Investigations, Compliance and Defense

The Growing Danger to Privilege in Investigations

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More than three decades ago, the US. Supreme Court held that memoranda and notes of interviews that lawyers conduct of a corporate client’s employees are generally protected from disclosure by both the attorney-client privilege and the attorney work-product doctrine. See Upjohn Co. v. United States, 499 US 383 (1981).

In two recent cases, the English High Court of Justice ruled the opposite way under English law, holding that notes and interview memoranda created in internal investigations enjoyed no privilege protection at all. Instead, both English judgments ordered the lawyers’ notes and interview memoranda to be turned over – in one instance to prosecutors and in another to private litigants. See Serious Fraud Office v Eurasian Natural Resources Corporation Ltd [2017] EWHC 1017 (QB) (hereinafter “ENRC”); The RBS Rights Issue Litigation [2016] EWHC 3161 (Ch) (hereinafter “RBS”).

The facts of one of the cases show just how far English courts might take the doctrine. The RBS case was civil litigation stemming from the financial crisis of 2008. In 2017, nearly a decade later, the English court ordered the disclosure of lawyers’ notes and memoranda that had been created during an internal investigation years earlier. These materials included memoranda written by US lawyers summarizing interviews conducted by US lawyers that took place within the United States in order to counsel the client how best to defend an investigation by the US Securities and Exchange Commission.

In light of these two decisions, UK prosecutors and private plaintiffs alike may now see it as open season on documents long viewed as protected by US privilege law – at least pending review by the UK Supreme Court. In the meantime, ENRC has sought leave to appeal from the lower court’s decision, potentially affording the Supreme Court a chance to blaze a different trail than the one the President of the Law Society of England and Wales has called “deeply alarming.”

The US position

US lawyers conducting internal investigations have known since the Upjohn case in 1981 that their notes and memoranda of interviews of employees of corporate clients are typically privileged under US federal law. The Supreme Court held that the attorney-client privilege protects not only the giving of advice, but also the “giving of information to the lawyer to enable [the lawyer] to give sound and informed advice.” 449 US at 390. The Court further held that frequently “[m]iddle-level— and indeed lower-level—employees can . . . have the relevant information needed by corporate counsel . . . to advise the client” and therefore communications with those employees should also be protected by the corporation’s attorney-client privilege. 449 US at 391, 95.

Moreover, even to the extent that the lawyers’ memoranda and notes do not reveal attorney-client communications, they are nonetheless protected by the federal work-product doctrine. The US Supreme Court deemed them “work product based on oral statements,” noting that they “reveal the attorneys’ mental processes in evaluating the communications” even when they do not reveal actual communications. 449 US 401. Said the Court: “Forcing an attorney to disclose notes and memoranda of witnesses’ oral statements is particularly disfavored because it tends to reveal the attorney’s mental processes.” 449 US at 399.

The English position

In RBS and ENRC, the English High Court found no protection for lawyers’ interview notes or memoranda under any of the three doctrines it considered: (1) legal advice privilege, (2) lawyers’ working papers privilege and (3) litigation privilege.

Nor, in the end, did it deter the High Court in the RBS case that it was compelling disclosure of communications created in the United States by US lawyers and that are privileged under US law. England has carefully struck the privilege balance
in its courts as a matter of public policy, said the Court, and that overrides even legitimate expectations under US law (see \(RBS\) at \(\S\) 160, 171, 174 and 184).

**Legal Advice Privilege**

In English law, the nearest equivalent to the attorney-client privilege is Legal Advice Privilege, which protects confidential communications passing between a client and its lawyers, acting in their professional capacity in connection with the provision of legal advice.

Legal advice privilege, though, does not apply to information provided by a client’s employees to the client’s lawyers, said the High Court. Communications with mere employees are “not privileged communications,” \(RBS\) at 103, and instead legal advice privilege protects communications only with the small group of employees “authorised to seek and receive legal advice from the lawyer,” \(RBS\) at \(\S\) 91.[1]

As a practical matter, internal investigations involve interviewing corporate employees. Indeed, typically the very problem is that management does not know the facts, and consequently the lawyer is instructed to unearth the facts as an essential part of rendering legal advice. It is difficult, indeed, to do that without interviewing employees. Currently (and if the High Court’s rulings stand upon any appeal to the Supreme Court) these interviews will be unprotected by English legal advice privilege. And as the \(RBS\) case shows, this doctrine can uncloak interviews by US lawyers, even if the interviews took place outside England.

**Lawyers’ working papers privilege**

The High Court also examined – and rejected – the applicability of the lawyers’ working papers privilege, a subset of the legal advice privilege doctrine. Lawyers’ working papers privilege protects certain papers created during the course of the provision of legal advice to the client.

Both the \(RBS\) and \(ENRC\) decisions held that that lawyers’ interview notes and memoranda of client employees were not protected by working papers privilege. Lawyers’ internal memoranda are privileged, wrote the High Court, only when they give a “clue” as to the “trend” of legal “advice.” \(RBS\) at \(\S\) 102, 107 and 126. Said the Court: “[T]he protection afforded to lawyers’ working papers is justified if, and only if, they would betray the tenor of the legal advice.” \(ENRC\) at \(\S\) 97. The Court described a lawyer’s decisions about what facts to try to uncover and what facts to memorialize as being “not sufficient…to substantiate the claim to privilege” because as a matter of English law “there is a real difference between reflecting a ‘train of inquiry’ – which is what the selection of material would divulge – “and reflecting or giving a clue to the trend of legal advice” (emphasis in original). \(RBS\) at \(\S\) 126.

This too contrasts sharply with \(Upjohn\), and shows a vastly different approach between the two systems about the centrality of facts in providing legal advice. To the US Supreme Court, “The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.” 449 US at 390-91. For just that reason the Court explicitly protected “the giving of information to the lawyer.” 449 US at 390.

