

## THE SFO V. EURASIAN DECISION.

1. The High Court has recently held that documents created by a company's solicitors and forensic accountants into the company's activities, during an internal investigation that was a precursor to a criminal investigation under the Bribery Act 2010 ("**the Act**"), were not covered by legal professional privilege: Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd [2017] EWHC 1017 (QB).
2. The case provides a useful review of the scope of legal advice privilege ("**LAP**") and litigation privilege ("**LP**"), and considers the novel question of when a solicitor's working papers (as opposed to his advice) will attract privilege. This article focuses on its impact for civil litigation.

## 3PB'S ANALYSIS.

3. **The Facts.** Eurasian Natural Resources Corporation Limited ("**Eurasian**") was concerned about potential corruption and financial wrongdoing in one of its subsidiaries, and instructed solicitors and forensic accountants to investigate and to engage in discussions with the Serious Fraud Office ("**the SFO**") under the 'self-reporting' regime of the Act. The investigation and discussions took place from August 2011.
4. Thereafter, in April 2013 the SFO began a criminal investigation into possible criminal activity by Eurasian. For that investigation the SFO exercised statutory powers to require production of documents produced during Eurasian's internal investigation.
5. **The issue.** The SFO applied to the court for declarations that certain classes of documents were not privileged and, therefore,<sup>1</sup> not immune from production by Eurasian.

<sup>1</sup> Documents which the recipient of a notice "*would be entitled to refuse to disclose or produce on grounds of legal professional privilege in proceedings in the High Court*" were immune from production under section 2(9) of the Criminal Justice Act 1987.

6. Eurasian withheld four categories of documents on the grounds of LAP and/or LP: Category 1: notes taken by the solicitors of evidence given to them by individuals; Category 2: evidence resulting from books and records reviews undertaken by the forensic accountants; Category 3: documents produced by a solicitor for Eurasian's board which contained or summarised the factual evidence; and Category 4: communications between an in-house qualified lawyer and the board of Eurasian.
7. **The judgment** can be analysed in 3 parts: (i) the *procedural* requirements for asserting privilege; and the legal principles of (ii) litigation privilege and (iii) legal advice privilege.
8. **(i) Asserting a claim for privilege.** While privilege is absolute and cannot be overridden by some countervailing rule of public policy (at [37]), a court will not necessarily accept a claim for privilege at face value. The person claiming privilege has an evidential burden. An affidavit of documents will generally be treated as conclusive, but will not be if it appears that the deponent has mischaracterised the documents, or the affidavit can be seen to be materially incorrect or incomplete. The court will carefully consider the nature, quality and content of the evidence supporting the claim for privilege, and will evaluate it against all other admissible evidence (at [38]-[44]) and reasonable inferences (at [50]).<sup>2</sup> Rarely, and as a last resort, the court may inspect the document itself (at [48]).
9. **(ii) Litigation privilege.** Andrews J (at [51]) summarised Lord Carswell's judgment in Three Rivers District Council v. Governor and Company of the Bank of England [2005] 4 All ER 948 at [102] as to the conditions which must be satisfied for LP to arise, namely: (1) litigation is in progress or reasonably in contemplation; (2) the communications are made with the sole or dominant purpose of conducting that anticipated litigation; and (3) the litigation must be adversarial, not investigative or inquisitorial.

<sup>2</sup> The fact that the solicitor has advised that a document may be privileged is not therefore conclusive, even if the client has accepted that advice (see at [148]).

