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Briefing note

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Litigation privilege limited

A first instance judge has limited the scope of litigation privilege for entities under investigation by regulatory or criminal authorities. Anticipation of an investigation will not suffice to offer litigation privilege, nor will the investigation itself - at least, until sufficient evidence of wrongdoing emerges that might justify a sanction.

The decision in *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) caused consternation. It concerned legal advice privilege, which applies to confidential communications between lawyer and client for the purpose of giving or obtaining legal advice. Hildyard J decided that the "client" for these purposes is limited to those authorised on behalf of a company to obtain legal advice; the "client" does not extend to those who might have information that the lawyers need to know in order to give the legal advice.

In *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB), Andrews J conceded that, particularly in the context of a large corporation, the person directly instructing a lawyer (eg inhouse counsel) may not be the same as those within the corporation who want to receive the advice, but that person would still be within the "client" for privilege purposes or would be acting as the agent of the "client". Otherwise, she agreed with the judge in *The RBS Rights Issue Litigation* that fact-finding by lawyers will not be covered by legal advice privilege, unless the facts just happen to be in the heads of those who actually want the legal advice.

The only way in which a fact-finding process will be privileged is if it is covered by litigation privilege. Litigation privilege applies to communications with third parties if three conditions are met: litigation is in progress or reasonably in contemplation; the communications are made with the sole or dominant purpose of conducting the anticipated litigation; and the litigation is adversarial, not investigative or inquisitorial. However, in *Eurasian Natural Resources,* Andrews J went on to restrict the scope of litigation privilege in a number of areas.

First, the judge decided that, even if litigation is contemplated, a document prepared for the purpose of avoiding litigation is not privileged. Privilege only applies to documents created for the conduct of litigation, and the avoidance of litigation is not its conduct (though documents created for this purpose could be subject to legal advice privilege). However, a document created for the purpose of trying to settle litigation can be subject to litigation privilege. This distinction between the avoidance of litigation and its settlement may be very fine in practice.

Secondly, the judge decided that a document created for the purpose of being shown to a prospective adversary cannot be subject to litigation privilege (even if, perhaps, it is not actually shown to the adversary - though again, it could be subject to legal advice privilege before being shown to the other side and, if in pursuit of settlement, without prejudice afterwards). The judge considered that a document of this sort would not have been created for the purpose of the "conduct" of the litigation, to which she gave a restricted interpretation.

Thirdly, the judge concluded that a reasonable contemplation of a criminal investigation is not necessarily the same as a reasonable contemplation of a prosecution, ie of litigation. A company may conduct an internal investigation into allegations of improper behaviour because it is concerned that the authorities will want to know what went on, but that internal investigation might only be in contemplation of litigation once it becomes clear that there is some

Key issues

- Legal advice privilege only applies to communications with a "client", a limited group within a company
- Litigation privilege requires an adversarial process to be reasonably in contemplation
- A regulatory investigation is not necessarily litigation
- Only documents prepared for the conduct of litigation are privileged

truth in the underlying allegations. Even the fact of a criminal investigation by the authorities might not be sufficient for litigation to be reasonably in contemplation.

Fourthly, the judge stressed that litigation only covers documents prepared for the dominant purpose of the conduct of litigation. Finding out whether, for example, there is any truth in allegations made against a company is not the same as the conduct of litigation. The information must, it seems, be "gathered to form part of a defence brief".

Conclusion

The RBS Rights Issue Litigation decision caused a lot of concern; *Eurasian Natural Resources* will do likewise. There is likely to be an appeal in *Eurasian Natural Resources*, which will, at least, offer the higher courts a welcome opportunity to consider the correctness both of these first instance decisions.

These decisions limit the scope of privilege and, most importantly, undermine the function of privilege. For example, the purpose of legal advice privilege is to allow clients to place the full facts before their lawyers without fear that what they say to their lawyers will have to be revealed to others later. If the "client" is confined to those who will act on the legal advice, companies will, in many cases, have limited ability to take confidential legal advice. With regard to litigation privilege, the narrow approach adopted sets England further apart from other common law jurisdictions and impinges on a company's legitimate interest in gathering evidence from its employees and third party experts.

It can only be hoped that the Supreme Court steps in soon to sort out the whole sorry mess. Pending an appeal, however, there is no single magic step that can generate privilege that might not otherwise apply. A cautious approach to factual investigations will be required, recognising that there is at least a risk that disclosure could be required.

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