

Two Recent Decisions Highlight the Court's Increasingly Narrow Interpretation on the Availability of Legal Privilege in Internal Investigations

Two recent decisions of the English High Court have considered the availability of legal professional privilege in relation to internal investigations. In both cases the availability of legal professional privilege has been interpreted narrowly and companies can therefore no longer assume that private documents, including interview notes, will be protected.

The first was delivered by Mr Justice Hildyard on 8 December 2016 and related to the RBS Rights Issue Litigation. It is a landmark decision on the unavailability of legal advice privilege under UK law in relation to the conduct of interviews of current and former bank employees in the course of internal investigations.

The claims to privilege arose out of two internal investigations, one responding to two US SEC subpoenas and the second following certain allegations made by a former employee. The principal claims concern a RBS rights issue in 2008 just before the financial crisis. RBS shareholders are now seeking to recover substantial investment losses incurred as a result of the subsequent collapse of the RBS share price on the grounds that the prospectus for the rights issue was not accurate or complete.

The claimants sought disclosure of transcripts, notes or other records of 124 interviews conducted by or on behalf of RBS with current and ex-employees as part of both investigations. In asserting privilege over these, RBS's evidence was that the only documents in existence within these categories were interview notes prepared by RBS's in-house lawyers and by a US law firm (assisted by a London firm as their agents), each of which was said to summarise those interviews.

There was no dispute that RBS authorised each of the interviewees to participate in the relevant interviews; that all interviewees had been told that the interview notes would be kept confidential; and that the interviews would be subject to attorney-client privilege. On that basis, RBS asserted privilege over the interview notes, contending that any communication by an employee who is authorised to communicate with a legal adviser for the purpose of her employer seeking legal advice is privileged and that it is not part of

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the test that the communication should consist of instructions rather than information. Alternatively, RBS argued that the interview notes were lawyers' privileged working papers.

The High Court ruled that where a corporation is "seeking information" from employees and former employees, persons who merely provide that information are unlikely to be the "client". In his ruling, the Judge decided that (1) the client for the purposes of privilege would consist only of those employees authorised to seek and receive legal advice from the lawyer and (2) that legal advice privilege did not extend to information provided by employees and ex-employees to or for the purpose of being placed before a lawyer.

The Judge also rejected the argument that the interview notes could still fall within the scope of legal advice privilege as comprising "lawyers' working papers". RBS had failed to demonstrate some attribute of or addition to the relevant interview notes which distinguished them from verbatim transcripts or revealed the trend of legal advice being given, such as might otherwise trigger their protection as lawyers' working papers.

The decision is now the subject of a pending leapfrog appeal to the Supreme Court in order that they can examine the important policy issues. The full judgment can be read [here](#).

In a separate and subsequent landmark decision handed down on 8 May 2017, Mrs Justice Andrews favoured the Serious Fraud Office (SFO) in its claim against mining company, Eurasian Natural Resources Corporation (ENRC), in which the SFO sought an order to compel the production of documents from ENRC pursuant to its powers under the Criminal Justice Act 1987. ENRC had resisted the request on the grounds that legal professional privilege attached to the documents in question. However, the Judge disagreed with their assertion in respect of all, but one category of documents.

In 2011, following whistleblower allegations of fraud, bribery and corruption in its mining operations in both Kazakhstan and Africa, ENRC agreed with the SFO that it would engage lawyers to conduct a self-reporting investigation. ENRC delivered a report on issues in Kazakhstan, but shortly before a similar report was due to be delivered on the issues in Africa, ENRC dismissed its lawyers. Following this, the SFO then commenced its own criminal investigation in 2013 and requested sight of the investigative documents prepared by the lawyers and forensic accountants, but ENRC claimed legal privilege over such documents.

The High Court ruled that legal advice privilege did not attach to communications by a party's lawyer with third parties in the course of gathering evidence and making inquiries. Mrs Justice Andrews also held that (1) factual findings by a solicitor carrying out investigations are not privileged, only any advice given about them; and (2) that legal advice privilege did not attach to lawyers' working papers unless they betrayed the tenor of legal advice given. Perhaps most surprisingly, Andrews J. held that "*the reasonable contemplation of a criminal investigation does not necessarily equate to the reasonable contemplation of a prosecution... The question whether the person anticipating a*

criminal investigation also contemplates that prosecution is likely (though not more likely than not) to follow the investigation, rather than just possible, must therefore be considered on a case by case basis." This narrow interpretation of the application of litigation privilege is surprising in many respects and its potentially far reaching effect is that litigation privilege in the criminal context may only arise in limited circumstances and far less often than in civil cases. The full judgment can be read [here](#).

For years the SFO has encouraged businesses to self-report corporate crime on the basis that they will receive more lenient treatment in return. This judgment, however, is the first to consider the application of legal professional privilege in the context of self-reporting investigations and its result, unless overturned, may have profound consequences on the willingness of businesses to cooperate with the SFO. ENRC are appealing the decision to the Court of Appeal. It is also worth noting that, under the Conservative Party's manifesto in the forthcoming general election, it is proposed that the SFO will be incorporated into the National Crime Agency. As such, the future of the self-reporting regime is somewhat uncertain.