

# Dispute Resolution Hotline

October 29, 2018

## THE ENGLISH COURT OF APPEAL RULES ON PRIVILEGED DOCUMENTS IN INTERNAL INVESTIGATIONS

- Litigation privilege will apply to communications between clients and their attorneys if there is reasonable contemplation of criminal proceedings. This would include investigations conducted to ascertain the likelihood of such prosecution.
- Additionally, for litigation privilege to be applicable, litigation must be the sole or dominant purpose of investigation. This would cover cases where litigation was not the dominant purpose of the investigation at its inception but subsequently became so.
- Documents prepared by the solicitors and forensic experts forming part of the investigation following formal instructions of the solicitors would be protected. This would include documents which may have to be shown to the opposite party and the preparatory legal work, forming part of the fact-finding process.

### INTRODUCTION

Legal professional privilege available to certain communications exchanged between a lawyer and his client may be categorized into:

**a) Litigation privilege:** Communications between parties or their solicitors and third parties for obtaining information or advice in connection with existing or contemplated litigation are privileged, upon satisfaction of the following conditions:

- i. litigation must be in progress or in contemplation;
- ii. the communications must have been made for the sole or dominant purpose of conducting that litigation;
- iii. the litigation must be adversarial, not investigative or inquisitorial.<sup>1</sup>

**b) Legal advice privilege:** Such privilege extends to communications or other documents made confidentially for the purposes of legal advice, which could be non-litigious. Such purposes are to be construed broadly. Thus, such privilege would be attached to a document rendering legal advice from solicitor to client and to specific requests from the client for such advice. Legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.<sup>2</sup>

The English Court of Appeal ("**Court of Appeal**") addressed the issue of legal professional privilege in the recent case of *Eurasian Natural Resources Corporation Limited ("Appellant") v. The Director of the Serious Fraud Office ("Respondent")*<sup>3</sup>.

The Appellant was a part of a multinational group of companies operating in the mining and natural resources sector. Pursuant to an email from an apparent whistleblower alleging corruption and financial wrong-doing, the Appellant's audit committee engaged a law firm ("**Law Firm**") to investigate into such allegations. Additionally, a forensic accountants firm ("**Forensic Firm**"), was appointed to review the books and records. The Forensic Firm was originally appointed directly by the Appellant but considering the scope and to maintain privilege, it was formally instructed by the Law Firm on its scope of services as:

"...We would remind you that we believe litigation to be in reasonable contemplation and as a result litigation privilege applies to the work we have asked you to undertake..."

### SEQUENCE OF EVENTS

10 August 2011: Serious Fraud Office ("**SFO**") reached out to the Appellant, based on intelligence and media reports concerning allegations of corruption and wrongdoing, inviting them to consider voluntary disclosure under the 2009 Self-Reporting Guidelines, while pursuing their internal investigation.

Thereafter, several meetings took place between the Appellant and SFO, wherein the Appellant updated the SFO on the status of the internal investigations.

9 October 2012: The Self-Reporting Guidelines were amended such that all supporting evidence including, emails, banking evidence and witness accounts were required to be provided to SFO as part of the self-reporting process.

12 December 2012: The Law Firm wrote to SFO, asserting that the Appellant was already under the self-reporting process as per the guidelines prior to the amendment. It asserted that any report submitted to SFO would be under a limited waiver of legal professional privilege. SFO's confirmation was also sought such that the report submitted to SFO would not be used by it in criminal proceedings against the Appellant in the event of a failure of an equitable

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21 January 2013: According to SFO, it did not consider the Company to be under the self-reporting process as no report had been submitted by the Company thus far. Further, the witness statements and disclosure of details of investigation would be required as part of the reporting process and that SFO could not provide any assurance on the applicability of legal professional privilege.

28 February 2013: The Law Firm submitted to SFO its final report on the investigation for a particular jurisdiction.

28 March 2013: SFO sought production of documents by the Law Firm, to determine initiation of criminal investigation against the Appellant.

