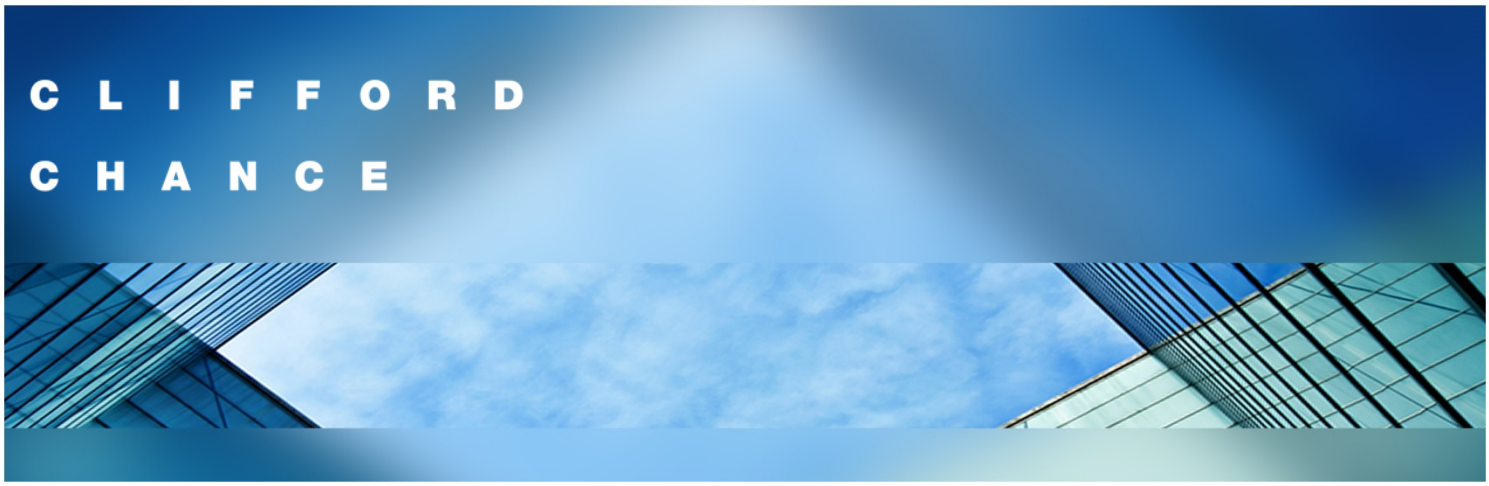

ENGLISH COURT OF APPEAL OVERTURNS LOWER COURT DECISION IN *ENRC*

Cross-border investigations are fraught with potential pitfalls unless all of the relevant laws, practices and customs are considered when planning the approach and strategy. One key aspect is managing to the client's best advantage the differing laws of privilege. On September 5, 2018, the English Court of Appeal in *SFO v. ENRC*, [2018] EWCA Civ 2006, overturned the High Court decision from May 2017 which held that interview notes prepared by external counsel for ENRC during an internal investigation were not protected by any privilege and had to be produced to the SFO. In overturning the High Court decision, the Court of Appeal held that because ENRC reasonably contemplated litigation with the SFO when it commenced its internal investigation in 2011, the interview notes generated during the investigation were protected by the UK litigation privilege. While important differences still remain between the levels of protection afforded by the US attorney-client privilege and attorney work-product doctrine compared with the UK litigation and legal advice privileges, the Court of Appeal's decision in *ENRC* helpfully clarifies the reach of the litigation privilege.

BACKGROUND AND HIGH COURT DECISION

ENRC first began investigating allegations of bribery and corruption in connection with the acquisition of mining operations in the Democratic Republic of Congo and Kazakhstan in 2011. While the SFO opened an official investigation of ENRC in 2013, it had been informally investigating ENRC since 2011 when the company launched its internal investigation. Moreover, media reports regarding allegations of corruption were published in August 2011. In April 2013, after it commenced its official investigation, the SFO requested documents from ENRC's lawyers, and

ENRC asserted litigation privilege over the lawyers' interview notes and other materials prepared. The SFO claimed no privilege had attached to the documents, and litigation in the High Court followed.

In her decision in July 2017, Mrs. Justice Andrews found that the interview memos sought by the SFO were not covered by the litigation privilege as litigation was not reasonably contemplated in 2011 when ENRC launched its internal investigation. The court held that for litigation privilege to attach, ENRC had to demonstrate "a real likelihood" of litigation as opposed to a "general apprehension," a showing it failed to make according to the court. The court further held that in the context of an SFO investigation, an actual prosecution must be contemplated for the litigation privilege to be valid. Because ENRC had promised to cooperate and provide the SFO with its findings, Mrs. Justice Andrews found the dominant purpose behind the internal investigation was to avoid prosecution as opposed to litigate against the SFO. Thus, according to the court, the documents were prepared to avoid litigation and were not protected by the litigation privilege.