10. Andrews J continued that the trend was towards confining the ambit of LP (see Waugh v British Railways Board [1980] AC 521). The ‘dominant purpose’ limitation is a manifestation of that trend. A ‘reasonable prospect’ of litigation will usually be met by showing from *objective* facts that litigation was pending or had been threatened. But the court will also consider the actual state of mind of the party claiming privilege, and if litigation is not pending or threatened, an *active contemplation* of litigation on his part will be necessary (at [56]).
11. (iii) **Legal advice privilege.** LAP, conversely, does not depend on litigation being in contemplation. It attaches “to all [confidential] communications passing between the client [or its agents authorised to communicate or receive that advice] and its lawyers, acting in their professional capacity, in connection with the provision of legal advice [relating to the client’s legal rights]” (at [62],[64]).
12. It follows that communications with parties *other than lawyers* cannot attract LAP, and those communications will not become privileged just because a lawyer is interposed in the chain (at [65]). Moreover, in larger corporations it is important to identify who in the company is authorised to *instruct* the solicitors, and to *receive* their advice, since only communications with those persons, and for the purpose of obtaining advice, will attract LAP (at [81]-[82],[86]-[87]).
13. **LAP and solicitors’ working documents.** Privilege attaches to documents beyond just written advice; a document will be privileged if it is “*part of that necessary exchange of information of which the object is the giving of legal advice as and when appropriate*” (at [64]). Indeed, documents not otherwise be privileged (e.g. because in the public domain) may become privileged once included in such an exchange (at [182]).
14. Eurasian is the latest of a series of first instance cases that considered when a solicitor’s working documents might be privileged. They will *only* be if they tend to reveal the solicitor’s advice itself: “*the protection afforded to lawyers’ working papers is justified if, and only if, they would betray the tenor of the legal advice*” (at [96]-[97]).
15. **On the facts**, each of the Categories of documents, except one, was liable to be produced.
16. The claim to LP failed entirely because: (i) Eurasia could not demonstrate that it was aware of circumstances in

which prosecution was a real likelihood;<sup>3</sup> and (ii) even if prosecution was reasonably contemplated, the dominant purpose of the documents was not the conduct of such litigation. The various documents had been produced *to be disclosed* to the SFO; that was a key facet of the self-reporting regime under the Act. Similarly, LP would not extend to documents which were created by third-parties *to avoid* contemplated litigation; hence Category 2 documents fell outside the scope of LP.

17. The claim to LAP also largely failed because: there was no evidence that the persons involved in the interviews/communications had been authorised to seek or receive legal advice for Eurasian; and interview notes were, at best, preparatory documents rather than part of the continuum of seeking advice. Further, for Category 4, the identified internal advisor had not been acting as a lawyer (at [190]). The claim for privilege succeeded to the limited extent of a slideshow report (in Category 3), containing advice, presented to Eurasian’s board by the solicitors.

#### IMPACT OF THE DECISION

18. In civil litigation, privilege is often asserted but rarely challenged. Eurasian is a demonstration of the scrutiny (both procedural and substantive) that the Court will apply to a claim for privilege. Another recent example of which practitioners should be aware is Stockman Interhold SA v. Arricano Real Estate Plc<sup>4</sup> in which the Court ordered the party claiming privilege to identify each relevant document in a list, so that the claim to privilege could be better analysed.
19. The Eurasian decision also contains a useful summary of the situations in which LAP can be asserted. Advisors, especially those acting for large corporate clients, would be advised to clarify in advance which persons within the corporation have authority to instruct them. It is only communications with those persons, made as part of the continuum of seeking advice, that will attract LAP.

<sup>3</sup> Although its board contemplated at the relevant time that the SFO might mount a criminal *investigation*, they had no reason to suspect it would find evidence to support a subsequent *prosecution*. Andrews J. noted a distinction here between criminal prosecutions (in which the prosecuting authority had to be satisfied that the prosecution had a certain degree of merit) and civil proceedings (where an opponent could issue proceedings even if they were unmeritorious).

<sup>4</sup> Unreported, 2017, May 12 (Field J.)

20. Finally, in the context of LAP, a careful distinction needs to be drawn between documents that embody a lawyer's advice, and working and preparatory documents that precede that advice. Working/preparatory documents do not automatically attract privilege, and will only do so if they tend to betray the advice itself.
21. At the time of writing, an application has been made to the Court of Appeal for permission to appeal the decision, but has not been determined.

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**This article intends to state the law at the date indicated above. Although every effort is made to ensure accuracy, this article is not a substitute for legal advice.**

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