Take nothing for granted - legal privilege and internal investigations

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The subject of legal professional privilege has been back in the spotlight recently, with the English Court of Appeal decision in SFO v. ENRC substantially reversing the original High Court decision. This stops – at least for now – the erosion of a fundamental legal principle: that a person can seek legal advice without fear that it might be disclosed to the wider world.

Privilege is a complex topic, with a number of different strands that potentially apply in different circumstances. It is also a topic that is particularly relevant to regulated providers of trust company business in the context of investigations they may face and the duty of candour owed to their regulators. It is a concept that is easier to state in theory, than apply in practice, and so Trustees should tread carefully and take advice in order to preserve this important protection.

Every regulated business should take the time to consider its policies and procedures around internal investigations, and think carefully before embarking on any internal investigation when faced with a regulatory issue that needs investigating. The importance of doing so is all the more important if the business wishes to assert and maintain any claim to withhold privileged material from disclosure to a third party or to the Court.

Legal advice privilege protects confidential communications between a lawyer and client for the purpose of giving or receiving legal advice (identifying who is the 'client' in that regard is key); and litigation privilege applies to documentation produced when litigation is reasonably anticipated and where the dominant purpose at the time of creation of the document is for use in relation to litigation. The underlying purpose of legal professional privilege is to protect legal communications from disclosure to the world and it enables clients and lawyers to converse freely without fear that their communications will be seized upon. It most commonly arises in the context of giving legal advice or litigation.

Recent decisions in England and Wales have highlighted the difficulties that companies may face when trying to maintain privilege over documents produced in investigations. The reality is that legal professional privilege is often easier to state in theory than it is to apply in practice – and that the issue of privilege needs to be considered from the outset, not once an investigation is in train.

Legal professional privilege has received a lot of attention by the Courts over the years both in England and Wales and here in Jersey with some controversial decisions along the way. It is well established that the Jersey Courts will apply English principles in relation to questions of privilege and the Courts here have made it clear that such an approach is entirely appropriate - not least since the general principles underlying civil litigation and the position of lawyers in that process are similar in both jurisdictions.

The latest English Court of Appeal decision in the case of the SFO v ENRC is of key importance not least because it overturned a controversial decision of the English High Court in the same case last year which had otherwise significantly narrowed the scope of litigation privilege where the High Court rejected ENRC's claims to litigation privilege over documents including interview notes and material associated with the forensic accountant's review from the ENRC's

internal investigation into allegations of bribery, fraud and corruption.

Thankfully the English Court of Appeal has restored some orthodoxy as to when litigation privilege arises and held that documents produced to investigate allegations were created for the dominant purpose of preventing or defending litigation and hence were covered by litigation privilege. And the rule as to legal advice privilege otherwise remains the same in that it protects confidential communications between a lawyer and client for the purpose of giving or receiving legal advice.

The English Court of Appeal expressed the view that that rule puts large corporations at a disadvantage where those tasked with seeking legal advice are likely to have to rely on information gathered by employees which will not necessarily be covered by privilege (unless litigation privilege applies).

The English Court of Appeal decision in the SFO v ENRC is a welcome one. There is clearly a public interest that companies should be prepared to investigate allegations against them before deciding whether or not to self-report to the regulator. The decision supports a culture of investigating issues when they arise and that in turn encourages a system of good corporate governance.

So what practical steps can a business take to try and maximise any claim to privilege that it might be able to make?

- Take nothing for granted. Consider instructing external lawyers at an early stage.
- Set up a protocol for undertaking the investigation. Establish a designated team with clearly defined responsibilities to undertake the investigation
- Consider and clearly define who the 'client' is i.e. who is specifically tasked with seeking and obtaining legal advice?
- Limit the dissemination of legal advice –circulate on a 'need to know' basis only.
- Mark any privileged documents 'confidential and privileged'. Be aware that simply marking a document in this way does not necessarily guarantee the document will be privileged.
- Be aware that attaching non-privileged documents to privilege documents does not make them privileged.
- If reports need to be drafted, ensure they are drafted by external counsel and only shared with the core investigations team – once confidentiality is lost so is privilege.

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Meet the Authors

Nick Williams
Partner
Jersey
nick.williams@ogier.com
T+44 1534 514318
M+44 7797 829052

Rebecca McNulty
Managing Associate
Jersey
rebecca.mcnulty@ogier.com
T+44 1534 514495
M+44 7797 921386

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