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# ENRC appeal on privilege:

## Five key points arising out of the decision

The Court of Appeal has overturned the High Court's decision in the case of the *Serious Fraud Office v Eurasian Natural Resources Corporation* ([2018] EWCA Civ 2006), confirming that documents produced during an internal investigation can be protected by litigation privilege.

Significantly, the Court found that criminal proceedings were sufficiently contemplated for litigation privilege purposes at the point at which ENRC commenced an internal investigation following a whistle blower report alleging corruption in parts of its business, and they were certainly contemplated when the Serious Fraud Office (**SFO**) subsequently contacted ENRC about the same matter (even though the SFO stated it was *not* at that time carrying out a criminal investigation into ENRC).

In the course of what will be viewed as a welcome decision for corporates looking to investigate alleged wrongdoing, the Court noted that it is "*obviously in the public interest that companies should be prepared to investigate allegations from whistle blowers or investigative journalists, prior to going to a prosecutor such as the SFO, without losing the benefit of legal professional privilege for the work product and consequences of their investigation*".

The decision is also of broader significance as it confirms that documents prepared for the purpose of avoiding litigation, whether civil or criminal, can be protected by litigation privilege.

We look at five key points from this decision.

**1. The trigger for when an investigation can be protected by litigation privilege can be quite early**

It is not necessary for the SFO to have commenced a formal investigation (let alone for it to have commenced a prosecution) in order for criminal legal proceedings to be reasonably contemplated, and for litigation privilege to therefore apply. While an SFO investigation will be part of the factual matrix, it is not determinative. In fact, while the Court found that criminal proceedings were "certainly" in reasonable contemplation by the time it received a letter from the SFO in August 2011, ENRC reasonably contemplated criminal proceedings earlier, in April 2011, when it began its internal investigation in response to the whistle blower report.

The materials in question, which the Court of Appeal held were protected by litigation privilege, included interview notes produced by external lawyers and materials produced by forensic experts during: (i) the internal investigation; and (ii) ENRC's subsequent engagement with the SFO.

Whether criminal proceedings are reasonably contemplated during an investigation is fact-specific. However, this decision demonstrates that, in the right circumstances, such proceedings may be reasonably contemplated even in the early stages of an internal investigation. Interest from the SFO would then strengthen any such claim to litigation privilege (or may be the basis for it if the first time the company learns of the issue is through contact from the SFO). Although the Court indicated that "*not every SFO manifestation of concern would properly be regarded as adversarial litigation*", where the SFO is raising material issues in connection with a company's conduct, there is likely to be a good basis for asserting litigation privilege over the related investigation.

Key to the Court's finding was the evidence as to the state of mind of the relevant individuals at ENRC and whether they reasonably contemplated litigation at the relevant time. This highlights the importance of carefully considering the issue and documenting the decision-making process, whether in civil or criminal litigation.

**2. Documents prepared to avoid litigation are protected by litigation privilege**

The High Court decision had, counter-intuitively to many, suggested that documents prepared for the purpose of avoiding litigation were not protected by litigation privilege.

The Court of Appeal has now clarified the position and confirmed that where a document is prepared for the purpose of avoiding contemplated proceedings (in both civil and criminal proceedings), it will be protected by litigation privilege. The Court was of the view that legal advice given so as to avoid litigation should be protected by litigation privilege just as much as documents prepared for the purpose of defending those proceedings would be.

The Court's decision in this respect will be welcomed by both clients and lawyers, as it is consistent with both the public policy of supporting the early resolution of disputes and with how litigation privilege had been viewed prior to the High Court decision.

**3. The 'dominant purpose' question is a question of fact**

In order to benefit from litigation privilege it is necessary to demonstrate not only that adversarial proceedings are reasonably contemplated, but also that the documents in question were prepared for the sole or dominant purpose of that litigation. Where litigation is an equal or subsidiary purpose, litigation privilege is not available. Cases involving more than one purpose are likely to fall somewhere on a spectrum between those where there is a clear dual purpose and those where it is difficult to see what purpose there could have been other than preparing for litigation. According to the Court, this case fell somewhere between those two ends of the spectrum.

Helpfully, for all companies at the early stages of investigating facts in light of anticipated litigation (whether criminal or civil), the Court of Appeal did not draw a distinction between fact-finding and preparing to conduct or resist the litigation. At first instance, the High Court viewed the role of ENRC's external lawyers as a 'fact-finding one' and rejected the assertion their role was to investigate the allegations so they could advise on reasonably anticipated litigation (which, according to Andrews J, was not reasonably in contemplation at the relevant time in any event). By contrast, the Court of Appeal did not see those two purposes as being separate, rather fact-finding can be (and in this case was) an integral part of the process of preparing for or seeking to avoid litigation. It noted the need to investigate the existence of corruption was "*just a subset of the defence of the contemplated legal proceedings*".

