

Blurred lines: protecting legal professional privilege in investigations

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This Client Briefing considers how the decision earlier this month of the English High Court in Serious Fraud Office v Eurasian Natural Resources Corporation Limited [2017] EWHC 1017 (QB) (SFO) regarding legal professional privilege (LPP) in the context of an internal investigation might affect practice in Hong Kong.

Introduction

SFO is an important decision in respect of the availability and application of both legal advice privilege (LAP) and litigation privilege (LP) under English law to protect communications and other documents created for or by lawyers during an internal investigation by a company or other organisation.

In SFO, the judge, Mrs. Justice Andrews, appears to have sought both (i) to confine the ambit of LP and (ii) reinforce an already restrictive approach under English law to the ambit of LAP in internal investigations. We consider briefly below the implications of key parts of her decision for the ambit of both LAP and LP in Hong Kong.

SFO was a claim by the SFO against Eurasian Natural Resources Corporation (ENRC) for a declaration that certain documents generated during investigations undertaken between 2011 and 2013 by solicitors and forensic accountants into activities of ENRC and its subsidiaries should not be subject to LPP. The SFO's claim was made against the background of an ongoing criminal investigation by the SFO which began in April 2013 relating to the activities of ENRC and others. Prior to issuing its claim, the SFO had sought to compel production of the relevant documents

exercising its powers under section 2(3) of the Criminal Justice Act 1987. ENRC had resisted disclosure on grounds of LPP.

Legal Advice Privilege

Definition of client

The decision of Andrews J. in SFO follows the recent decision of Mr. Justice Hildyard in another English High Court case, The RBS Rights Issue Litigation [2016] EWHC 3161 (Ch) (RBS). The effect of SFO and RBS is that in England and Wales, LAP attaches only to communications between the lawyer and individuals within a corporate entity who are authorised to obtain legal advice on the entity's behalf. LAP does not extend to information provided by other employees for the purpose of being placed before the lawyers to enable them to give legal advice.

This part of judgment dealing with LAP emphasises the recent divergence between the English and Hong Kong positions, which we explained in detail (together with the practical effects for clients) in a previous article originally published in the March 2017 edition of *Butterworths Journal of International Banking and Financial Law*. That article can be found on our website by clicking [here](#).

In summary, though, the position under English law has differed from the position in Hong Kong since the recent Court of Appeal decision in CITIC Pacific Limited v Secretary for Justice and Commissioner of Police [2015] HKEC 1263 (CITIC Pacific). In CITIC Pacific, the court preferred a broader definition of 'client' for the purposes of LAP. The practical effect of this is that communications and documents produced by a

company's employees (not limited to employees authorised to seek and receive legal advice) are covered by LAP provided that the dominant purpose of those communications is to seek legal advice.

Protection of interview notes

Andrews J. also refused to allow ENRC to claim LAP over lawyers' working papers, here interview notes. Again this represents a significant departure from the expectations of many commentators who quite fairly are concerned that even interview notes can betray the trend of legal advice. SFO may have significant implications for how interviews are conducted whether in Hong Kong or in multi-jurisdictional investigations including in the UK, particularly of individuals not employed by the client entity or no longer employed by the client entity.

Litigation Privilege

LP applies to communications between parties or their lawyers and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation. LP may therefore protect communications with third parties, including factual witnesses and experts, which would not be protected by LAP, even under Hong Kong law. However, a party seeking to establish LP over a communication must show, if challenged, that the communication meets the following three conditions:

- litigation must be in progress or reasonably in contemplation;
- the relevant communication must have been made with the sole or dominant purpose of conducting that anticipated litigation; and
- the litigation must be adversarial, not investigative or inquisitorial. This distinction is based on the underlying rationale for litigation privilege that it should be available in legal proceedings that take the form of a

contest where a judge, jury or other adjudicator determines the winner. Each party should then be free to prepare its case as fully as possible without the risk that its opponent will be able to recover the material generated by its preparations.

The effect of the decision in SFO is that LP may not be available as early in investigations as practitioners may previously have assumed.

When is litigation reasonably in contemplation?

As a consequence of SFO, it may be harder to claim LP in the context of investigations into potential criminal conduct than in preparation for potential civil proceedings. Unlike civil proceedings, criminal proceedings cannot be started unless the prosecutor is satisfied that there is sufficient evidence to provide a realistic prospect of conviction and the public interest test is satisfied. Andrews J. concluded therefore that criminal proceedings cannot be reasonably in contemplation unless the prospective defendant knows enough to appreciate that it is realistic (i.e. more than fanciful) to expect a prosecutor to be satisfied it has a good chance of securing a conviction.

We are not surprised that the judge in SFO distinguished between the inquisitorial and adversarial phases of an investigation to define when litigation might reasonably be in prospect. It is not clear, however, how the 'reasonably in contemplation' test set by the judge in SFO in a criminal investigation should be applied in practice. In other words: how is a person or entity under investigation expected to be able to assess whether the prosecutor is satisfied that there is sufficient evidence to provide a realistic prospect of conviction? This test may also raise interesting questions as to when LP arises in circumstances where an authority or regulator is investigating both suspected criminal offences and non-criminal breaches of legislation or disciplinary breaches or is, for example, pursuing concurrent civil proceedings.

Dominant purpose

The judge also confined narrowly the application of the dominant purpose test for establishing LP. The judge concluded that communications directed toward how best to persuade the SFO not to initiate criminal proceedings, but only to pursue civil settlement, were created for the *avoidance* of the allegedly contemplated litigation, not its conduct and therefore would not be protected by LP. Even apart from the apparent logical inconsistency in this conclusion with the judge's decision on when litigation is reasonably in contemplation (if a lawyer is advising a client how to avoid litigation, there must be a good argument that litigation is reasonably in contemplation), this decision raises some awkward questions. In particular, it is difficult to ascertain the extent to which communications intended to assist a client in mitigating the risk of litigation arising from an internal inquiry are privileged. It is also unclear as to the policy justification for protecting communications created to conduct litigation, but not those created to seek to avoid it.



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The Hong Kong courts have traditionally been consistent with the English courts in their definition and application of LP. For the moment, therefore, the uncertainties in relation to LP that are likely to persist in practice under English law as a consequence of SFO are likely also to apply in Hong Kong.

ENRC sought but was refused permission to appeal by the judge at first instance. ENRC is entitled to seek permission to appeal the judge's decisions in respect of her application of both LAP and LP from the Court of Appeal. Assuming permission is granted, it may be 18 months or more before the appeal is heard by the Court of Appeal. SFO is likely therefore to represent the English law position in relation to the application of LPP for some considerable time yet.

To the extent you have any questions regarding the above, please contact either Mark Hughes or Kevin Warburton, whose contact details are below.



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