ROPES & GRAY

ALERT

London

September 5, 2018

Common sense prevails in the UK's battle over Legal Professional Privilege

Attorneys
Matthew Burn
Judith Seddon
Amanda N. Raad
Sarah Lambert-Porter

Companies around the world can finally breathe a sigh of relief today with respect to the UK's position on privilege in criminal investigations. In a much anticipated judgment on the ENRC case *(Serious Fraud Office (SFO) v Eurasian Natural Resources Corp. Ltd* [2018] EWCA Civ 2006), the English Court of Appeal today clarified the boundaries of legal professional privilege. The judgment realigns the UK's position on privilege in criminal investigations with that of other common law jurisdictions by taking a common sense approach and more readily protecting the work of lawyers and other advisors. This decision will be of great interest to companies who deal regularly with regulators and prosecutors in the UK (such as the FCA and SFO) or are involved in multi-jurisdictional investigations.

The key elements of the judgment are as follows:-

1. The test for the application of litigation privilege in English law is whether or not litigation is in reasonable contemplation. In criminal proceedings (as has long been acknowledged to be the case in civil proceedings) whether or not litigation is in reasonable contemplation is a question of fact. The Court of Appeal explicitly rejected the first instance judge's proposition that criminal proceedings can only be said to be in reasonable contemplation once it is realistic to expect a prosecutor to be satisfied that it has enough material for there to be a realistic prospect of conviction. The Court described the first instance judge's distinction between civil and criminal proceedings as "illusory".

   On the facts of this case, the Court of Appeal found that the advice of ENRC's external counsel that the evidence unearthed by their internal investigation meant that there was "a real and serious risk of law enforcement and/or regulatory intervention, including criminal prosecution" was sufficient basis to conclude that litigation – in the form of a criminal prosecution – was in reasonable contemplation, notwithstanding that the SFO had not yet commenced a criminal investigation, let alone a prosecution. Importantly, the Court of Appeal said that the fact that a party may need to undertake further investigations to say with certainty whether criminal proceedings are likely, would not, in itself, prevent criminal proceedings being in reasonable contemplation.

2. Litigation privilege applies to:

   a. Notes of interviews.

   b. Documents containing the factual evidence presented by a company's external lawyers to the company's board.

   c. Reports created by an external firm of forensic accountants.

The Court of Appeal considered that the above-listed material was created at a time when litigation was reasonably in contemplation and that the documents had been brought into existence for the dominant purpose of resisting or avoiding criminal proceedings.

The Court of Appeal rejected the first instance judge's conclusion that litigation privilege could not apply to this material on the basis that if ENRC had chosen to co-operate with the SFO, much of this material would have been handed over.

As a result of this decision, English law in relation to privilege is now far more closely aligned to that in the US. The Court of Appeal explicitly acknowledged in its judgment that it was advantageous to multinational companies for there to be some "commonality" in privilege law across common law countries.

In addition, the Court of Appeal commented on one of the thornier questions of English law on privilege: who is the client? In 2003 in a case known as *Three Rivers (5)*, the Court of Appeal held that in companies the client was whoever was authorised to give or receive legal advice. The Court of Appeal in ENRC noted that - while it did not have grounds to depart from the *Three Rivers (5)* decision - it felt that it was more appropriate to the 19th Century than the 21st Century. The Court of Appeal acknowledged that in modern, large, complex, multinational companies the information needed to seek legal advice is not often in the hands of the board or those who are specifically authorized to seek legal advice (e.g. the general counsel). Accordingly, if a multinational company cannot ask its lawyers to obtain the information needed to give advice (including from employees with the relevant first-hand knowledge) knowing that it is protected by legal privilege, then multinational companies will be in a less advantageous position than smaller companies and individuals.

The ENRC decision can be located at: https://www.bailii.org/ew/cases/EWCA/Civ/2018/2006.html