

UPDATE

The difficulty in maintaining privilege over documentation produced by internal investigations (part 3)

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The English Court of Appeal has handed down judgment in the matter of *SFO v Eurasian Natural Resources Corporation Limited* [2018] EWCA Civ 2006. This judgment is of key importance as it overturned the High Court's controversial approach to deciding whether documents had been prepared for the dominant purpose of litigation (and hence whether they would be subject to litigation privilege). The earlier High Court judgment was considered in our [June 2017 update](#) and subsequent judicial criticism was considered in a further update in [March 2018](#).

In 2011 a whistleblower alerted Eurasian Natural Resources Corporation Limited (ENRC) to allegations of corruption, fraud and bribery. The company subsequently undertook internal investigations and self-reported to the Serious Fraud Office (SFO). There were various follow up meetings between ENRC and the SFO and subsequently the SFO commenced its own criminal investigation into ENRC in 2013 with a view to a possible prosecution. Later the SFO issued notices seeking to compel production of documentation ENRC produced during its internal investigations. ENRC refused to provide this documentation claiming legal advice privilege in relation to a subset of documents and litigation privilege over the remainder.

Litigation Privilege

Litigation privilege applies to confidential documentation produced when litigation is reasonably anticipated and where the dominant purpose at the time of the creation of the document was for use in relation to the litigation. The Court of Appeal's decision overturns a number of controversial findings contained within the High Court judgment as to when litigation privilege arises (the High Court's controversial findings were summarised in our [June 2017](#) article. Happily the Court of Appeal judgment has restored a measure of orthodoxy as to when litigation privilege arises. In summary:

1. The Court of Appeal disagreed with the High Court's finding that where ENRC's purpose was to investigate allegations made by a whistleblower, this was insufficient to meet the dominant purpose test. On the facts, the Court of Appeal held that documentation produced to investigate the allegations was created for the dominant purpose of preventing or defending litigation and hence covered by litigation privilege. Further, the Court of Appeal's view was that it was obviously in the public interest that companies should be prepared to investigate allegations from whistleblowers or investigative journalists, prior to going to a prosecutor such as the SFO, without losing the benefit of litigation privilege (judgment paragraph 116).
2. The Court of Appeal also rejected the High Court's finding that litigation privilege does not apply to documents created for the purpose of obtaining advice about how to avoid contemplated litigation. The Court of Appeal found that documents produced for the dominant purpose of avoiding or settling litigation are covered by litigation privilege, just as documentation produced for the purpose of resisting or defending them.

Legal Advice Privilege

Legal Advice privilege protects confidential communications between a lawyer and client for the purpose of giving or receiving legal advice. In relation to ENRC's appeal, the Court of Appeal considered itself bound

by the Court of Appeal's decision in *Three Rivers No. 5* [2003] QB 1556 (**Three Rivers**) to find that legal advice privilege is limited to communications between a lawyer and those tasked with seeking and receiving advice on behalf of a company.

Importantly, however, the Court of Appeal expressed the view that *Three Rivers* had been wrongly decided in this respect. The Court made clear in its judgment that if it had been open to it to depart from this aspect of the *Three Rivers* decision it would have been in favour of doing so, but that that issue could only be determined by the Supreme Court. In the Court of Appeal's view, the *Three Rivers* decision puts large corporations at a disadvantage compared to small corporations and individuals. Those tasked with seeking legal advice on behalf of a large corporation are less likely to have the relevant factual information, and will therefore have to rely on employees whose communications will not be covered by privilege based on the *Three Rivers* decision (unless litigation privilege applies). The Court of Appeal also accepted that English Law is out of step with international common law on this issue. Given this background it would be interesting to see whether the Guernsey Court would now follow *Three Rivers*, or agree with the Court of Appeal in *ENRC* and other common law jurisdictions that *Three Rivers* was wrongly decided on this issue. Given the Guernsey Court is not bound by decisions of the English Court, the Guernsey Court would be perfectly entitled to take a differing view even at first instance.

Conclusion

The English Court of Appeal's decision in *ENRC* is to be welcomed in overruling the restrictive approach to litigation privilege which the High Court found at first instance. The Court of Appeal, in particular, rejected the general proposition that documents produced in order to avoid contemplated litigation are not covered by litigation privilege. The Court of Appeal's decision is also important in flagging the Court's wish for the Supreme Court to reconsider the restrictive nature of legal advice privilege set down in *Three Rivers*. It remains to be seen whether or not this decision of the Court of Appeal or any other appropriate case will in fact be appealed to the Supreme Court to allow it to consider this issue.

In summary, the various recent decisions considered in this and other recent updates have again highlighted the difficulty parties face when seeking to maintain privilege over documents produced by internal investigations. In our view, it is vital that organisations consider legal privilege from the outset of any internal investigation and seek appropriate advice.

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