In Practice

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Erosion of legal privilege: should insolvency practitioners be concerned?

KEY POINTS

- The recent decision of the High Court in *Serious Fraud Office v Eurasian Natural Resources Corporation* has significantly restricted the protection offered by legal privilege.
- This affects insolvency practitioners because it greatly increases the chances of third parties accessing working papers in relation to claims pursued in the context of an insolvency.
- Anything prepared before legal proceedings are raised is now at risk of disclosure.

Legal privilege is a long-established and well understood principle throughout the UK. It has, however, been fundamentally altered by a recent decision of the High Court in the case of *Serious Fraud Office v Eurasian Natural Resources Corporation* (ENRC) [2017] EWHC 1017 (QB). In that case the court, in an unprecedented move, ordered the disclosure of highly confidential and sensitive documentation by ENRC. The documentation was prejudicial to ENRC's interests and would never previously have been recoverable by a regulator.

This article examines the impact of this decision on the two main types of legal privilege, with particular focus on its impact in the context of an insolvency. It discusses the risk now faced by insolvency practitioners of disclosure of their confidential working papers and recommends steps to be taken to mitigate against that risk.

WHAT IS LEGAL PRIVILEGE?

Legal privilege is rightly regarded by lawyers and academics alike as a fundamental pillar of the legal systems in both England & Wales and Scotland. It is a right afforded to any person or company accused, or who might be accused, of committing a crime or who is, or might become, involved in civil litigation.

The right in the context of a criminal prosecution was helpfully summarised by Lord Gosforth in *R v Derby Magistrates Court* [1996] 1 AC 487 where he said:

> '… a man must be able to consult his lawyer in confidence since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.'

It was addressed in a civil litigation context in Scotland by Lord President Clyde:

> 'After an accident and even before any claim has been made, each party having a possible interest should be entitled to pursue his own investigations into the cause of the accident, free from the risk of having to reveal his information to the other side.'

Legal privilege, in fact, encompasses two separate protections:

- legal advice privilege which protects communications between a lawyer and their client; and
- litigation privilege which protects communications and documents prepared in contemplation of litigation.

SFO V ENRC: AN EROSION OF LEGAL PRIVILEGE?

The case of *Serious Fraud Office v Eurasian Natural Resources Corporation* arose out of a long-running criminal investigation into ENRC. The SFO has been investigating the company since 2013 in relation to its activities in Kazakhstan and Africa.

In this case, Mrs Justice Andrews ordered that material generated during ENRC's internal investigations must be given to the SFO. She held that there was:

> 'a recognised public interest in the Serious Fraud Office being able to go about its business of investigating and prosecuting crime; and the sort of evidence which one would expect to be found in the disputed documents is likely to be of considerable value to its current investigation.'

ENRC's argument that the materials it was being made to hand over were covered by legal privilege was rejected by Mrs Justice Andrews. She held that litigation privilege cannot protect documents produced to enable advice to be taken about litigation, or to avoid litigation. She said that the key documents were not prepared with the sole or dominant purpose of conducting litigation that could be 'reasonably' anticipated. She suggested that litigation, in a criminal context, can only be reasonably anticipated once charges have been brought. In a civil litigation context this might suggest that litigation can only be reasonably anticipated once a claim form or summons has been prepared.

Mrs Justice Andrews went on to state:

> 'prosecution only becomes a real prospect once it is discovered that there is some truth in the accusations, or at the very least that there is some material to support the allegations of corrupt practices.'

The Law Society of England and Wales described the decision as 'deeply alarming'.

Biog box
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There is little doubt that this was a shock decision. The High Court, in forcing ENRC to hand over an internal investigation report to the Serious Fraud Office placed the fundamental principle of legal privilege in doubt. If the decision is upheld, the effect will be the forced disclosure of a far wider range of documents and communications than has ever been the case before.

Will concern that details of investigations into the conduct of a debtor could find their way into that debtor's hands force insolvency practitioners to change the way they conduct and record investigations? Will that compromise the interests of the creditors?

