THE SERIOUS FRAUD OFFICE, LEGAL PRIVILEGE AND THE PRODUCTION OF DOCUMENTS – RECENT DEVELOPMENTS

SFO Director v ENRC Ltd [2018] EWCA Civ 2006 and *R (KBR Inc) v SFO Director* [2018] EWHC 2368 (Admin)

Introduction

Two important decisions were handed down in September 2018 relating to Serious Fraud Office ("SFO") investigations.

By a decision handed down on 5 September 2018 in *Director of the SFO v Eurasian Natural Resources Corp Ltd* [2018] EWCA Civ 2006, the English Court of Appeal considered how and when a party facing potential prosecution from the SFO might be entitled to rely upon Litigation Privilege and held that it was possible that documents that had been prepared for the purpose of settling or avoiding a claim could be held to have been created for the "*dominant purpose*" of defending litigation.

By a decision handed down on 6 September 2018 in *R (KBR Inc) v Director of the SFO* [2018] EWHC 2368 (Admin), the English Divisional Court held that the SFO's statutory power to require any person to produce relevant documents for a SFO investigation had extraterritorial application to foreign companies holding documents abroad where there was a sufficient connection between the company and the United Kingdom.

(1) *Director of the SFO v Eurasian Natural Resources Corp Ltd* [2018] EWCA Civ 2006 (5 September 2018) (Sir Brian Leveson PQBD; Sir Geoffrey Vos C; McCombe LJ)

Background

A whistleblower alerted ENRC to allegations of bribery, corruption and fraud and ENRC undertook internal investigations. The SFO investigated ENRC with a view to commencing and pursuing a possible prosecution. The SFO issued notices to ENRC compelling broad document production, including evidence provided by ENRC's employees and officers, forensic accountants' reviews of ENRC's records, and documents that contained legal advice to ENRC. ENRC claimed that all of those documents were protected by Litigation Privilege

(i.e. that they had been created for the dominant purpose of being used in the conduct of litigation).

At first instance, the English High Court (Andrews J) held that ENRC could not claim Litigation Privilege. Andrews J considered that a criminal investigation by the SFO did not constitute "*litigation*" for these purposes, but was instead a preliminary step that was taken prior to a decision to prosecute. Andrews J also found that, in the case of a company, only communications between a lawyer and individuals authorised by the company to obtain the legal advice would benefit from Legal Advice Privilege. The scope of Legal Advice Privilege did not extend to cover other company officers or employees. ENRC appealed against the High Court's decision.

Decision

The Court of Appeal (Sir Brian Leveson PQBD; Sir Geoffrey Vos C; McCombe LJ) allowed the appeal in part.

The Court of Appeal held that the High Court had erred in concluding, for the purposes of Litigation Privilege, that a criminal prosecution was not reasonably in prospect. The documents demonstrated that ENRC was aware of the particular circumstances that made litigation with the SFO a real likelihood. The SFO had made the prospect of criminal prosecution clear to ENRC. Legal advisers had been engaged to address that situation. Thus, criminal prosecution had been in reasonable contemplation by ENRC.

The Court of Appeal held that in circumstances where solicitors prepared a document with the ultimate intention of showing it to the opposing party, that document would not automatically remove Litigation Privilege from the preparatory legal work that went in to the creation of that document. The Court of Appeal considered that, both in a criminal and in a civil context, legal advice given and received with a view to settling or otherwise avoiding reasonably contemplated legal proceedings was entitled to Litigation Privilege in the same way as legal advice given and received for the purpose of defending such proceedings. In the instant case, ENRC had not in fact ever agreed to disclose to the SFO materials created in the course of the internal investigation. If litigation had not been the dominant purpose at the commencement of the investigation, it had quickly become the dominant purpose. As a matter of public interest, companies should be prepared to investigate allegations made against them, before going to a prosecutor, without necessarily losing any Legal Professional Privilege benefit that they might otherwise be entitled to. The Court of Appeal held that the notes of interviews conducted by ENRC's lawyers with employees, former employees, officers of the company and its subsidiaries, suppliers and other third parties as well as the materials generated by a books and records review commissioned by ENRC had been created for the dominant purpose of avoiding contemplated criminal proceedings and thus were entitled to Litigation Privilege.

Had it been necessary to determine the issues relating to Legal Advice Privilege, the Court of Appeal would have held that, by virtue of the House of Lords' decision in *Three Rivers DC v Bank of England* [2003] QB 1556, communications between a company employee and the

company's lawyers could not benefit from Legal Advice Privilege unless the employee had been tasked with seeking and receiving such advice on behalf of the company. Although the Court of Appeal expressed some doubt as to whether the House of Lords had been correct in that regard, it was not open to the Court of Appeal to depart from it.

