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Compliance & Investigations
Hong Kong/Singapore

# Client Alert

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# UK Decision Provides Useful Reminder on Carefully Navigating Privilege Protection in Multi-Jurisdiction Investigations

On 8 May 2017, the UK Serious Fraud Office ("**SFO**") obtained a declaration that certain documents prepared during investigations by solicitors and forensic accountants into the activities of a UK-incorporated multinational corporation ("**the Company**") were not subject to legal professional privilege. The English court in SFO v ENRC[1] ("**SFO Case**") ruled that the Company must hand over, among other things, notes of interviews with employees. Our London office has reviewed the SFO Case in its recent alert.

The impact of this UK decision may in fact be more far reaching where confidential documents required to be disclosed in the UK could potentially be available to regulators in other jurisdictions. Our alert reviews the position from a Hong Kong, Singapore and US perspective, and discusses the implications on multi-jurisdiction investigations.

## Implications to clients

We represent clients in multi-jurisdictional internal investigations globally, including jurisdictions where the doctrine of privilege does not exist or is of limited application. In those circumstances, we design protocols to maximize protection and manage risks arising from the different levels of confidentiality and privilege protections offered by local laws.

For clients who may potentially be subject to litigation in the English courts or regulatory investigations by UK authorities, the SFO Case reinforces the fact that English law will apply when they are seeking to resist disclosure in the UK. This means that when faced with an internal investigation, clients need to establish early on whether English law may apply to the underlying conduct and how best to protect work product if subsequently sought to be produced in the UK or elsewhere. Since the SFO Case, parties involved in internal investigations have been most concerned with two key questions:

1. To what extent will interview notes produced in internal investigations be protected locally and in the UK?
2. Will disclosure in the UK mean that those documents may be available to regulators in local or other jurisdictions?

### *1. The SFO Case*

UK decisions such as *RBS*[2] *and Three Rivers (No 5)*[3] have confirmed that if the individual being interviewed is not the "client", the communication in question will not be protected as it cannot be "a communication between a client and their lawyer for the purpose of seeking legal advice".

In brief, the SFO Case involved an ongoing criminal investigation by the SFO into the activities of the Company, its subsidiaries, officers and employees. A law firm represented the Company in its dealings with the SFO, and was

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[1] *SFO v ENRC* [2017] WLR(D) 317
[2] *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch)
[3] *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2003] QB 1556

responsible for the internal investigation. As part of the SFO's investigation, the SFO issued notices against various entities and individuals to compel the production of documents.

The court rejected the claim of privilege over notes of interviews with employees, among other documents, as there was no evidence that any of the persons interviewed were authorised to seek and receive legal advice on behalf of the Company. The court considered that the primary purpose of the investigation was to find out if there was any truth in certain whistleblower allegations. Further, the court rejected the claim for litigation privilege as the Company could not show that adversarial litigation was contemplated at the time that the documents were produced.

The SFO Case sets out useful guidance on how to successfully claim privilege under English law. The court considered that the taking of notes by lawyers and his or her selection of what should be written down is not sufficient to "cloak" the selected information with privilege. A party has to show the substance of its legal team's analysis of the documents and provide examples of the sort of legal input into the document that would justify a claim to privilege.

## *2. Contrasting Hong Kong, Singapore and the US*

In Hong Kong, the disclosure of interview notes is subject to the "dominant purpose test". Legal communications and documents created between clients and their lawyers are given greater protection from disclosure as a result of the 2015 Hong Kong Court of Appeal decision in *CITIC Pacific Ltd v. Secretary for Justice and Commissioner of Police*[4]. In that decision, the court rejected the narrow view of who constitutes a "client" as laid down by the English Court of Appeal in *Three Rivers (No 5)* and held that it is not necessary to define a small group of individuals as the "client". Instead, the court held that legal advice privilege in Hong Kong applies more widely to communications between company employees and external lawyers, and its application is subject to a "dominant purpose test". Privilege extends to the whole process of gathering information for the purpose of obtaining legal advice.

In Singapore, the Court of Appeal has similarly declined to give effect to the restricted definition of "client". In *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] SGCA 9, the Court endorsed the position of the Australian decision in *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122, where the Federal Court of Australia found that certain communications from third parties were protected by legal advice privilege by focusing on the nature of the function of the third party, rather than the nature of the relationship between the third party and the party that engaged it. The issue, however, remains open as the documents were eventually found to be protected by litigation privilege.

