Privilege – Between a rock and a hard place

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On 8 February 2017, Ogier reported on the RBS Issue Rights Litigation. A copy of that article can be found here. A recent decision of the High Court of England and Wales follows that judgment and extends the trend, casting doubt as to whether subjects of investigations or possible investigations by regulatory bodies can claim privilege over certain documents. Our dispute resolution teams in the Channel Islands examine the decision in The Director of the Serious Fraud Office ("SFO") v Eurasian Natural Resources Corporation Ltd ("ENRC")[1].

Facts

At a time when ENRC sought to expand its operations into Africa in 2009/10 it became aware of various unsubstantiated allegations of previous criminality (including corrupt practices) on the part of companies it was seeking to acquire, or those individuals behind them. In December 2010, ENRC received an email from an apparent whistleblower containing allegations of corruption and financial wrongdoing within its subsidiary, SSGPO. Lawyers and accountants were instructed to investigate the allegations and report on them to ENRC. A further allegation of possible corruption within SSGPO was made and an MP raised questions in Parliament about a deal with which ENRC was involved and was reported as having written to the SFO asking it to investigate whether ENRC was complying with the Bribery Act. The head of compliance at ENRC predicted a "dawn raid" and steps were put in place to prepare for this. In July 2011, The Times then published an article referring to the whistleblower email and stating that lawyers had been instructed to investigate. The SFO wrote to ENRC the next day referring to "recent intelligence and media reports concerning allegations of corruption and wrongdoing". They drew attention go the 2009 Self-Reporting Guidelines[2] and urged ENRC to consider the guidance carefully whilst undertaking the investigations.

Following investigations (during which there were a number of communications between ENRC and the SFO) in December 2012, ENRC's lawyers wrote to the SFO indicating they had a draft report and seeking assurance that ENRC were still within the corporate self-reporting process, stating any report submitted would be "under a limited waiver of Legal Professional Privilege" ("LPP"). The SFO did not accept the report was privileged but the report was sent to them in any

event. The lawyers then presented their findings on in respect of the investigation a committee of the ENRC Board. Very shortly after that, ENRC's Board underwent a reshuffle and several senior personnel departed, ENRC terminated their lawyers' retainer and appointed alternative lawyers to represent them. The SFO then commenced a criminal investigation into ENRC's affairs.

The provision of certain documents was refused and the Director of the SFO brought a claim seeking a declaration that certain documents generated during the investigations undertaken by the solicitors and forensic accountants into the activities of ENRC and its subsidiaries were not subject to LPP.

The Law of privilege

The law on privilege is wide ranging, and a number of Court judgments have enunciated various principles, but in broad terms, "litigation privilege" applies to communications between parties and their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation, if at the time of the communication: (1) litigation is in progress or reasonably in contemplation, (2) the communications are made with the sole or dominant purpose of conducting that litigation, (3) the litigation is adversarial, not investigative or inquisitorial. Whether or not litigation is reasonably in prospect is an objective question, though the Court must consider the actual state of mind of the party claiming privilege.

"Legal advice privilege" attaches to communications passing between the client and lawyers, in connection with the provision of legal advice. There is no requirement for litigation to be contemplated.

Findings

From the outset of the judgment, the Court observed that the evidence supporting the claim for privilege was not of the highest quality. Normally it would come from the person whose motivation and state of mind was in issue – in the case of a company, the individuals who were responsible for giving the relevant instructions to the lawyers on the company's behalf. In this case, it was not possible for ENRC to give such direct evidence, as the group of individuals responsible for directing the investigations had changed over time. The crux of the issue was what was contemplated and when. ENRC alleged it had a reasonable anticipation of criminal litigation throughout its engagement with the SFO.

The evidence was that ENRC were concerned about a formal SFO investigation into the affairs of ENRC and its subsidiaries if the SFO ever got wind of the allegations, its lawyers, head of compliance and general counsel all advising of a risk of formal SFO intervention and/or a so called "dawn raid". There was, however, no evidence that upon receipt of the investigatory materials, the Board anticipated that the SFO would prosecute ENRC, the Court holding that the

internal investigation was regarded as a means of reducing the risk of external investigation full stop, rather than prosecution. The majority of documents over which LPP was claimed were held not to be.

Litigation Privilege

Where ENRC had claimed "litigation privilege", the Court held that ENRC had to establish that it was "aware of circumstances which rendered litigation between itself and the SFO a real likelihood rather than a mere possibility". ENRC had not established that test, but even if prosecution had been reasonably in contemplation, the documents were not created with the dominant purpose of being used in the conduct of such litigation. The information was not being gathered to form part of a defence brief. ENRC's decision to co-operate was not driven by the discovery of a problem, but rather by the understandable desire to avail itself of the possible advantages of the self-reporting process should the worst-case scenario emerge, and to retain control over the investigations.