Separately, as to legal advice privilege, the court reaffirmed the holding of *Three Rivers District Council v. Governor and Company of the Bank of England (No. 5)*, [2003] QB 1556, that limited the "client" for purposes of a privileged attorney-client communication in a corporate representation to the small group of individuals expressly authorized to give instructions and receive advice from the lawyers regarding the issue at hand.

COURT OF APPEAL DECISION

In its decision on September 5, 2018, a three-judge panel of the Court of Appeal held that interview notes, prepared by lawyers in the context of a corporation's investigation of criminal risks, are protected by the litigation privilege. The Court of Appeal overturned the lower court decision regarding the application of litigation privilege. While making clear that whether the litigation privilege attaches is dependent on the context and circumstances of a particular internal investigation, the Court of Appeal held that when the SFO specifically makes clear that there is a prospect of criminal prosecution, litigation is in reasonable contemplation. Thus, even though the SFO did not open an official investigation until 2013, the Court of Appeal found that "ENRC was right to say that they were in reasonable contemplation [of litigation] when it initiated its investigation in April 2011."

The Court of Appeal further departed from the lower court's holding that litigation in the context of an SFO investigation is only in reasonable contemplation when it is discovered that there is some truth in the allegations. To the contrary, the Court of Appeal held that the need to investigate further does not mean litigation privilege is inapplicable. Rather, while the dominant purpose for which investigation materials were created is fact-specific, a court must take a "realistic, indeed commercial view." In doing so, the Court of Appeal found that the interview notes were brought into existence by ENRC for the dominant purpose of resisting criminal or other proceedings, notwithstanding the nature of its cooperation with the SFO.

Importantly, the Court declined to distinguish, or limit to its facts, the decision regarding the legal advice privilege and the narrow definition of a "client" as set

forth by the earlier Court of Appeal decision in *Three Rivers (No. 5)*. As the Court of Appeal noted, "If the ambit of *Three Rivers (No. 5)* is to be authoritatively decided differently from the weight of existing opinion, that decision will, in our judgment, have to be made by the Supreme Court rather than this court." The Court of Appeal is (unlike the Supreme Court) bound by its own previous decisions but indicated that, had it been free to depart from *Three Rivers (No 5)*, it would have done so.

CONSIDERATIONS FOR CROSS-BORDER INVESTIGATIONS

While the Court of Appeal decision in *ENRC*, by rejecting the lower court's narrow formulation of "reasonable contemplation of litigation," provides broader protection under the litigation privilege for material generated during an internal investigation, important differences remain between US and UK privilege and work product doctrines that must be kept in mind while conducting cross-border investigations. Under US law, documents prepared during an internal investigation (including witness interview notes and memoranda) generally are protected as attorney work product when the documents contain an attorney's mental impressions and the document was generated "in anticipation of litigation." While the Court of Appeal decision in *ENRC* moves the UK litigation privilege closer to the protection afforded by the work-product doctrine, the standards are not identical and lawyers managing cross-border investigations should be mindful of the implications in various jurisdictions when creating work product. In particular, while US courts generally take a broader view when construing the "in anticipation of litigation" standard compared to the English counterpart, an opposing party can still obtain attorney work product in the US upon a sufficient showing of need.

Moreover, with respect to the attorney-client privilege, communications with employees of a corporate client are privileged if they satisfy the *Upjohn* test: (1) they involve information necessary for the attorney to provide legal advice to the company; (2) the communication relates to matters within the employee's scope of employment; (3) the employee is aware the information is being shared with an attorney in order to provide the company with legal advice; and (4) the communication is kept confidential and not shared beyond those who need to know its contents. 449 U.S. 383 (1981). Unlike in the US, the Court of Appeal in *ENRC* affirmed that the definition of the corporate "client" includes only those employees who have authority to give or receive legal advice on behalf of the company. Under UK law (at least, until a suitable case reaches the Supreme Court), communications between lawyers and employees outside the narrow client definition will not be covered by the legal advice privilege. Thus, while witness interview memoranda will be subject to broader protection under the expanded ambit of the litigation privilege as set forth by the recent *ENRC* decision, communications between the lawyers and employees outside of the control group will likely not be protected by legal advice privilege. Notably, an English court will apply English privilege rules when determining whether particular documents or communications are privileged, even if the documents were created by foreign lawyers outside of the UK.

CONCLUSION

Attorneys conducting internal investigations involving multiple jurisdictions must continue to be vigilant of the rapidly evolving differences regarding the application of privilege rules and how they may impact the defensive strategy and end game options for their clients. While the Court of Appeal decision in *ENRC* in the UK helpfully clarifies the protection of litigation privilege, documents prepared and communications made in one jurisdiction may be still be subject to disclosure in another. Attorneys must therefore, from the initial stages of planning strategy, continue to take a nuanced and holistic view of jurisdictional distinctions when seeking to maximize the protection of attorney-client communications.

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