



Clarification on privilege from the court of appeal

On the 5th September 2018, the Court of Appeal gave its much anticipated judgement on privilege in the case of *The Serious Fraud Office v Eurasian Natural Resources Corporation 2017*. Although it involves the SFO the same principles apply to an investigation by the HSE, LA, EA and other enforcement agencies. The High Court judgement had thrown doubt on whether companies were able to create documents such as investigation reports and witness statements in the course of their own internal investigations and be sure that 'Litigation privilege' would apply. It was no longer clear whether these documents would need to be disclosed to regulatory authorities at a later stage in proceedings. The Court of Appeal has overturned this judgement and clarified the application of 'litigation privilege' in cases involving both civil and criminal proceedings. The issue as to who is a client for the purpose of 'legal advice privilege' is less clear from this judgement, despite helpful comments from the Court of Appeal.

Background

In December 2010, a whistle blower made allegations of corruption at ENRC. ENRC instructed forensic accountants and lawyers to investigate the allegations internally. Many documents were created in the course of these investigations including solicitors interview notes and forensic accountant documents in support of a report. The only document released to the SFO was a report of the investigation. The SFO wanted to see all the documents prepared in the course of the investigation. ENRC argued these documents should be the subject of 'legal advice privilege' or 'litigation privilege' as the dominant purpose in obtaining the documents was in order to obtain legal advice about any potential litigation. The High Court dismissed ENRC's claims to both 'legal advice privilege' and 'litigation privilege'. The Judge held that almost all the documents were not privileged as they were not prepared in reasonable contemplation of litigation. Judge Andrews J held the ENRC was unable to establish that at the time of the investigation, litigation with the SFO was a 'real likelihood rather than a mere possibility'.

The court of appeal decision

On appeal it was clarified that almost all of the documents were covered by Litigation privilege. The court found that 'the whole sub-text of the relationship between ENRC and the SFO was the possibility, if not the likelihood, of prosecution'. It held the judge was 'not right to suggest a

general principle that litigation privilege cannot attach until either the defendant knows the full details of what is likely to be unearthed or a decision to prosecute has been taken'. The court also confirmed that it was in the public interest for companies to be able to investigate allegations or incidents without losing the benefit of privilege, prior to going to a regulator or prosecutor. The Court determined that fear of having to disclose anything uncovered during an investigation might lead to no investigation taking place at all. Helpfully the Court of Appeal also confirmed that the judge's distinction between civil and criminal proceedings was 'illusory'.
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Litigation privilege – Make it clear

This case helpfully clarifies that generally, documents produced during an internal investigation such as solicitors interview notes or forensic accountant's notes are protected by litigation privilege, as long as the documents are created when litigation is reasonably in contemplation and that the 'dominant purpose' of that investigation is the contemplation of litigation.

Practical tips

- Consider whether any incident could lead to litigation, civil or criminal, and if so whether the investigation should be privileged.
- In-House solicitors or externally appointed solicitors should record clearly the reason for the investigation and why litigation is contemplated.
- Simply labelling a document 'privileged' does not ensure it is privileged.

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