THE PRIVILEGED POSITION OF THE COURT OF APPEAL: LEGAL PRIVILEGE IN INVESTIGATIONS

In May, the High Court handed down their decision in *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd.* [2017] EWHC 1017 (QB)[1] narrowing the application of legal professional privilege, particularly in relation to investigations by regulators. The defendant has now been granted the right to appeal this controversial decision.

1 *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd.* [2017] EWHC 1017 (QB)

The High Court decision

In 2011, Eurasian Natural Resources Corporation (ENRC) instructed external solicitors and forensic accountants to carry out an internal investigation into allegations of fraud, bribery, and corruption. In 2013, the Serious Fraud Office (SFO) commenced a criminal investigation into these allegations. As part of its investigation, the SFO required ENRC to produce four classes of documents generated prior to and during the internal investigation. ENRC refused on the basis that the documents were privileged.

The High Court ruled in favour of the SFO on the basis that an SFO investigation is not classed as adversarial litigation and as such the dominant purpose for which the documents were created was not for constructing a defence in future proceedings. Therefore, the claim for litigation privilege failed. Equally, it was difficult to claim legal advice privilege as the majority of documents did not fall into this definition. For a full explanation of the first instance judgment please see my previous article[2].

Criticism

The High Court held that there is a recognised public interest in the SFO being able to go about its business of investigating and prosecuting crime, and the evidence in the relevant documents was likely to be of considerable value to the SFO's investigation.

However, the decision has been widely criticised, including by the Law Society who strongly condemned the decision, commenting that it was "just one part of a worrying trend", increasing concern in the legal community that legal professional privilege is being eroded.[3] The decision has also been criticised for taking the English law position even further from that of other jurisdictions, creating difficulties for organisations who deal across borders and jurisdictions.

The Court of Appeal's permission to appeal decision

Lord Justice Floyd granted ENRC leave to appeal this week, noting that "the grounds of appeal have a real prospect of success".

The appeal has widespread support amongst the legal community and also with clients. Certainty in relation to privilege is needed and it is hoped that the Court of Appeal's judgment will provide this.

The HFW perspective

Our feeling is that ENRC may well be successful in its appeal.

However, whilst we wait for the Court of Appeal to provide clarity in this crucial area, our advice is that if you are undertaking any internal investigations, always consider whether a regulator may be interested in your findings. If this is likely, you should take steps to try and protect privilege in any documents produced in the course of the investigation, we suggest the following measures are adopted:

- Contact legal advisors early. Not only can they help with the investigation itself, but they can also provide advice on how to try to protect privilege from the outset.
- The High Court's decision upheld a narrow definition of 'client' as meaning only those employees who are authorised to communicate with the legal advisor. Therefore, set up a clearly defined team to manage the internal investigations; this is know as the Three Rivers test[4].
- Given the uncertainty about what constitutes "legal advice", consider holding oral discussions only.
- If reports do need to be drafted, ensure they are written by external counsel and are only shared with the investigations team.

We will publish an update once the Court of Appeal have heard the case and published their judgment.

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2 http://www.hfw.com/Putting-privilege-behind-bars-legal-privilege-in-criminal-investigations-June-2017

3 http://www.lawsociety.org.uk/communities/the-city/articles/eurasian-natural-resources-corporation-ltd-legal-professional-privilege-corporate-internal-investigations-and-beyond/

4 *Three Rivers District Council (No 6)* [2004] UKHL 48