Ever-decreasing circles

Gwendoline Davies, Andrew Northage and Robert Starr assess the impact of a recent ruling on legal professional privilege

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A recent High Court ruling is the latest in a line of cases to limit the scope and availability of legal professional privilege. While *Serious Fraud Office (SFO) v Eurasian Natural Resources Corporation Ltd* [2017] (*SFO*) was a criminal case, it applies equally to civil and regulatory investigations, and will be of significant interest because of its important implications for legal professional privilege.

Privilege: policy considerations

Privilege is a vital legal protection. It entitles a client to withhold documents (including electronic communications) from a court or third party, without any adverse inferences being drawn. There are important public policy justifications underpinning privilege, such as the need for clients to be able to candidly disclose matters to their lawyers; to enable lawyers to obtain, investigate, record and freely communicate information to their clients, so that clients can make fully informed decisions; and, in the context of regulatory investigations, so that regulators can deal with experienced lawyers who can accurately advise their clients how to respond and cooperate, which in turn will advance public interest. For more detailed information on the various different types of privilege protection, please see 'For your eyes only' by Andrew Beck and Gwendoline Davies, *CLJ*71, January/February 2017, p5.

However, there is frequently a tension between a regulator's or an investigator's need to review documents so as to determine a full and true picture, and the subject's (often entirely proper) wish to protect its position by claiming privilege over confidential documents where possible.

That tension came to a head before the High Court in the recent case of *SFO*. In the context of its investigation into alleged fraud, bribery and corruption at the now de-listed Eurasian Natural Resources Corporation (ENRC), the SFO requested disclosure of certain documents. ENRC resisted on the basis that the documents were privileged.

Judgment

In a decision which endorses recent authority in restricting the ambit of legal professional privilege (*The RBS Rights Issue Litigation* [2016]), and which seemingly imposes further significant limits on the scope and availability of privilege protection, the following key points arose in *SFO*:

- Legal advice privilege and litigation privilege are two key forms of legal professional privilege. Documents will not have to be disclosed if one or both of these protections apply.

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R (Prudential plc & anor) v Special Commissioner of Income Tax & anor [2013] UKSC 1

Serious Fraud Office (SFO) v Eurasian Natural Resources Corporation Ltd [2017] EWHC 1017 (QB)

The RBS Rights Issue Litigation [2016] EWHC 3161 (Ch)

Three Rivers District Council & ors v The Governor & Company of the Bank of England [2003] EWCA Civ 474

- For legal advice privilege to apply:
    - the document in question must be confidential;
    - it must pass between a qualified lawyer and his or her client (both of which entities have been given a narrow definition in binding authority: in *R (Prudential plc) v Special Commissioner of Income Tax* [2013] the Supreme Court confirmed that legal advice privilege does not extend beyond qualified members of the legal profession, even to other professionals such as accountants, and *Three Rivers District Council v The Governor & Company of the Bank of England* [2003] (aka *Three Rivers (No 5)*) defined 'client' in this context very narrowly, as only covering those members of an organisation who are actually charged with instructing lawyers);
    - the document must have been created for the purpose of giving or receiving legal advice in the relevant legal context (that is, privilege will not arise where a lawyer advises on purely business or administrative matters); and
    - privilege must not have been lost or waived, even inadvertently.

Documents created with a view to investigating, or even obtaining advice for the purpose of avoiding criminal or civil litigation or an investigation, will not attract litigation privilege protection.

- For litigation privilege to apply, the document must have been created for the dominant purpose of litigation which is reasonably contemplated or existing.
- In a criminal investigation, the test as to whether litigation is in reasonable contemplation is not met merely because an investigation is contemplated, or even necessarily once it is ongoing, because prosecution will only occur once evidence of any truth in the allegations is discovered. In this context, only a prosecution (and not an investigation) amounts to 'litigation' for privilege purposes.
- It may be easier to pass the 'contemplation of litigation' test in a civil matter, in which it could reasonably be anticipated that a party would commence litigation even where there may be no genuine grounds for a claim.
- Turning to the 'dominant purpose' test. The judge found that the test requires documents to be created for the dominant purpose of being used in the conduct of litigation (paras 149 and 164). Documents created with a view to investigating, or even obtaining advice for the purpose of avoiding criminal or civil litigation or an investigation, will not attract litigation privilege protection. (However such documents may, depending on the particular circumstances of the case and whether other requirements are met, attract legal advice privilege.)
- Whether or not documents created in relation to a settlement will attract privilege will depend on whether the litigation is 'in train'. The judge rejected the