In the US, the analysis remains guided by the seminal Supreme Court decision of *Upjohn* Co. *v United States,* 101 S. Ct. 677 (1981) that held interview memos can be cloaked with the evidentiary protection of the attorney-client privilege and work product doctrine in internal investigations. As long as obtaining legal advice was one of the significant purposes of conducting the internal investigation, the privilege applies to the interview with outside counsel. The US view is therefore far broader than other jurisdictions, protecting communications with a lawyer's third party if engaged

[4] CACV 7/2012

to help provide legal advice (opening up the possibility of having third parties conduct interviews at the direction of counsel for obtaining facts for counsel to provide legal advice).

### *3. Any waiver or loss of protection?*

If documents are produced to a regulator in the UK, such as in the SFO Case, will local or US protection be automatically lost? The answer varies between jurisdictions. For example, Hong Kong courts recognize the concept of partial waiver which means that a privileged document may be disclosed to one party for a limited purpose, thus waiving the privilege to that document as against that party alone only for the specified purpose. Privilege to the document is retained as against all other third parties.

Meanwhile, there is some uncertainty as to whether partial waiver applies in Singapore. The Singapore courts have not considered that precise point, but it is possible to argue that partial waiver can apply depending on the circumstances in which the document is disclosed. Academics have also opined that there are good grounds for adopting the concept of partial waiver. In an environment where individuals and corporations will increasingly have to deal with a variety of regulatory or other investigations which involve documents in their possession, denying the concept of partial waiver may have the effect of discouraging individuals and corporations from disclosing such documents for fear of completely losing the protection of privilege.

The above should be contrasted with the more severe position in the US where the majority view amongst the Circuits is that a disclosure of privileged notes to a regulator in another jurisdiction would be considered a full waiver of privilege in the US, subject to instances where the waiver would be deemed involuntary and public policy reasons may require the court to protect from discovery.

This means that when conducting investigations involving multi-jurisdictions, it is crucial that parties take measures to provide the greatest level of privilege protection at the earliest time, and avoid waiver (inadvertent or deliberate) wherever possible.

## Actions to consider

Given the conflicting legal regimes illustrated above, we suggest that clients take the following steps when conducting an investigation:

1. Engage external lawyers at the outset and carefully consider the terms and scope of such engagement. Consider the jurisdictions of potential impact and structure the review to ensure the scope and staffing are tailored to the review.

2. Seek legal advice and review internal protocols in relation to handling and distribution of communications with external lawyers. Despite the wider application of legal advice privilege in common law jurisdictions outside of the UK, it remains good practice to:

    i) identify who needs to be part of the communication group so as to avoid any waiver of privilege.

    ii) mark all documents containing legal advice, in particular those to be provided to non-legal advisers, as privileged and confidential, and for the purpose of advice on the particular transaction only.

iii) keep a list of non-legal advisers to whom the documents were provided, the documents provided and the purpose for which they were provided.

3. Seek legal advice when faced with a third party request for disclosure (including notices from a regulator or other compulsory process) on:

   i) whether documents sought are protected by privilege before any production;

   ii) any risk of waiver of privilege;

   iii) how to limit the scope of disclosure as far as possible;

   iv) expressly reserving privilege and confidentiality;

   v) whether a partial waiver is necessary, and how to manage this process;

   vi) terms of disclosure and restrictions on wider disclosure;

   vii) remedies and possible injunctive action to prevent breach of agreed terms and to obtain the return of documents.

4. When seeking advice on internal investigations, consult lawyers at the outset on the methodology for documenting interviews, fact-finding, reports and legal analysis. In this context, it is interesting to note that the documents found to be privileged in the SFO Case were the slides prepared by the lawyers for the specific purpose of giving legal advice to the Company. The court considered such documents to be privileged, even if it contained references to factual information, or findings from the investigation that would not otherwise be privileged, as they are part and parcel of the confidential solicitor-client communication.

## Conclusion

Clients in multi-jurisdictional investigations should be aware of the need to navigate the complex rules providing different levels of protection and involve lawyers at an early stage. While this does not completely remove the risk that disputes over the protection of privilege will continue to persist, proper legal advice can assist clients with strategies to structure their investigations and design appropriate protocols to strengthen the mantle of privilege locally, in the UK, the US and other jurisdictions.

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