25 April 2013: The SFO announced a formal criminal investigation into the Appellant, and subsequently issued notices to the Appellant and its legal advisers requesting the production of the documents prepared by the Law Firm and the Forensic Firm. The Appellant asserted privilege over these documents, which was challenged by the SFO, leading to the present dispute.

### THE ENGLISH HIGH COURT'S ("HIGH COURT") DECISION

The High Court was of the view that:

1. Litigation privilege does not attach to documents which are brought into existence for settling the litigation and are intended to be shown to the other side. Privilege does not apply to documents which may enable a party to avoid litigation (*relying on Bailey v. Beagle*<sup>4</sup>) It applies only when litigation is reasonably contemplated. The documents over which such privilege is sought, should have been created with the dominant purpose of deployment in, or obtaining legal advice relating to the conduct of such contemplated litigation.
2. Legal advice privilege would attach only to communications between the lawyer and those individuals who are authorized to obtain legal advice on its behalf.<sup>5</sup> Such privilege would not extend to interview notes/documents prepared by the solicitors on factual accounts, which are, *per se*, not legal advice (*relying on Three Rivers (No. 5)* case).
3. Legal advice privilege would apply to documents of a lawyer only if they show a tenor of legal advice. Thus, a document merely recording verbatim what a prospective witness has informed the lawyer would not be protected by privilege (*relying on Stax Claimants v. Bank of Nova Scotia Channel Islands Ltd.*<sup>6</sup>)

### DOCUMENTS UNDER CONSIDERATION

- i. Notes taken by the Law Firm of the evidence given by individuals (including employees and former employees or officers of the Appellant and of its subsidiary companies, their suppliers and other third parties with whom they had dealings);
- ii. Materials and reports generated by the Forensic Firm upon review of books and records;
- iii. Documents indicating or containing the factual evidence presented by the Law Firm to the Nomination & Corporate Governance Committee and the Board of Directors of the Appellant.
- iv. Certain documents referred to in the letter from the counsel of the Appellant to SFO which included reports of the Forensic Firm, emails and letters related to the work of the Forensic Firm and communications between the Head M&A of the Appellant and a senior executive of the Appellant.

### THE COURT OF APPEAL'S JUDGMENT

Upon an appeal being preferred, the following issues concerning legal professional privilege fell for consideration before the Court of Appeal:

#### *Litigation Privilege*

- i. Was the High Court right in determining that, at no stage prior to creation of documents, criminal legal proceedings against the Appellant or its subsidiaries or their employees were reasonably in contemplation?

The Court of Appeal ruled in the negative, observing that the on-going meetings and communications exchanged between the Appellant and SFO made apparent the possibility of prosecution, *if not likelihood*, in the event self-reporting process did not result in a civil settlement.

The evidence of the Appellant's solicitor specified that reasonable contemplation of criminal proceedings had been confirmed to him and there was a real and serious risk of law enforcement and/or regulatory intervention. In anticipation of possible prosecution, investigations may be conducted to ascertain the likelihood of such prosecution. This should not be misconstrued as not contemplating prosecution. The Court of Appeal opined that a party anticipating prosecution would often be required to carry out investigations to know for confirming the likelihood of such proceedings. However, this uncertainty at the outset does not imply that proceedings or prosecution is not in reasonable contemplation. Thus, litigation privilege may attach even before the defendant becomes aware of complete details of the outcome of the investigation or a decision to prosecute has been taken.

- ii. Was the High Court right in determining that none of the documents were brought into existence for the dominant purpose of resisting contemplated criminal proceedings against the Appellant or its subsidiaries or their employees?

The Court of Appeal held that merely because the documents prepared by the solicitors would ultimately be shown to the opposite party, such documents (including the preparatory legal work) would not be ousted from litigation privilege. Further, the Appellant had never actually agreed or committed to disclose the documents created in the course of the investigation to the SFO.

