SQUIRE PATTON BOGGS

Internal Investigations and Privilege
Recent Developments

It is a commonly held misconception that if a lawyer is present, then any information gathering or witness interviewing will automatically be covered by legal professional privilege. In recent months, we have seen two high-profile decisions that have re-emphasized that this is most definitely not the case, to the detriment of those seeking to assert privilege.

These two cases highlight the need to tread very carefully when gathering information, particularly in the context of internal investigations and criminal/regulatory investigations, and as to what will and will not be protected by legal professional privilege.

Background

Legal professional privilege has two predominant strands: **legal advice privilege** and **litigation privilege**. Both require confidentiality, but legal advice privilege is narrower in ambit, as it only protects communications between client and lawyer as part of the giving and receiving of legal advice. Legal proceedings do not need to be in contemplation. Litigation privilege, which is much wider in scope, protects communications that come into existence for the dominant purpose of gathering evidence for proceedings, which are in contemplation and will include communications between the client and third parties as well as the lawyer and third parties.

In internal investigations, legal advice privilege may apply to communications made in scenarios such as the receipt of a notice from an investigative authority or regulator that alleges facts that require investigation. Whether litigation privilege will also apply will typically depend on the particular circumstances of the case.

For litigation privilege to apply, legal proceedings (which are adversarial rather than purely inquisitorial) must either be in existence or reasonably contemplated. Litigation privilege is unlikely to apply to purely internal investigations or investigations carried out in furtherance of early stage regulatory investigations.

Where a notice is served, it is important to determine the purpose of the notice and the relevant stage of the investigation, as was considered by the Court in the following cases.

The RBS Rights Issue Litigation[1]

In this high-profile action, shareholders in RBS were seeking to recover losses from RBS arising from the collapse of the shares on the ground of inaccuracies in the prospectus issued prior to the rights issue. As part of the litigation, the shareholders sought inspection of notes of interviews conducted by RBS lawyers with RBS employees as part of investigations carried out in response to two US subpoenas over allegations made by a former employee.

RBS resisted on the basis that they were subject to legal advice privilege because they recorded a communication between a lawyer and its employees or former employees. RBS claimed that the interviewees acted as agents in providing instructions to its lawyers. It was not suggested that the interviewees were themselves seeking or being provided with legal advice but rather that the interview notes comprised information gathered from employees at the instance of its lawyers for the purpose of enabling RBS to seek legal advice from its external counsel. The High Court disagreed, instead following the traditional view decided in Three Rivers (No 5).

Three Rivers and the Meaning of "Client"

The decision in *Three Rivers No. 5*[2], whilst remaining controversial, established who was the lawyer's "client" for the purposes of legal advice privilege. In this case, the creditors of BCCI sued the Bank of England ("the Bank") for misfeasance in public office. The Bank asserted privilege in documents prepared by its employees, which were to be provided to its external solicitors to assist in preparing the Bank's submissions to the Bingham Inquiry on the collapse of BCCI.

The Court of Appeal held that, for the purpose of assessing privilege, the "client" did not encompass all employees of the Bank but was limited to a particular group of three individuals (the Bingham Inquiry Unit or BIU) who had been given responsibility for coordinating communications with the Bank's solicitors. Everyone else at the Bank was a third party to the lawyer-client relationship, so legal advice privilege did not apply.

In the RBS case, the Court confirmed that legal advice privilege is strictly confined to communications between a lawyer and his client for the purpose of giving or receiving legal advice. Records of interviews with employees and former employees carried out by RBS's solicitors were not privileged. The interviewees had been authorised to provide information for the purpose of obtaining legal advice, but they could not be treated as the client.

The Court went further and denied another route to obtaining the protection of privilege by refusing to treat the interview notes as working papers of the lawyers.