Mrs Justice Andrews' decision removes the protection for 'documents produced to enable advice to be taken about litigation, or to avoid litigation'. That would seem to cover a great deal of documentation routinely produced by a insolvency practitioner and their team in the context of an insolvency appointment (where the office holder is considering 'clawback' proceedings, for example).

Restricting legal privilege is dangerous territory. There is a strong argument that authorities should not be given a road map of how to prosecute – they should investigate correctly of their own accord. Police and regulators investigating criminality have employed heavy-handed search and seize operations in recent years which has often resulted in the seizure of documents subject to legal privilege. A London law firm was awarded £500,000 in costs last year in respect of the actions of Police Scotland, which judges called an 'abuse of state power'. The documents were rightly claimed as being subject to legal privilege by the administrators instructing the law firm. Oppressive conduct by regulators and police, when taken alongside the ENRC decision, make for uncomfortable reading. Insolvency practitioners can waive legal privilege if appropriate but should not be discouraged from taking legal advice and properly investigating all relevant matters.

THE IMPACT ON INSOLVENCY PRACTITIONERS

If the decision in the ENRC case remains a definitive statement of the law on legal privilege, it has wide-ranging ramifications for insolvency practitioners as well as their legal advisers. Whilst legal advice privilege only applies to communications with a qualified lawyer (it has never applied to communications between an accountant or insolvency practitioner and their client) litigation privilege previously offered a considerable degree of protection to investigations commonly undertaken in the early stages of an insolvency appointment.

However, we now find ourselves in a world where records of much of the work done by an insolvency practitioner will not be protected. Take director conduct reports, for example. These are prepared in the relatively early stages of an appointment – long before a decision is made about proceedings against that director, let alone the actual commencement of those proceedings. Before the ENRC decision, the vast majority of lawyers would have confidently advised insolvency practitioners that these reports, and working papers related to them, were protected. In the post-ENRC world we must accept that they are readily accessible by the director in question.

The same is true of, for example, proceedings against a director to recover an outstanding loan or against a third party to unwind a gratuitous alienation. Before an insolvency practitioner can even become aware that such a claim might exist, detailed investigations must be undertaken: records must be recovered and reviewed, relevant parties interviewed and their input recorded and internal discussions about viability, tactics and funding will take place. All of this will happen before any proceedings are raised, and likely before any lawyer is engaged. In the post-ENRC world, when proceedings are eventually raised, the director would most likely be able to access all of this.

PRACTICAL STEPS

So, what practical steps can be taken to mitigate the effects of the erosion of legal privilege? Here are some examples:

- Take considerable care when drafting internal communications on anything which might end up in litigation. Never include anything you would not want the other side to see.
- If you discuss legal advice received during internal meetings, never detail that advice in any minutes. Only record the fact that legal advice had been taken and was discussed – never outline the advice itself.
- Any email correspondence containing legal advice should only be exchanged between a small group of internal staff. If an email communication group is too wide or advice is widely disseminated, privilege may be lost. Beware the 'reply all' and 'blind cc'.
- Mark any document or communication that relates to something that you think might become litigious as 'confidential, privileged and prepared in contemplation of litigation'.
- Always remember, the only communications that will definitely be protected are those in which a lawyer gives legal advice to a 'client'. The client will invariably be the insolvency practitioner who holds the appointment. The greater the number of people involved in the process beyond that, the greater the risk that the protection of privilege will be lost.

ROOM FOR OPTIMISM?

ENRC sought leave to appeal, and Lord Justice Floyd recently granted that leave, noting that 'the grounds of appeal have a real prospect of success'.

Christina Blacklaws, Vice President of the Law Society of England & Wales, welcomed that decision. She said:

> 'The original ruling gave a narrow interpretation of legal advice privilege and litigation privilege. There are worrying ramifications for corporations trying to do the right thing in conducting internal investigations and self-reporting potential issues to authorities.'

The prospective appeal has widespread support in the legal community. Certainty in relation to legal privilege is now needed urgently. It can only be hoped that the Court of Appeal's judgment will see a re-affirmation of this most fundamental of legal principles. ■