The Court was of the view that the criminal law is the 'stick' used to enforce appropriate compliance and governance standards and therefore an investigation whose purpose was compliance and remediation could itself have been intended to avoid or deal with litigation. This reflects that fact that one of the factors which the SFO must consider when deciding whether to offer a Deferred Prosecution Agreement (DPA) (so that the corporate avoids a criminal prosecution) is whether or not the company had an effective compliance programme in place at the time and if not, whether it significantly improved its compliance programme subsequently. The importance of compliance and remediation to the DPA process was highlighted by the new Director of the SFO, Lisa Osofsky in a recent speech where she explained that "*the SFO will want assurance that companies are doing everything they can to ensure the crimes of the past won't be repeated long after the watchful eye of the prosecutor moves on to another target.*"

The Court also noted that even if litigation was not the dominant purpose at the outset of ENRC's investigation, it very swiftly became the dominant purpose. This emphasises the need to keep the question of whether litigation privilege applies under regular review as the situation may change, for example as new facts are discovered or additional allegations are made.

**4. This decision should not cause any fundamental change to the DPA process**

The Court (the composition of which included Sir Brian Leveson, who has presided over all four of the DPAs concluded to date) was careful to note that its analysis should not be taken to adversely impact the DPA regime. There is a suggestion in the judgment that the announcement of a formal investigation by the SFO might impact its ability to agree a DPA, the implication being that it may not have all the information it needs to make a decision if a company is able to withhold documents on the basis of litigation privilege.

Whilst the decision of the Court of Appeal in SFO v ENRC may give a company engaging with the SFO greater comfort when asserting litigation privilege over investigation documents, companies seeking a resolution will still need to consider if it is in the their strategic interests to waive privilege (on a limited basis) in such documents. As a matter of principle, maintaining privilege should be a 'neutral' factor as far as obtaining credit for co-operation is concerned. Privilege is a fundamental right. The DPA Code of Practice recognises that there is nothing in the existence of the DPA process that alters that right. However, the Court of Appeal in the ENRC case did note that an examination of a company's cooperation, for the purposes of determining whether a DPA would be in the interests of justice, 'will consider whether the company was willing to waive any privilege attaching to documents produced during internal investigations, so that it could share those documents with the SFO.' In light of this, the SFO may, in practice, consider it to be a positive sign of co-operation if a company chooses to waive privilege in

certain documents for the purposes of assisting the SFO in its investigation.

**5. The Court of Appeal would like to see its decision appealed**

The Court of Appeal clearly indicated that it considered the narrow definition of the 'client' as established in *Three Rivers 5* to be outdated and that it would have departed from that decision if it had been able to do so. It focused in particular on the fact that large national and multinational corporations are at a disadvantage compared to small to medium sized enterprises (***SMEs***). While knowledge of the relevant facts and issues is likely to reside within those instructing lawyers in SMEs, this is unlikely to be the case for larger companies. The Court was of the view that the law should apply equally to all clients regardless of size and the law on legal advice privilege as it currently stands does not. To remedy this, the Court appeared sympathetic to extending legal advice privilege to communications with employees authorised to communicate with a company's lawyers. The Court also recognised the need for a commonality in approach between common law jurisdictions, where England is out of step with other common law countries. The Court seemed to encourage an appeal to the Supreme Court on this issue.

The Court also left it to the Supreme Court to decide whether lawyers' working papers (in this case, interview notes) must betray the tenor of the legal advice in order to attract legal advice privilege. The High Court suggested that they did, but the Court of Appeal did not express a view. The position therefore remains unclear and clarification would be welcome as there will be instances where litigation privilege will not protect interview notes, for example where there is a dual purpose. If, as ENRC submitted, all confidential documents prepared by lawyers for the purpose of giving legal advice are privileged, then interview notes prepared by lawyers would also be protected by legal advice privilege.

In the event that these points are appealed to the Supreme Court, the case will continue to have significant implications for clients and the profession, well beyond the sphere of investigations.

If you would like to discuss these points, or any other investigations or litigation related matter, please do get in touch with your usual Freshfields contact.


**Matthew Bruce**
Partner
T +44 20 7785 2758
E matthew.bruce@freshfields.com

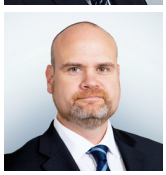
**Ben Morgan**
Partner
T +44 20 7716 4157
E ben.morgan@freshfields.com

**Geoff Nicholas**
Partner
T +44 20 7832 7773
E geoff.nicholas@freshfields.com

**Christopher Robinson**
Partner
T +44 20 7785 5781
E christopher.robin@freshfields.com

**Ali Sallaway**
Partner
T +44 20 7832 7242
E ali.sallaway@freshfields.com

**Nicholas Williams**
Partner
T +44 20 7785 5683
E nicholas.williams@freshfields.com



**Simon Murray**
Senior Associate
T +44 20 7785 2742
E simon.murray@freshfields.com