**Litigation privilege**

The final potentially relevant English doctrine that the High Court examined was Litigation Privilege, akin to the US attorney work-product doctrine: “[T]he purpose of the [Litigation Privilege] doctrine is to enable someone to prepare for the conduct of reasonably anticipated litigation.” \(ENRC\) at \(\S\) 53. Under the facts before it, the High Court held that lawyers’ interview notes and memoranda were not protected under this doctrine either.

In \(ENRC\) the Court focused on three aspects of Litigation Privilege: (1) That “adversarial litigation” must be (2) “reasonably in contemplation,” and that the documents at issue (3) must be made with the “dominant purpose” of conducting that litigation. \(ENRC\) at \(\S\) 51.

The overriding reality for ENRC was that much of its internal investigation was conducted under a well-founded fear of imminent criminal investigation. As ENRC’s Head of Compliance wrote in a graphic email: “I predict a shitstorm and a SFO [Serious Fraud Office] dawn raid in London before summer’s over.” \(ENRC\) at \(\S\) 112. Indeed, ENRC received a letter from the SFO which the Court said left “no doubt” that the prospect of a criminal investigation was “tacitly being used as a strong incentive” to persuade ENRC to cooperate. \(ENRC\) at \(\S\) 126. Throughout, there were newspaper articles, apparent
attempts at cooperation, and then, finally, a breakdown between the ENRC and the SFO that led to the SFO opening its own criminal investigation and compelling the production of the interview memoranda.

But the High Court held that this concrete fear of investigation – or even of a government raid – does not count as fear of "adversarial litigation" on the simple ground that "an investigation is not adversarial litigation." ENRC at ¶ 151. Thus the Court held that ENRC's claim to litigation privilege failed on the first ground.

It failed on the second ground as well, the "reasonable contemplation" requirement. Indeed, here the Court created a doctrinal Catch-22. The Court held that a company is unlikely to be in "reasonable contemplation" of litigation at the outset of most internal investigations because it will not yet know the very facts that the investigation is designed to uncover (see ENRC at ¶¶ 154-155). That is, if you are at a stage where you need to investigate, then you cannot yet "reasonably" anticipate litigation because you are still ignorant of unpleasant truths. Instead, "prosecution only becomes a real prospect once it is discovered that there is some truth in the accusations." ENRC at ¶ 155. The High Court enunciated the rule thus:

Criminal proceedings cannot be reasonably contemplated unless the prospective defendant knows enough about what the investigation is likely to unearth, or has unearthed, to appreciate that it is realistic to expect a prosecutor to be satisfied that it has enough material to stand a good chance of securing a conviction.

ENRC at ¶ 160.

Finally, the Court ruled against ENRC on the third ground as well, the so-called "dominant purpose" test. Specifically, the High Court held that a "purpose" of developing facts to avoid prosecution differs from developing facts for use in defending oneself during a prosecution, and that a purpose of avoiding prosecution is insufficient to warrant privilege protection. ENRC at ¶¶ 167-168. Indeed, it is apparently even the Court’s view that one might also fail the "dominant purpose" test if the client contemplates sharing facts from the internal investigation to make a presentation to the prosecutor designed to stave off charges; the Court deemed that flavor of advocacy "collaborative rather than adversarial." ENRC at ¶¶ 170-171. Nor, apparently, does one meet the Court’s test if the purpose of the investigation is merely "to meet compliance requirements," ENRC at ¶ 173 – notwithstanding that having an effective compliance program is a ground in the United States to persuade prosecutors to forgo charges. See US Dep’t of Justice, United States Attorneys’ Manual §§ 9.28.300(5), 9-28.800(B).

Evidential bases

One aspect of the ENRC and RBS cases that is being debated in the London defense community is the extent to which the decisions are fact bound. Both cases discuss at some length various failures of the party seeking privilege in coming forward with evidence that demonstrated the privileged nature of the documents. RBS at ¶¶ 124-127 ("the evidence put forward on behalf of [the party claiming privilege] is revealing for what it does not cover or say"); ENRC at ¶¶ 39-50 ("regardless of whether there is justification for the failure by [the party claiming privilege] to provide better evidence, the Court has no choice but to decide whether the [documents] are privileged on the basis of the evidence before it. . . . [I]t cannot supply evidence to make up any deficiencies . . . . ").

Consequently, even under the doctrines as the High Court has enunciated them, there is at least some possibility of a different result if: (a) fuller or different evidence is adduced when resisting disclosure of lawyers’ notes, (b) a full contemporaneous record about the purpose of the interviews is made or (c) lawyers adopt practices in taking notes and writing memoranda that place them within the privilege protections as described by the Court, such as, for example, writing them so they more clearly reflect the trend of legal advice given to the client. This is unlikely to be a cure all, however. Depending on the specific case, lawyers might find making that different kind of record impossible, impracticable, or imprudent.

Conclusion

The English High Court has twice ruled recently that a lawyer’s notes of interviews of a client’s employees have no privilege protection. It has ruled that, in English proceedings, the public policy underpinning English privilege law trumps US privilege law, and it has ordered that memoranda written by US lawyers of interviews in the US be produced in English courts and to English prosecutors.
We have not seen the final word. The High Court itself has recognized that the doctrine adopted by the English courts has been heavily criticized by academics and other jurisdictions. *RBS* at ¶ 47. There will be more debate, and in the words of the High Court itself, “if there is to be any change of approach to bring the law in this jurisdiction into line with the more liberal approach adopted in other jurisdictions, it will have to be made by the Supreme Court or by Parliament.” *ENRC* at ¶ 93.

[1] This is akin to the so-called US “control group” test that the US Supreme Court rejected in *Upjohn*.

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