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UPDATE

# The difficulty in maintaining privilege over documentation produced by internal investigations

Update prepared by Tim Richards (Counsel, Guernsey)

Recent decisions of the English and Guernsey Courts have highlighted the difficulties parties face when seeking to maintain privilege over documents produced by internal investigations. The best way to avoid these difficulties is to instruct outside lawyers at an early stage.

Two recent court decisions in England and Jersey have highlighted the difficulties companies face in maintaining privilege over documentation produced by internal investigations. Such internal investigations are regularly prompted by the intervention of a regulator such as the Guernsey Financial Services Commission (the **GFSC**) (the regulator for the finance industry in the Bailiwick of Guernsey). Regulated companies should be aware that unless litigation is in prospect, most or all internal documentation produced by such an investigation may not be privileged and hence may be disclosable. The easiest way to avoid such difficulties is to engage external lawyers at an early stage so that possible pitfalls can be avoided.

In the Jersey case of *Smith v SVM Ltd* [2017] JRC026 [link to full judgment] (the **SVM Case**), a Jersey Master held that a report which the Jersey Financial Services Commission (**JFSC**) had required SVM Limited to obtain on the conduct of its investment business was not subject to legal professional privilege and hence that report was disclosable in an action by a client of SVM Limited in relation to that business. The Master held, *inter alia*, that the exercise of powers by a regulator, such as the JFSC, was not adversarial and that the dominant purpose of any report obtained by the JFSC was to allow the JFSC to discharge its regulatory responsibilities.

The Master accepted that his conclusions meant that a regulated entity might receive a complaint about services provided, which complaint is also made to the JFSC and that such a complaint could lead to the JFSC exercising regulatory powers, including requiring the production of a report which the regulated entity then has to disclose if it is later pursued by the complainant. Such a report is likely to be a fact finding exercise and an assessment of whether or not regulatory standards have been met, as such, it would not be subject to legal professional privilege. This applies even if the regulated entity can establish that legal proceedings by a former client or clients are reasonably in contemplation. The key point being that the dominant purpose of the exercise by the JFSC of its regulatory powers was not the production of documentation for use in anticipated litigation.

The recent English case of *SFO v Eurasian Natural Resources Corporation* [2017] EWHC 1017(QB) (the ENRC Case) [link to full judgment] also highlights the extent to which documentation produced by internal investigations may not be subject to privilege.

In 2011 a whistle-blower at ENRC made various allegations of fraud and bribery in relation to ENRC's businesses in Kazakhstan and Africa. ENRC then commenced an internal investigation and at the same time self-reported to the SFO. There were various follow up meetings between ENRC and the SFO and subsequently the SFO commenced its own criminal investigation into ENRC in 2013. Later the SFO requested that ENRC disclose internal documentation produced during its internal investigations. ENRC refused claiming legal advice privilege in relation to a small subset of documents and litigation privilege over most of the remainder. Litigation privilege applies to confidential documentation produced when

litigation is reasonably anticipated and where the dominant purpose for the production of the document is for use in the litigation. The judgment handed down in early May 2017 refused the claims for litigation privilege and made a number of findings including the following:

- a raid by the SFO and the processes triggered by a raid (including an SFO investigation) did not constitute adversarial litigation
- reasonable anticipation of a criminal investigation did not amount to reasonable anticipation of litigation
- litigation privilege applies only to documents prepared for the sole or dominant purpose of conducting litigation (and not to documents produced with the purpose of enabling advice to be taken in connection with anticipated litigation)
- litigation privilege does not apply to documents created with the purpose of obtaining advice about how to *avoid* contemplated litigation.

It must be emphasized that the ENRC decision was in the context of a criminal investigation launched by the SFO. The judge's findings, however, are both surprising and controversial not least because its effect is that litigation privilege in England in the criminal context may arise only in limited circumstances and far more rarely that in a civil context. It is also worth noting that the Guernsey Royal Court is not bound by the ENRC decision and the decision is likely to be appealed in England.

In conclusion, both the SVM and ENRC Cases serve to highlight the difficulties clients may face in maintaining claims to privilege over documentation produced by internal investigations. In order to reduce such difficulties, many of these pitfalls can be avoided by instructing outside lawyers at an early stage in order that, where possible, effective steps can be taken to preserve privilege.

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