

HIGH COURT DECISION TAKES RESTRICTIVE APPROACH TO BOTH LITIGATION PRIVILEGE AND LEGAL ADVICE PRIVILEGE

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Legal Briefings

A High Court decision earlier this week has applied a strict approach to litigation privilege in the context of criminal proceedings, finding that litigation was not in reasonable contemplation (so the first limb of the test for litigation privilege was not met) even though a criminal investigation by the SFO was reasonably contemplated: *SFO v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB).

The decision suggests it is likely to be easier to establish that litigation is in reasonable contemplation in the context of civil proceedings than criminal proceedings. However, the decision contains unhelpful comments regarding the second limb of the test for litigation privilege - whether a document has been prepared for the dominant purpose of litigation - which would appear to apply equally to civil proceedings. The decision also endorses a restrictive view of who is the "client" for legal advice privilege, as recently applied by the High Court in the *RBS Rights Issue Litigation* (see our blog post on that decision [here](#)).

Key points of interest arising from the present decision include:

- The court found that the test of whether litigation is in reasonable contemplation is not met just because a criminal investigation is contemplated. Only a prosecution, not an investigation, amounts to "litigation" for these purposes, and the contemplation of a criminal investigation does not necessarily equate to the contemplation of a prosecution. Prosecution only becomes a real prospect once it is discovered there is some truth in the allegations, or at least some material to support them.

- The court commented that the situation is different for civil proceedings. There may be reasonable grounds to contemplate that litigation will be commenced by (say) a commercial counterparty even where there is no proper foundation for a claim. In contrast, criminal proceedings cannot be brought unless the prosecutor is satisfied that there is a sufficient evidential basis for prosecution. It is therefore likely to be easier to establish the first limb of the test for litigation privilege in the civil context.
- The decision takes a strict approach to whether documents have been prepared for the dominant purpose of litigation, finding that even if litigation was in reasonable contemplation at the time the documents in question in this case were prepared, they were not prepared for the purpose of that litigation. The court found that the primary purpose here was to find out if there was any truth in allegations made by a whistleblower and (if there was) to decide what to do about it, and this was not sufficient.
- Even if the purpose was to obtain advice in relation to a criminal investigation and minimise the risk of it happening, the court said this would not mean the documents were covered by litigation privilege. The court accepted that the purpose of conducting litigation includes the settlement of litigation once it is in train. However, it rejected the submission that litigation privilege extends to documents created to obtain legal advice as to how best to avoid contemplated litigation, even if that entailed seeking to settle the dispute before proceedings were issued. This seems a fine distinction, and an arbitrary one, which may give rise to significant problems in practice.
- The court rejected an alternative claim for legal advice privilege over certain of the documents, which comprised lawyers' notes of interviews with their clients' employees, on the basis that there was no evidence that the interviewees were authorised to seek and receive legal advice on behalf of the client company. The decision strongly endorses the narrow approach to the question of who is the "client" for the purposes of legal advice privilege (as applied in the *RBS* case) which excludes those who are authorised only to communicate relevant facts to the lawyers, rather than seeking and obtaining advice on the company's behalf. The court comments that the decision in *RBS* is "plainly right" and there is no justification for departing from it. It does not however endorse the judge's obiter suggestion in *RBS* that the "client" may be restricted even further to comprise only those who are the "directing mind and will" of the organisation.
- The court also rejected an argument that the lawyers' notes were privileged on the basis that they were lawyers' working papers, endorsing the decision in *RBS* that lawyers' working papers are privileged only if they would betray the trend of the legal advice.
- The court accepted that a lawyer's summary of the facts, including information in the public domain, will be privileged if it is part of the continuum of communications between solicitor and client for the purpose of giving or receiving legal advice. This is consistent with the High Court's decision in *PAG v RBS* [2015] EWHC 3187 (Ch) (considered [here](#)).
- The decision suggests that privilege is unlikely to attach to communications with individuals who are qualified lawyers but are not employed in a legal role, even if they are in fact giving legal advice. Here privilege was denied to advice given by ENRC's Head

of Mergers and Acquisitions, even though he was a qualified lawyer, had previously been ENRC's General Counsel, and subsequently reverted to that role.

According to press reports, ENRC has said it will appeal against the decision. Click [here](#) to read more on the decision on our Litigation Notes blog.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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