

SFO v ENRC¹: Legal professional privilege in internal investigations

Interview notes and forensic accountant's documents generated during an internal investigation were not protected by legal professional privilege under English law

After a whistle-blower conveyed allegations of fraud and corruption within its Kazakhstan subsidiary, the Eurasian Natural Resources Corporation Ltd ("**ENRC**") instructed external counsel to investigate. As part of this investigation, ENRC's external counsel conducted interviews with employees from ENRC, ENRC's subsidiaries and its suppliers ("**Interviews**"). A forensic accountant was also engaged to identify controls, systems weaknesses and potential improvements.

Seeking to avail itself to the Serious Fraud Office's ("**SFO**") self-reporting regime for cases of overseas corruption, ENRC began a dialogue with the SFO. This dialogue was terminated by the SFO after ENRC decided to dispense with the services of its external counsel which was responsible for the investigations and which had been representing ENRC in its dealings with the SFO. The SFO commenced a criminal investigation into ENRC's affairs and sought production of, amongst other things, the notes taken by ENRC's former external counsel of the Interviews it conducted ("**Interview Notes**") and the reports and documents generated by the forensic accountants' review ("**Forensic Accountant's Materials**"). ENRC asserted litigation privilege over these two classes of documents and legal advice privilege over the Interview Notes. The English High Court (Andrews J) decided in *SFO v ENRC* that neither privilege was applicable and ordered production of these two classes of documents.

This Update takes a look at the English High Court's decision and its applicability in Singapore.

The Decision

Regarding the claim for litigation privilege: The Court held that the Interview Notes and Forensic Accountant's Materials were not protected by litigation privilege for two key reasons. First, ENRC failed to establish that litigation (in the form of criminal prosecution) was reasonably in contemplation when these documents were created. Second, these documents were not created for the dominant purpose of litigation. Though the Court found that an SFO investigation was reasonably in contemplation, an investigation was not adversarial litigation and the policy that justifies litigation privilege (i.e. to enable parties to prepare for reasonably anticipated litigation without adversarial inference and the fear of premature disclosure) does not extend to enabling a party to protect itself from having to disclose documents to an investigator. The Court rejected ENRC's submission that once a criminal investigation was reasonably contemplated, then so too was a criminal prosecution.

Regarding the claim for legal advice privilege: The Court, citing the English Court of Appeal decision of *Three Rivers (No. 5)*², observed that legal advice privilege only attaches to communications between the lawyer and those individuals who are authorised by the company to obtain legal advice on its behalf. Communication of relevant facts by an employee or someone authorised by the company to communicate with its lawyers so that its lawyers may provide the company with legal advice is not protected by legal advice privilege. As there was no evidence that any of the interviewees were

¹ *The Director of Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017

² *Three Rivers District Council v Governor and Company of the Bank of England (No. 5)* [2003] QB 1556

authorised to seek and receive legal advice on behalf of ENRC and the communications between these interviewees and ENRC's external counsel were not communications in the course of conveying instructions to counsel on behalf of ENRC, the Court rejected ENRC's claim that the Interview Notes were protected by legal advice privilege. The Court also rejected ENRC's submission that the Interview Notes could be characterised as lawyer's work product and their disclosure would reveal the trend of the legal advice given to ENRC as this was not established on the evidence.

Our Comments / Analysis

Litigation privilege

A reasonable prospect of investigation ≠ a reasonable prospect of litigation

The Court's findings in *SFO v ENRC* regarding litigation privilege shows that a reasonable prospect of investigation by enforcement agencies does not necessarily equate to a reasonable prospect of litigation (which is one of the two requirements for establishing litigation privilege). While a general apprehension of litigation may exist under such circumstances, it is well established under both English and Singapore law that this will not suffice for the purposes of establishing litigation privilege. Thus documents created during the course of an internal investigation where there is only a reasonable prospect of investigation without a reasonable prospect of resulting litigation by enforcement agencies would not enjoy the protection of litigation privilege.

Legal advice privilege

SFO v ENRC may not necessarily be followed in Singapore

The Court's decision regarding legal advice privilege essentially regards communications between the company's lawyers and the company's employees as communications with a third party. Under English law, communications to and from a third party are not protected by legal advice privilege unless the third party is an agent for communication (i.e. a mere conduit for information and nothing more) between the client and its lawyers³. This narrow approach may not necessarily be followed in Singapore.

In *Skandinaviska v APB*⁴, the Singapore Court of Appeal cited with approval the approach adopted in *Pratt Holdings Pty Ltd v Commissioner of Taxation*⁵ ("**Pratt Holdings**"), where the Australian Federal Court held that communications with third parties may be protected by legal advice privilege if the third party's function was for the dominant purpose of enabling the client to obtain legal advice. The Singapore Court of Appeal considered this approach to be principled, logically coherent, practical and consistent with the reality of legal practice.

Communications with third parties whose function was for the dominant purpose of enabling the client to

Using the approach in *Pratt Holdings*, it may be argued that when the company's officers and employees provide information regarding the relevant facts during an internal investigation to enable the company to obtain legal advice, they are doing so for the dominant purpose of enabling the company to

³ *Wheeler v Le Marchant* [1881] 17 Ch. D. 644

⁴ *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR(R) 367 ("**Skandinaviska**")

⁵ [2004] 136 FCR 357

obtain legal advice may be privileged

obtain legal advice and these communications are protected by legal advice privilege.

The rationale behind legal advice privilege is allow a person to communicate with his lawyer with candour so that the latter can provide him with effective legal advice. It has been recognised that such candour cannot be expected if disclosure of the contents of their communication may be compelled⁶. For a company, information regarding its operations will be found with its officers and employees, and allowing them to communicate such information to the company's lawyers freely and frankly enables the company to receive effective legal advice. If disclosure of the contents of such communications may be compelled, it will hamper the company's ability to provide its lawyers with all the relevant facts and prevent it from obtaining effective legal advice.

Concluding remarks

The decision in *SFO v ENRC* has been criticised for eroding the protection of the legal professional privilege. The President of the Law Society of England and Wales has described the decision as “deeply alarming”⁷. ENRC has applied for permission to appeal the decision and appellate consideration of this matter will certainly be welcomed by practitioners.

As things stand, *SFO v ENRC* is not binding in Singapore. It has yet to be considered by the Singapore Courts and its decision regarding legal advice privilege may not be followed for the reasons stated above. That said, if there is a possibility that the documents produced during your company's internal investigation may be subject to an application for discovery in an English Court or subject to a production order by English regulators, the protection provided the legal professional privilege under English law for these documents is likely to be limited. Companies embarking on internal investigations in such circumstances should seek legal advice early on how best to address this.

If you would like information on this or any other area of law, you may wish to contact the partner at WongPartnership that you normally deal with or contact the following lawyers:



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⁶ *Skandinaviska* citing *R v Derby Magistrates' Court, Ex parte B* [1996] 1 AC 487

⁷ Financial Times, 13 May 2017 (see <https://www.ft.com/content/437c3586-3647-11e7-bce4-9023f8c0fd2e?mhq5j=e1>)

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