

## Investigations, Compliance and Defence

# Legal Privilege and Internal Investigations: The Court of Appeal Provides Some Protection and Suggests Legal Advice Privilege Is Revisited

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The Court of Appeal on 05 September 2018 gave judgment in *SFO v ENRC* [2018] EWCA Civ 2006. The judgment allowed the appeal, overturning the judgment of Andrews J in the court below. Mrs Justice Andrews' judgment had limited the scope of litigation privilege in internal investigations. This judgment has now reaffirmed that when an internal investigation is conducted, in certain cases litigation privilege will apply. The Court was not required to rule on the questions concerning legal advice privilege, but suggested the time was ripe for the Supreme Court to revisit the subject.

## The Facts

This case concerned internal investigations conducted in order to ascertain whether criminal wrongdoing had occurred at Eurasian Natural Resources Corporation (ENRC), a multinational natural resources company headquartered in the United Kingdom, with major operations in Kazakhstan and parts of Africa. In 2010, ENRC received information from a whistle-blower alleging corruption and financial wrongdoing at one of ENRC's subsidiaries, SSGPO. ENRC instructed outside counsel to conduct an investigation into the allegations. By 2011, the investigation had expanded, with ENRC instructing a firm of forensic accountants to undertake a books and records review.

In August 2011, the Serious Fraud Office ("SFO") contacted ENRC. Thereafter followed a series of meetings and communications between the SFO and ENRC, together with further internal investigations carried out by ENRC, ostensibly undertaken with a view to reaching a settlement with the SFO through the SFO's self-reporting process. The investigation was conducted by Dechert LLP ("Dechert"), and involved extensive evidence gathering and witness interviews. Shortly before Dechert was due to produce a second report to the SFO, ENRC dismissed its lawyers and asserted legal professional privilege over documents requested by the SFO. The SFO ultimately issued a Part 8 claim against ENRC in 2016, seeking disclosure of the documents withheld. It was this claim that led to the current appeal.

## Judgment at First Instance (*SFO v ENRC* [2017] EWHC 1017 (QB))

The case history at first instance has been well publicized, but in essence Andrews J held that litigation privilege would not apply to a criminal investigation by the SFO, as such an investigation would not be adversarial litigation, unlike a criminal prosecution. Andrews J also held that legal advice privilege would not apply (relying in part on the narrow interpretation of the "client" from *Three Rivers No. 5*<sup>[1]</sup>). Amongst various other points found by Andrews J, this judgment had the consequence that materials from an internal investigation would potentially not have the benefit of legal professional privilege. It was thought that the judgment could lead to fewer companies conducting investigations at all and ultimately a reduction in self-reporting to the SFO over time.

## Judgment on Appeal

### **(i) Litigation Privilege**

On appeal, ENRC argued that the documents should have the benefit of litigation privilege. They said that (i) criminal prosecution was in fact in reasonable contemplation at the time of the documents' creation; (ii) the documents were created with the sole or dominant purpose of defending anticipated criminal proceedings; and (iii) the facts showed that Andrews J was wrong to hold that the documents had been created on the understanding that they would be provided to the SFO. The SFO conversely argued that Andrews J's conclusions were justified.

The Court of Appeal revisited the contemporaneous documents, finding that Andrews J was wrong to conclude that a criminal prosecution was not reasonably in prospect after April 2011. There were in fact clear grounds (including express references in communications) for contending that a criminal prosecution was in reasonable contemplation and that litigation privilege would apply. The Court held that it was in the public interest for a company to investigate allegations before approaching the SFO, confident in the knowledge that legal professional privilege will apply to their work product and the consequences of their investigation. The temptation otherwise would be for companies not to investigate, for fear of what an investigation may reveal.

The Court therefore held that interview notes, books and records, and certain documents referred to in a letter to the SFO, all resulting from ENRC's internal investigation, were protected by litigation privilege. These documents were all found to have been brought into existence for the dominant purpose of resisting contemplated criminal proceedings against ENRC.

The Court of Appeal's decision is likely to allay practitioners' concerns about the application of litigation privilege to internal investigations. However, some care must be taken given the Court's careful analysis of the facts of this matter, namely that there were clear grounds for believing that a criminal prosecution was in contemplation: "[...] the whole sub-text of the relationship between ENRC and the SFO was the possibility, if not the likelihood, of prosecution if the self-reporting process did not result in a civil settlement" (para.93).

### **(ii) Legal Advice Privilege**

Further, in respect of legal advice privilege, ENRC submitted that Andrews J's interpretation of *Three Rivers No.5* was incorrect, arguing for a wider interpretation of "client" in the context of that case. The SFO countered that legal advice privilege could not apply, as the dominant purpose of the communications in question was to conduct an investigation, not to obtain legal advice.

As to these arguments, the Court largely demurred, noting that its decision on litigation privilege was sufficient to allow the appeal.

However, the Court did engage in a discussion of *Three Rivers No.5*, the subject of animated oral submissions at the hearing. It saw "much force" in Mr Thanki QC's and Miss Dinah Rose QC's submissions (for ENRC and the Law Society, respectively) that *Three Rivers No.5* had been interpreted too narrowly in saying that communications between an employee of a company and that company's lawyers could only attract legal advice privilege if that employee was specifically authorised with the giving of instructions and the receiving of legal advice. It was acknowledged that the law must cater for legal advice sought by large, multinational corporations, where the information sought is unlikely to be in the hands of the individual(s) appointed to solicit legal advice. The Court agreed with Dinah Rose QC's submissions that "English law is out of step with the international common law on this issue".

The Court said that "had it been open to us to depart from *Three Rivers No.5*, we would have been in favour of doing so". It acknowledged however that such a departure would properly be a matter for the Supreme Court "in this or an appropriate future case".

## Conclusion

This Court of Appeal decision would appear to be a promising step towards a more level playing field for corporations in their dealings with the SFO, with the fundamental right of litigation privilege - as an important check on the power of the state - being reaffirmed.

It is not yet known whether the SFO will be appealing this decision.

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[1] *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No.5)* [2003] QB 1556

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