1 [2016] EWHC 3161 (Ch)
2 [2003] EWCA Civ 474

Director of the Serious Fraud Office v Eurasian Natural Resources Corp. Ltd[3]

The Serious Fraud Office (SFO) began an investigation into Eurasian Natural Resources Corp. (ENRC) concerning allegations of fraud, bribery and cross-border corruption. Using its powers under the Criminal Justice Act, the SFO issued a notice demanding that ENRC produce various documents of potential relevance to that investigation. Included in that notice were documents that had been prepared by ENRC's lawyers. ENRC resisted the production of four categories of documents on the grounds that they were subject to legal professional privilege, consisting of:

(i) Notes taken by ENRC's lawyers during interviews, prior to the SFO's investigation, of the evidence given to them by witnesses about allegations made by a whistleblower. The witnesses included employees and former employees of ENRC and its subsidiaries, as well as third parties such as suppliers.

(ii) Documents generated by ENRC's forensic accountants as part of a review they carried out into ENRC's books and records prior to the SFO's investigation.

(iii) Documents containing evidence given by a partner in the law firm handling the investigation for ENRC to ENRC's board and Corporate Governance Committee.

(iv) Documents that an independent lawyer had advised did not attract privilege, including emails between a senior ENRC executive and Mr. Ehrensberger – ENRC's Head of Mergers and Acquisitions – who happened also to be a qualified lawyer.

The SFO rejected the claims and applied to the High Court for a declaration that none of the documents attracted privilege, and that they all must, therefore, be disclosed.

Decision

Save in respect of item (iii) Andrews J rejected all of ENRC's claims to privilege. In relation to the notes taken during interviews, the Court held that the threshold for litigation privilege had not been satisfied because litigation had not been in reasonable contemplation when the interviews took place. At this stage, ENRC had only anticipated a potential criminal investigation, and this did not sufficiently amount to litigation.

The Court held that a defendant cannot reasonably contemplate litigation unless it knows enough about what the prosecutor's investigation is unlikely to unearth (or has unearthed) in order to appreciate that prosecution was a real possibility. Moreover, the Court was not satisfied that litigation had been the dominant purpose for which the documents were created. At the time the investigation was carried out, the primary purpose was to find out if there was any truth in the whistleblower's allegations.

In relation to the forensic accountants, the Court held that the documents did not attract litigation privilege. The dominant purpose of their creation was to meet compliance requirements or to obtain accountancy advice on remedial steps as part of the comprehensive books and records review.

In relation to the internal emails with a senior executive, the Court found, basing its ruling on statements made in ENRC's annual reports and accounts, that Mr. Ehrensberger was not engaged as a lawyer but as a "man of business". Accordingly, legal advice privilege did not attach to his communications, even if legal advice was sought and given in those exchanges.

Key Points

Please bear in mind the following if you are faced with an internal investigation or criminal/regulatory investigation:

- Particular care has to be given as to who the client is in legal advice privilege communications. Privilege is likely to be restricted to only a limited number of individuals and not the whole company.
- Communications with legally qualified staff may not be privileged if those individuals are not formally employed in a legal role at the time – even if legal advice is given and received.
- Documents created in anticipation of a criminal investigation may not attract litigation privilege.
- Documents created when there is reason to believe that a criminal prosecution is in prospect (e.g., where it is known that an investigation has unearthed or is likely to unearth prejudicial material) are more likely to satisfy the requirement for litigation to be in reasonable contemplation.
- The courts may take a narrow approach when assessing whether the dominant purpose of an investigation is truly litigation (in which case, the associated documents may be privileged) or, for example, whether the investigation is intended to unearth facts for the company's own purposes, or is an attempt to meet regulatory compliance requirements. It is very important to be clear about the dominant purpose of any investigation in contemporaneous documents.
- Lawyers' communications with employees may not attract legal advice privilege if those employees are not specifically authorised to give and/or receive legal advice on behalf of their company. All legal advice should be obtained from the formally appointed in-house counsel or from external.
- Lawyers' notes of conversations with witnesses are not automatically protected by legal advice privilege and they will not be treated as the lawyer's working papers.

If you would like any further information, please contact:

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3 [2017] EWHC 1017 (QB)