In this context, the Court of Appeal observed that such internal investigations should not affect the possibility of deferred prosecution agreements<sup>7</sup> pursuant to self-reporting. In the absence of applicability of privilege to such documents, companies may not investigate at all, for fear of being forced to reveal everything that had been uncovered with a prosecuting authority. This would directly contradict with the public interest that companies should be prepared to investigate allegations of wrongdoing before approaching the prosecutor, without then

losing the benefit of legal professional privilege for the work product and consequences of the investigation. In cases of civil as well as criminal prosecution, legal advice given to initiate, prevent or settle reasonably contemplated proceedings would be protected by litigation privilege, as in case of advice given for resisting or defending such contemplated proceedings.<sup>8</sup> In any event, assuming litigation was not the dominant purpose of the investigation at its inception, it was apparent that it subsequently became the dominant purpose.

Thus, such documents created by the Law Firm would be privileged as well as those prepared by the Forensic Firm pursuant to the books and records review. Particularly, such review formed part of the investigation following formal instructions received by the Law Firm.

iii. In the circumstances, whether any of the documents in categories i, ii or iv are protected by litigation privilege?

The Court of Appeal observed that the notes taken by the Law Firm of the evidence given by individuals and materials generated by the Forensic Firm upon review of books and records (which formed part of the fact-finding process) were covered by litigation privilege as they were prepared for the dominant purpose to resist or avoid contemplated criminal proceedings against the Appellant or its subsidiaries and/or their employees.

#### Legal Advice Privilege

The findings on legal advice privilege are obiter, given that the Court of Appeal had already determined that the documents would be subject to litigation privilege. The Court of Appeal considered: whether the *Three Rivers (No. 5)* case decided that communications between an employee and the lawyers of a corporation wouldn't attract legal advice privilege unless that employee was tasked with seeking and receiving such advice.

The Court of Appeal noted that this view may not be correct anymore and English law was not in sync with the legal position in other common law countries. The Court considered that in a large corporation, information would be with different employees and as such if only a particular person is authorized to interact with the lawyers, then such corporation would be placed in a disadvantageous position as compared to smaller corporations. However, and the Court of Appeal observed that they could not depart from the view taken in *Three Rivers (No. 5)* case and that such issue would be a matter for the Supreme Court.

#### ANALYSIS

With the extended applicability of litigation privilege to documents prepared by solicitors (including preparatory legal work) and forensic and accounting experts in the course of internal investigations, companies will now heave a sigh of relief. The approach adopted by the Court of Appeal in concluding that legal proceedings were in reasonable contemplation and that documents created were for the dominant purpose of resisting criminal proceedings prevents a very strict and narrow application of the legal privilege. This judgment will undoubtedly instil faith and confidence in companies seeking to investigate the allegations levelled against them and encourage better corporate governance and self-regulation. However, at the same time, this judgment leaves some void with respect to legal advice privilege, as the Court of Appeal expressly disagrees with the *Three Rivers (No. 5)* case and leaves it to the Supreme Court for finality.

Further, there could be specific instances distinct from the present one where government bodies have not raised questions or such self-reporting procedures have not begun, for example, internal investigations voluntarily undertaken by a company. In those circumstances, the extent to which litigation was reasonably contemplated, would have to be separately examined.

– **Shweta Sahu, Ashish Kabra, Payel Chatterjee & Moazzam Khan**

You can direct your queries or comments to the authors

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<sup>1</sup> *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No. 6)* [2004] UKHL 48 (“*Three Rivers No. 6*”) (paragraph 102)

<sup>2</sup> *Three Rivers (No. 6)*

<sup>3</sup> [2018] EWCA Civ 2006

<sup>4</sup> [2001] FCA 185

<sup>5</sup> See, *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No. 5)* [2003] QB 1556 (“*Three Rivers No. 5*”). The High Court adopted a narrow interpretation of this judgment in concluding that communications with a client for these purposes were only those with an employee who was specifically tasked to seek and obtain legal advice.

<sup>6</sup> [2007] EWHC 1153 (Ch)

<sup>7</sup> Crime and Courts Act 2013, Schedule 17

<sup>8</sup> See, *Bilta (in liquidation) v RBS* [2017] EWHC 3535 (Ch)

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