The Court specifically rejected the submission that a criminal investigation by the SFO should be treated as adversarial litigation, holding that an SFO investigation was a preliminary step taken, and generally completed, before any decision to prosecute is taken and that the policy which justifies litigation privilege did not extend to enabling a party to protect itself from having to disclose documents to an investigator. Documents generated at a time when there was no more than a general apprehension of future litigation could not be protected by litigation privilege just because an investigation was, or was believed to be, imminent.

It was held that the reasonable contemplation of a criminal investigation did not necessarily equate to the reasonable contemplation of a prosecution. The investigation and the inception of a prosecution could not be characterised as part and parcel of one continuous amorphous process. It was always possible that a prosecution might ensue, depending on what an investigation uncovered, but unless the person who anticipates an investigation was aware of circumstances that, once discovered, would make a prosecution more likely, it could not be established that just because there was a real risk of an investigation, there was also a real risk of prosecution.

Legal advice privilege

The Court considered that where a lawyer is carrying out, or directing others to carry out, a fact finding or evidence gathering exercise in circumstances where litigation is not in contemplation, the fruits of their labour should not be privileged from disclosure, independently of any communication of them by the lawyer to the client, simply because the purpose of that exercise was to enable advice to be given to the client.

It referred to the decision in Three Rivers DC v Bank of England (No 5) [3] where it was held that it was only communications between solicitor and client for the purpose of seeking and

obtaining legal advice, and evidence of the content of such communications that were subject to legal advice privilege. Preparatory materials obtained before such communications, even if prepared for the dominant purpose of being shown to a client's solicitor, even if prepared at the solicitor's request, and even if subsequently sent to the solicitor, did not fall within the scope of privilege.

The Court noted it was bound to follow the decision in The RBS Rights Issue Litigation [4] where it was held that for corporations, to warrant protection, the communication with the lawyer must be to or from a person who was authorised to seek and receive legal advice on behalf of the corporation, and for the purpose of giving or receiving legal advice. Such communication was to be distinguished from the preparatory work of compiling information undertaken by persons with no authority to seek or receive legal advice for the purposes of enabling the corporate client to seek and receive such advice.

It was held that information coming from an employee to a lawyer could not be equated with instructions or information emanating from the client, unless he had been tasked by the client with seeking or obtaining legal advice on the client's behalf. It was a question of fact to be determined on the evidence who has authority to seek and obtain such advice, in this case, there were problems with the identity of whom the lawyers communicated with, which caused a serious issue for ENRC, such that they were held not to be communications in the course of conveying instructions to the lawyers on behalf of the corporate client.

The Court observed protection would be afforded to lawyers' working papers if they would betray the tenor of the legal advice. A verbatim note of what a lawyer was told by a prospective witness would not, without more, be a privileged document. On the evidence, such documents were merely notes of what the lawyers were told by witnesses, there was no suggestion they included the lawyers' qualitative assessment of the evidence, or any thoughts about its importance or relevance to the inquiry, and as such, did not establish that the notes would give a clue as to any aspect of legal advice given to ENRC.

Conclusions

Given the very broad consideration of the principles pertaining to LPP, it may be that this judgment is cited by regulatory bodies such as the GFSC or JFSC when seeking disclosure of documents created by an organisation during the course of any internal investigations prior to GFSC or JFSC involvement, which would normally be protected by LPP. If so, the consequences for such organisations could be damaging.

It remains to be seen whether or not this judgment is persuasive in the Channel Islands, given it is a judgment of the High Court which is not directly binding on our Courts, and is being appealed to the English Court of Appeal. Of course, every case will be decided on its own facts, but the best evidence of the necessary state of mind will be the contemporaneous documents, which may include records of discussions at board level. It therefore it makes sense to seek legal

advice prior to commencing any internal investigation into suspected or alleged wrongdoing as any documents created should be carefully controlled. It is also imperative that legal advice is taken as to whom from your organisation has authority to seek and receive legal advice on behalf of the organisation for the same reason.

Ogier will be keeping a close eye on the appeal of this judgment and will report further in due course.

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[1] [2017] EWHC 1017 (QB)

[2] The Self-Reporting Guidelines outlined a process whereby, in return for full and frank cooperation by a corporate body which discovered a problem concerning overseas corruption and reported it to the SFO, the SFO might, in appropriate circumstances, agree to a civil settlement in lieu of prosecution

[3] [2003] QB 1556

[4] [2016] EWHC 3161 (Ch)

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