(2) *R (KBR Inc) v Director of the Serious Fraud Office* [2018] EWHC 2368 (Admin) (6 September 2018) (Gross LJ; Ouseley J)

Background

The claimant US parent company (KBR) had a UK subsidiary, but did not itself have any fixed place of business in the UK. In 2017, the SFO began a criminal investigation into the claimant's UK subsidiary and others regarding suspected bribery and corruption. The SFO identified suspected corrupt payments from the claimant's UK subsidiary to a third party, that were approved by the claimant in the USA. Under Section 2(3) of the Criminal Justice Act 1987, the SFO Director is empowered to "*by notice in writing require the person under investigation or any other person*" to produce relevant documents for its investigation. In April 2017, the SFO Director issued a Section 2(3) notice. In the course of its cooperation with the SFO, the claimant's multinational group voluntarily produced documents located outside the UK. In July 2017, the claimant's multinational group arranged a meeting in the UK with the SFO in order to discuss the investigation. When the claimant's executive vice-president attended, the SFO handed her another Section 2(3) notice requiring document production from the claimant.

The claimant applied to the Divisional Court for the quashing of the July 2017 Section 2(3) notice on the grounds that: (1) the July 2017 Section 2(3) notice was *ultra vires* because that statutory power had no extraterritorial jurisdiction; (2) the SFO Director should have sought Mutual Legal Assistance rather than use Section 2(3) of the Criminal Justice Act 1987; and (3) the July 2017 Section 2(3) notice had not been properly served on the claimant.

Decision

The Divisional Court (Gross LJ; Ouseley J) rejected the claimant's application.

The Divisional Court held that, as a matter of statutory interpretation, the presumption against extraterritorial application could be displaced – Section 2(3) of the Criminal Justice Act 1987 needed to have an element of extraterritoriality in order to allow for its effectiveness, otherwise a UK company could resist a Section 2(3) notice from the SFO on the basis that its documents were held on a server that was outside the English jurisdiction. The SFO was engaged in investigating and prosecuting fraud, bribery and corruption – which would often have an international element. To impose a jurisdictional bar on Section 2(3) of the Criminal Justice Act 1987 would run the risk of frustrating its purpose. Furthermore, there was a strong public interest in there being an extraterritorial ambit to Section 2(3) of the Criminal Justice Act 1987. As a balance, the Divisional Court held that Section 2(3) of the Criminal Justice Act 1987 extended to foreign companies in respect of documents held abroad in

circumstances where there was a sufficient connection between the company and the English jurisdiction.

In the instant case, there was such a sufficient connection. Payments that were central to the SFO investigation of the claimant's UK subsidiary had required the claimant's approval and had in fact been paid by the claimant. Those approvals had involved high-ranking employees of the claimant. It was not possible to distance the claimant from the underlying transactions that were central to the SFO investigation. The claimant's corporate officer had previously been based in a UK office. However, the Divisional Court noted that some of the asserted factors were not relevant. The mere fact that the claimant was the parent company of a UK subsidiary under investigation by the SFO was not relevant. Neither was the claimant's previous cooperation with the SFO investigation nor the claimant's employee having attended the meeting in the UK.

The Divisional Court held that Mutual Legal Assistance was an additional option for the SFO, but it did not limit the SFO Director's discretion to use the Section 2(3) notice. There might be a number of practical reasons why the SFO Director would prefer to use Section 2(3) of the Criminal Justice Act 1987 rather than Mutual Legal Assistance, which was a complex process that ran a risk of delay when compared to a simple notice compelling the document holder to produce documents.

Section 2(3) of the Criminal Justice Act 1987 did not require a notice to be 'served'. No additional formalities were required beyond the giving of the notice, which had been done when the claimant's executive vice-president attended the meeting in the UK. The claimant's objections regarding service failed.

(3) Concluding Remarks

The Court of Appeal's judgment in *Director of the SFO v Eurasian Natural Resources Corp Ltd* [2018] EWCA Civ 2006 contains important clarification on the scope and applicability of Litigation Privilege and Legal Advice Privilege which will have a significant impact on SFO investigations and how companies address allegations of bribery, corruption and fraud made against them. On 2 October 2018, it was reported that the SFO had decided not to appeal to the Supreme Court against the Court of Appeal's decision.

The SFO's power to compel a party to produce documents is an important tool in its ability to carry out proper investigations and to commence successful prosecutions. As a large number of the SFO's cases concerning bribery and corruption will have an overseas element, the ability for the SFO to apply this power to foreign companies in respect of documents held abroad, as held by the Divisional Court in *R (KBR Inc) v Director of the Serious Fraud Office* [2018] EWHC 2368 (Admin), should bolster the SFO's ability to obtain evidence.