ENRC's overseas subsidiaries. In 2013, the Serious Fraud Office launched a criminal investigation against ENRC and its subsidiaries and, subsequently, it sought to compel production of documents by ENRC. ENRC resisted production of four categories of documents — including notes of interviews conducted during the investigation — on the grounds that they were subject to litigation privilege, legal advice privilege or both. The SFO sought a declaration that the documents weren't privileged. At first instance, the High Court judge rejected all of the claims to litigation privilege and almost all of the claims to legal advice privilege. ENRC appealed and the English Law Society intervened.

Types of Privilege

Under English law, there are two main categories of privilege: litigation privilege and legal advice privilege.

Litigation privilege protects communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation/ contested proceedings. The communication must have been made for the sole or dominant purpose of conducting adversarial litigation which is in progress or reasonably contemplated.

Legal advice privilege applies to confidential communications between a client and a lawyer for the purpose of giving or obtaining legal advice (which includes advice as to what should prudently and sensibly be done in the relevant legal context). Either in-house or external counsel may be a lawyer for legal advice privilege purposes.[3]

The Decision on Litigation Claims

Litigation privilege only attaches to communications in the context of existing or contemplated litigation. So one of the first considerations in structuring an investigation to preserve privilege will be whether there is a real likelihood of litigation. Even if litigation isn't in prospect at that time, the question will need to be reviewed on an ongoing basis based on what the investigation unearths and other developments, such as regulatory interest.

ENRC was the first case to consider at what point there is a real likelihood of adversarial litigation in the context of a criminal investigation by the SFO. Upholding ENRC's claims to litigation privilege, the Court of Appeal in ENRC said that it wasn't sure that every "manifestation of concern" by the SFO regarding a company's affairs would properly be regarded as a prelude to adversarial litigation. However, on the facts of the case, there were clear grounds for believing that a criminal prosecution — which did constitute adversarial litigation — was in reasonable contemplation.

The Court of Appeal rejected suggestions by the High Court that, as a general principle, litigation privilege cannot arise before a defendant knows what his investigation is likely to unearth. The stage in the process is only one element in the factual matrix when assessing whether litigation is/was in contemplation.

The decision also provides a reminder of the importance of clearly documenting the basis of privilege claims. In this case, the documentary evidence was central, with the Court of Appeal disagreeing with the High Court's interpretation of the documents both in relation to when litigation was contemplated and whether litigation was the dominant purpose of the investigation.

Legal Advice Privilege: Who Is the Client?

If litigation isn't contemplated, then litigation privilege doesn't arise and communications will only be protected if they fall within the realm of legal advice privilege. In order to maximize the chances of benefitting from legal advice privilege, companies need to bring in-house or external counsel on board as early as possible. However, it shouldn't be assumed that the involvement of a lawyer brings all communications under the umbrella of legal advice privilege.

First, the communications will only benefit from the privilege if they're concerned with advising in a relevant legal context.

Second, since the 2003 decision in Three Rivers (No. 5), the trend in English law has been to define the "client" narrowly for the purposes of legal advice privilege. The rule established in Three Rivers is that, in a corporate context, only those employees of a company who are tasked with seeking and receiving

legal advice on behalf of the company will be classified as belonging to the "client," and will therefore be able to engage in privileged communications.

The Court of Appeal in ENRC acknowledged that Three Rivers places large corporations at a disadvantage compared to small businesses, since the information that lawyers need to provide legal advice is unlikely to be in the hands of the "client" within the meaning of Three Rivers but will need to be sought from third parties with whom privileged communication isn't possible (except in a litigation context). Likewise, multinational corporations may face issues if, for internal political or organizational reasons, the parent company has to instruct the lawyers but the relevant information is held by the subsidiary. As Three Rivers is out of step with privilege laws in other jurisdictions such as the U.S., companies conducting global investigations with a U.K. aspect face the challenge of navigating differing privilege standards.

The Court of Appeal in ENRC noted that, had it been open to it to depart from Three Rivers, it would have done so. However, the court held that it was bound by that decision and that the law could only be changed by a future decision of the U.K. Supreme Court. Accordingly, companies conducting investigations will need to proceed on the basis that Three Rivers is good law, at least until it is challenged in the Supreme Court.

Structuring Investigations in Light of Three Rivers

- At the outset, companies should identify the core team or working group of employees charged with seeking and receiving legal advice within the meaning of Three Rivers. The client team could be defined formally — for instance, in an external lawyers' engagement letter — but, if so, the definition should be kept under review, so that it reflects the reality of the situation as it develops.

- Where plausible, the engagement letter should reflect any contemplated litigation.

- Where a group of companies is involved, it's important to be clear as to which entity instructs external lawyers.

- Only lawyers and the client team should engage in substantive communications concerning the investigation or the legal advice, since only communications between those parties will benefit from legal advice privilege. Only the client team should instruct and receive reports from the lawyers, to ensure consistency as to who is the "client."

- Communications with third parties — which includes employees outside the client team — should be assumed to be disclosable (unless litigation privilege applies). Such communications should be kept to a minimum.

- Where communication with third parties is necessary, for the purposes of gathering information to enable the lawyers to provide advice, written communications should be limited to administrative matters only, to avoid leaving a disclosable trail. Substantive discussions, such as first approaches to witnesses, should preferably be made by other means, such as telephone.

- In order to keep control of information requests, these should be routed through the client team.

- It should be assumed that employee interviews are unlikely to be privileged unless the interviewee is a member of the client team (or litigation privilege applies). Interview notes created by lawyers may, in theory, benefit from privilege on the basis that they are lawyers' working papers. The test for this is uncertain, since the Court of Appeal in ENRC left this issue for the consideration of the Supreme Court. However, it's likely that the notes would need to go beyond mere verbatim transcripts and give away the tenor of the legal advice (which is a high-risk strategy if the notes are not found to be privileged in subsequent proceedings).

- It may be helpful to establish a communications protocol for the investigation outlining what's expected. This may be especially helpful where the individuals involved are used to privilege laws, which may be less restrictive, in other jurisdictions.

Sharing Privileged Documents

Confidentiality is an essential requirement of privilege. Any dissemination of a privileged document risks loss of confidentiality and, as a result, loss of privilege. Privileged documents should be kept separate from nonprivileged documents to reduce the risk of accidental dissemination.

Where it's necessary to share privileged material outside the client team and lawyers, this should only be on a "need to know" basis. The material should be marked as privileged and confidential and it should be made clear that it's only shared on the basis that it is kept confidential and not circulated more widely.

Mark Beeley is a partner and Rebecca Dipple is a professional support lawyer at Orrick Herrington & Sutcliffe LLP.

[1] The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited [2018] EWCA Civ 2006

[2] Three Rivers District Council and Others v Governor and Company of the Bank of England (No. 5) [2003] QB 1556

[3] Except for in the context of EU competition investigations.