suggestion that litigation privilege extends to documents which are created to avoid litigation even if that entails seeking to settle before proceedings are issued (paras 60 and 61). (In relation to settlement negotiations in the context of a civil matter, such documents may, again depending on the circumstances of the case and whether other requirements are met, attract without prejudice privilege.)

- In line with the narrow approach adopted in the recent *RBS* case, lawyers' notes of employee interviews and lawyers' working papers generally will not attract privilege simply by virtue of the lawyers' involvement. Notes of interviews with employees and lawyers' working papers respectively will only attract legal advice privilege if the interviewees were actually charged with giving and receiving legal advice on behalf of the client organisation and if the papers indicate the content or direction of legal advice being given.

In this case, ENRC's alternative claims for both litigation privilege and legal advice privilege failed in respect of all but a limited category of documents which had plainly been prepared for the specific purpose of the giving of legal advice.

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Practical advice

There is some general practical advice which can assist:

- At the earliest possible time at the outset of any potential or ongoing investigation (internal or regulatory) or any dispute, clients should take specialist advice on the likelihood of privilege protection attaching to relevant documents and on the practical steps which can be taken to protect their position.
- Organisations should consider carefully the advisers who will be retained and the 'client' (ie the person or persons within the client-organisation) who will be charged with instructing advisers. If too many people are charged with instructing lawyers, that could undermine any claim to privilege. It could also cause practical case management difficulties and could risk confidentiality.
- Remember that privilege will only attach to documents and communications passing between a client and a qualified lawyer. Privilege will not arise when advice – even advice on legal matters – is taken from any other professional. Clients should therefore consider appointing specialist legal advisers to assist with any investigations and/or litigation. Appointing external lawyers can have the dual benefit of providing specialist expertise and strengthening any claim to privilege.
- To maximise protection, any reports or other documents created by lawyers for clients should ideally interweave legal analysis and advice along with factual matters and they should be headed 'privileged and confidential'.
- So far as interviewees are concerned, if individuals form part of the 'client' circle authorised to instruct legal advisers, then interview notes should be privileged after all. Alternatively, it may be possible, in some cases, to bring employee interviews within the cloak of privilege if interviewees are separately legally advised and have their own legal representation also in attendance. Whether this option is open and advisable, however, will depend on the circumstances of both the particular case and the particular interviewee.
- Finally, an important point to note is that you cannot make a document or communication privileged simply by saying it – whether or not privilege applies will, in each case, be a matter of fact and law. If privileged material (even material which may be subject to a confidentiality agreement) is disclosed to third parties such that any privilege is lost, then it might well be disclosable.

Conclusion

From *Three Rivers (No 5)* to the *RBS* case and now *SFO*, the trend seems to be towards the courts recognising an ever-more limited scope to privilege. In particular, whether any (and if so, what type of) privilege applies in the context of internal investigations, and even initial or pre-action consultations with advisers, is now a very nuanced question.

Apart from the practical difficulties which the restrictive approach as per the *SFO* case might entail for many corporates when it comes to their early analysis of investigations and disputes, the case may well result in delays, and possibly even satellite litigation, as parties involved in ongoing investigations or litigation pause to reconsider their position as a result of, and potentially become embroiled in, interim applications to resolve privilege uncertainties. Another consequence, potentially unforeseen by regulators who may have been campaigning for the curbing of privilege protection, might well be an increasing reluctance on the part of corporates and other organisations to self-investigate and self-report.

Pending a possible appeal of the *SFO* decision, clients should adopt a more cautious approach than ever before when creating documents and considering disclosure in relation to any potential or ongoing investigations or disputes. As part of that, clients should ensure that all staff members are aware of and properly understand the requirements for, and implications of, legal professional privilege. ■