

**Alert | White Collar Defense & Special Investigations**



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## **UK Court of Appeal Reverses Controversial Judgment That Watered Down Privilege in Internal Investigations**

On 5 September 2018, the UK Court of Appeal handed down a much-welcomed judgment in the case of *SFO v. ENRC*,<sup>1</sup> restoring the application of legal professional privilege (LPP) to various kinds of documents created in the context of internal investigations.

### **LPP**

LPP protects certain legal communications and documents from disclosure. It is an important right.

There are two types of LPP:

1. “Legal Advice Privilege” covers communications between clients and lawyers in connection with the giving and receiving of legal advice.
2. “Litigation Privilege” is more expansive and covers communications with a professional legal adviser and his client or any person representing his client; or between such an adviser or his client or any such representative and any other person made for the dominant purpose of dealing with actual and/or prospective litigation.

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<sup>1</sup> The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd [2018] EWCA Civ 2006.

Legal Advice Privilege is far more limited than Litigation Privilege. For example, interview notes of a witness will not (normally) attract Legal Advice Privilege – since they do not (normally) constitute a communication between a lawyer and a client.

If, on the other hand, an internal investigation attracted Litigation Privilege, then notes of interviews conducted as part of that review would likewise attract privilege and could not be compelled to be disclosed to law enforcement.

### **The Problem**

In *SFO v. ENRC*, the initial judge ruled that Litigation Privilege did not apply to the internal investigation conducted by Eurasian Natural Resources Corporation Limited's (ENRC) lawyers and accountants into allegations of misconduct. This was a controversial decision. A ruling that documents (e.g., interview notes or forensic accounting reports) created during the course of an internal investigation for a client by lawyers and accountants into allegations of misconduct could later be compelled by law enforcement was obviously a huge problem.

The privilege eroded by the initial decision was considered so fundamental that the Law Society of England and Wales joined ENRC in the appeal.

### **Background**

In 2011, ENRC retained white collar defence lawyers and forensic accountants to begin an internal investigation and engaged in dialogue with the Serious Fraud Office (SFO) in connection with allegations of misconduct. The investigation involved extensive interviews with ENRC's employees and ex-employees and reviews of ENRC's books and records. ENRC claimed privilege over these materials. The SFO challenged this claim and sought to obtain the materials generated throughout the investigation by ENRC's lawyers and accountants.

### **The Initial Decision**

The initial judge found that ENRC could not rely on LPP and ruled that Litigation Privilege did not apply. According to the judge, litigation was not reasonably in prospect because the SFO had not charged the company. Additionally, the work product created by ENRC's legal advisers was the result of a process aimed at avoiding litigation, not defending it.

Legal Advice Privilege did not apply either. According to *Three Rivers (No. 5)*,<sup>2</sup> the binding authority on the issue, Legal Advice Privilege can only exist between lawyers and their true clients. In this case, interviews were conducted with ENRC and its subsidiary companies' employees, former employees and officers, as well as their suppliers and third parties with whom they had dealings. The judge found that "client" must be interpreted narrowly as employees specifically authorised to seek and obtain legal advice. It cannot include any employee or ex-employee of the organisation to which the client belongs.

### **The Court of Appeal Decision**

The Court of Appeal has overturned the initial decision on the application of Litigation Privilege.

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<sup>2</sup> *Three Rivers District Council and Others v The Governor and Company of the Bank of England (No. 5)* [2003] EWCA Civ 474.

### *Litigation Privilege*

Restoring LPP in the context of internal investigations, the Court of Appeal found that the initial judge was wrong to suggest that Litigation Privilege cannot attach until after a defendant knows the full details of what is likely to be unearthed or a decision to prosecute has been taken. In perhaps the most important paragraph in the judgment, the court ruled:

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. The remedy for the SFO is not to allow prevarication and delay ... to prevent a timeous investigation, when it becomes clear that the company is not wholeheartedly reporting its own conduct and making appropriate waivers of privilege.

The Court of Appeal also found that the initial judge made an error of law in stating that documents prepared for the purpose of settling or avoiding a claim cannot be created for the dominant purpose of defending litigation. The need to investigate the existence of corruption in this case was a subset of the defence of contemplated legal proceedings. The initial judge was also wrong to find, as a matter of fact, that the documents were created for the specific purpose of being shown to the SFO and so were not protected by privilege. Whilst ENRC had indicated to the SFO that it would make full and frank disclosure of its eventual report to the SFO, it never committed to disclosing the work product of the investigation.

### *Key Lessons*

- Corporations can conduct investigations into whistleblower reports and allegations of misconduct safe in the knowledge that LPP can apply.
- Anticipation of a likely criminal investigation and/or criminal prosecution can trigger Litigation Privilege.
- International corporations will often need to further investigate allegations before they can determine with certainty whether proceedings are likely. Uncertainty does not in itself preclude triggering Litigation Privilege.
- The exercise of determining the dominant purpose of an investigation (and therefore determining whether Litigation Privilege is triggered) is one of fact, and the court must take a realistic commercial view of the facts.
- Legal advice given to head off, avoid, or even settle reasonably contemplated proceedings is as much protected by Litigation Privilege as advice given for the purpose of resisting or defending such proceedings.
- Documents may be prepared with the ultimate intention of being shown to the opposing party (e.g., where the goal is to settle); this does not deprive the underlying legal work or drafts of those documents, of privilege.

## Legal Advice Privilege

The Court of Appeal said that if it could, it would have departed from the *Three Rivers (No. 5)* decision and its restrictive approach to certain elements of Legal Advice Privilege. Since it could not, any overhaul of Legal Advice Privilege would need to be addressed by the Supreme Court or fresh legislation.

## Significance

The case provides important assurance to businesses that investigatory work commenced to deal with allegations of misconduct and potential law enforcement scrutiny or prosecution can be protected by Litigation Privilege.

It also indicates that Legal Advice Privilege is due for an overhaul, although this will have to wait.

The law relating to LPP in the UK is different from the United States, and if there is a UK nexus, then UK legal advice should be sought.

If it is decided that an investigation into allegations of misconduct is required to ascertain the facts and properly assess the company's exposure, the purpose of the investigation should be expressly understood and communicated in order to eliminate any doubt that the dominant purpose of the investigation is to deal with potential litigation.

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