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Client ALERT

15 May 2017

Potential changes to document privilege

SFO v ENRC judgment

In this important High Court decision, Mrs Justice Andrews has altered the potential scope of litigation privilege. The case was brought by the Director of the Serious Fraud Office (SFO) against Eurasian Natural Resources Corporation Ltd. (ENRC), with the SFO seeking a declaration to compel production of documents requested from ENRC under s.2 of the Criminal Justice Act 1987. The decision has prospective consequences for those facing criminal or regulatory investigation and their advisors.

The SFO's request was resisted by ENRC on the grounds that legal professional privilege (LPP) was attached to the documents in question, as they were the work product of their internal investigation (commenced in 2011) following whistleblower allegations of fraud, bribery and corruption in its mining operations in both Kazakhstan and Africa. ENRC's lawyers, instructed at the time, liaised regularly with the SFO on the progress of the investigation up until their dismissal, after which the SFO took the decision to commence its own criminal investigation in 2013.

Legal Advice Privilege and Litigation Privilege

The relevant distinction between legal advice privilege and litigation privilege is:

- Legal advice privilege is concerned with communications between lawyer and client for the purpose of giving or receiving legal advice or assistance in both litigation and non-litigious contexts.
- Litigation privilege is concerned with communications between a client or his/her lawyer and third parties for the purposes of litigation (whether anticipated or commenced).

Documents in Question

It is important to understand the nature of the documents/communications at the centre of this case. There were four categories of documents which the High Court was asked to rule upon:

Category one consisted of notes taken by ENRC's previous lawyers of the evidence given to them by individuals (including employees and former employees or officers of ENRC, their suppliers, and other third parties with whom they had dealings with) when asked about the events being investigated. ENRC claimed that these documents were subject to litigation privilege or, in the alternative, to legal advice privilege.

Category two comprised of materials generated by ENRC's forensic accountants as part of "books and records". It was agreed that the claim would only concern itself with ENRC's claim to litigation privilege for the purpose of the proceedings and ENRC would retain the right to claim legal advice privilege in respect of any individual document falling within this category.

Category three consisted of documents indicating or containing factual evidence presented by the Partner who had conduct of the investigations at all material times and, in turn, to ENRC's Board and Corporate Governance Committee.

Category four documents comprised 17 documents referred to in a letter sent to the SFO by ENRC's new legal advisors which independent counsel had determined did not attract LPP, and also email communications.

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Implications of the judgment

The effect of the ruling by Mrs Justice Andrews has caused concern amongst the legal profession. The impact of the judgment is that litigation privilege did not apply to any of the documents prepared by an international corporation as part of its internal investigation into alleged misconduct.

According to the court, privilege could only apply if ENRC anticipated actual criminal prosecution, but not for a document prepared for the purpose of avoiding litigation.

A document which is prepared, for example, to comply with self-reporting (as in this case) could not be subject to litigation privilege.

Mrs Justice Andrews added that LPP protects documents prepared with the sole or dominant purpose of conducting litigation, and not documents produced to enable advice to be taken in connection with anticipated litigation. Litigation privilege will only apply when litigation is reasonably in contemplation or prospect. The ruling stated that, although the company anticipated a raid by the SFO and a formal criminal investigation, such a belief did not constitute contemplation of adversarial litigation. Litigation for these purposes is defined as a prosecution.

Ramifications

Not surprisingly ENRC are mounting an appeal, but in the interim companies can no longer afford to assume that interview records with its officers and employees can lawfully be withheld from prosecuting agencies.

Careful consideration will need to be taken as to how fact finding investigations are conducted so that appropriate legal advice can be provided to clients. Company solicitors' notes from employees or other officers of the company in the course of the internal investigation will not attract litigation privilege or legal advice privilege as the employees or other officers are not their clients.

Solicitors need to carefully consider who their client is and the nature of communications which are capable of attracting legal advice privilege. The concept of the 'client' in the context of corporations has been the subject of appellate consideration by the Court of Appeal in *Three Rivers 5*. The issue is not without controversy, but it appears from *Three Rivers 5* that the 'client' will not necessarily be the corporation itself, or its employees per se, but only those within the corporation who are authorised to communicate with and receive the lawyer's advice.

One possible way to preserve privilege when conducting interviews with employees who are potential witnesses, would be for the employee to receive express authorisation from the company to communicate with the lawyers for the purposes of receiving advice. The position in relation to interviews with third parties is less clear, but an interview with a genuine third party is unlikely to attract legal advice privilege.

The interplay between documents and advice provided within a criminal sphere and the implications with civil claims will also require detailed scrutiny and careful consideration. Insurers need to be alive to requests by regulators and/or for their claims investigators' reports and other material they may have in their possession pursuant to DPA requests, for example.

It remains to be seen how regulators other than the SFO will view this decision. The Health and Safety at Work Act 1974 provides an exemption to companies producing privileged documentation if requested by a HSE Inspector pursuant to its S.20 powers (S.20 (8)) but the effect of this ruling may well result in further protracted litigation if regulators take the view that the documentation in question may improve their position if obtained.

However for the moment all eyes will be on any appeal arising from this ruling.

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