

Client Alert

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Landmark UK decision reinstates privilege protection to investigation work product

On 5 September 2018, the UK Court of Appeal (CA) overturned the 2017 High Court ruling in *SFO v ENRC* [2017] WLR(D) 317 (ENRC Decision) and held, among other things, that notes of interviews with company employees are protected by litigation privilege even if a formal criminal investigation has not been commenced (CA Decision).

This landmark decision resolves the controversy surrounding the ENRC Decision which held that certain documents, including working papers and notes made by lawyers, could not enjoy privilege because they had been created before criminal legal proceedings were contemplated. Please see an [alert](#) by our London office. We also refer to our earlier [alert](#) which discussed the impact of the ENRC Decision from a Hong Kong, Singapore and US perspective.

Implications of the CA Decision

We understand that the SFO confirmed earlier this month that it will not appeal the CA Decision. This lays to rest any continuing uncertainty for parties involved in multi-jurisdictional investigations who may be exposed to litigation or investigations in the UK.

To recap, the High Court in the ENRC Decision ruled that litigation privilege did not protect certain documents generated during an internal investigation as the primary purpose of the investigation was to find out if there was any truth to particular whistleblower allegations. The court held that the company could not show that adversarial litigation was contemplated at the time that the documents were produced. This was reversed on appeal whereby the CA found that most of the documents in question (including interview notes with company employees prepared by ENRC's lawyers) had the benefit of litigation privilege.

The CA Decision provides useful guidance on the parameters of litigation privilege where parties are facing whistleblowing allegations or embarking upon internal investigations. We have extracted some key points below:

- ***Whistleblowers:*** It is in the public interest that companies should be prepared to investigate allegations from whistle-blowers or investigative journalists, prior to going to a prosecutor without losing the benefit of legal professional privilege for the work product and consequences of their investigation.
- ***Likelihood of prosecution:*** A party anticipating possible prosecution will often need to investigate before it can say with certainty that proceedings are likely. The fact that a formal investigation has not commenced will be one part of the factual matrix, but will not necessarily be determinative.
- ***Avoidance of proceedings:*** Legal advice given to avoid or settle reasonably contemplated proceedings is as much protected by litigation privilege as advice given for the purpose of resisting or defending such contemplated proceedings.
- ***Corporate compliance:*** Whether the dominant purpose of an investigation is to deal with compliance and governance, or to defend legal proceedings, the CA considered that the measure for enforcing appropriate standards is the criminal law and in some measure, the civil

law. In other words, the rationale for investigating whistleblower allegations ultimately relates to the prevention or dealing with the litigation.

However, the question of whether interview notes with employees are protected by legal advice privilege was not resolved. While the CA was in favour of departing from the narrow definition of "client" in *Three Rivers* (No. 5), they considered that this was a matter for the Supreme Court. The CA observed that English law was out of step with international common law and it was desirable for the common law in different countries to remain aligned, particularly when so many multinational companies operate across borders. The CA referred to *Citic Pacific Ltd v. Secretary for Justice* [2016] 1 HKC 157 where the Hong Kong Court of Appeal concluded that a dominant purpose test in legal advice privilege was preferred over the narrow position in *Three Rivers* (No. 5). CITIC confirmed 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".

Clients seeking legal advice in Hong Kong can thus be assured that privilege will extend to the whole process of gathering information for the purpose of obtaining legal advice.

Actions to consider

The CA Decision presents a timely reminder that clients need to remain vigilant when conducting investigations and keep in mind the following:

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.

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