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*Privilege regained and the extra-  
territorial effect of the SFO's powers  
under section 2 (3)*

*An in-depth analysis of the implications of the ENRC and KBR  
judgments*

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## *Overview*

This seminar will consider the practical implications for privilege, especially in internal investigations and the SFO's powers to obtain documents located overseas.

- ***SFO v Eurasian Natural Resources Corporation Limited*** [2018] EWCA Civ 2006
- ***R (on the application of KBR Inc.) v SFO*** [2018] EWHC 2368 (Admin)

## *Why does it exist?*

It allows persons to freely obtain legal advice in confidence.

It protects persons from revealing any strategies or concerns during litigation.

It encourages a client to conduct his affairs properly.

## *What is privilege?*

Privilege attaches to certain communications between a client and his professional legal adviser.

Arises at common law/statute and provides protection against disclosure and imposes duty to protect





## *Legal professional privilege*

- **Litigation privilege:** confidential **communications** between lawyers and their **clients**, or the lawyer or client and a third party, which come into existence for the dominant purpose of being used in connection with actual or pending litigation.
- **Legal advice privilege:** confidential **communications** between lawyers and their **clients** made for the purpose of seeking or giving legal advice.
- Other types of privilege – **joint and common interest**



## *Who is the client and why is that important?*

- The client holds the right to privilege – relevant to whether privilege exists and waiver.
- **But** there is still uncertainty in relation to who is the ‘client’ when dealing with large companies.
- ***Three Rivers (No.5)*** [2004] EWCA Civ 218 still “good” law – narrow definition is out of step with other common law jurisdictions.
- Despite invitation, ENRC will not be appealed to Supreme Court



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## *When privilege may not apply?*

- Waiver of privilege – express and implied
- In certain circumstances, when documents are required by a regulator - although privilege not waived: ***FRC v Sports Direct*** [2018] EWHC 2284
- The iniquity exception - to cloak deliberate wrongdoing - commission of a crime, even where the lawyer is unaware.
- When company is in liquidation: ***Garvin Trustees Ltd v the Pensions Regulator*** [2014] UKUT B8 TCC



## *Privilege since ENRC?*

**The ENRC judgment – welcomed clarity, but not a blanket protection.**

- Each case will turn on its own facts, both as to dominant purpose and when litigation is reasonably contemplated.
- It was the factual scenario in this case that led the court to conclude that litigation privilege did apply.

**What about legal privilege?**

- Issues with the precedent set by *Three Rivers (No.5)* but refused to rule on the issue.



## *General guidance for internal investigations*

- **Instruct specialist lawyers** to structure and lead any investigation at an **early** stage, including third parties.
- Identify the '**client team**' in writing and be clear about the **purpose** of an investigation: scope of **legal advice/litigation reasonably in contemplation**
- **Special caution in conducting employee interviews**
- Careful consideration given to the precise extent of **co-operation and publication**
- Privilege varies between jurisdiction





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## *The 10 step practical guide*

- 1. Be clear on the “client” and who is part of the client group
- 2. Be careful about using non-lawyers to assist
- 3. Make clear the purpose of the investigation – advice/litigation
- 4. Consider the extent of *Upjohn* type warning to employee interviews
- 5. Draft interview summaries with a view to LPP preservation
- 6. Draft document production letters with clawback provisions
- 7. Consider need for Joint/Common interest agreements
- 8. Be careful about provision of commercial (non-legal) advice
- 9. When reporting findings, consider the audience and method
- 10. Be sensitive to complexities of multi-jurisdictional issues



## *Cross-border issues*

- Not all jurisdictions apply the same principles of privilege
- Privilege is usually determined by the local forum
- Careful consideration to applicable foreign law
- “Dieselgate” – recent decision of the German Federal Constitutional Court permitting access to law firm’s documents created in an internal investigation

R (on the application of KBR Inc.) v Director  
of the Serious Fraud Office [2018] EWHC  
2368 (Admin)

**A win for the SFO?**





## *S.2(3) Criminal Justice Act 1987*

(3) The Director may by **notice in writing require the person under investigation or any other person** to produce at such place as may be specified in the notice and either forthwith or at such time as may be so specified, **any specified documents** which appear to the Director to **relate to any matter relevant to the investigation** or any documents of a specified description which appear to him so to relate;

- No express intention of extraterritorial application
- See also *R v Bradley* [2014] EWCA Crim 1680 on Part 7 of POCA 2002 s.327(1)

## *Non-compliance?*

- At risk of criminal penalties if you do not comply without reasonable excuse
- **But** you can withhold information on the basis of s.2(9) which states:

*“(9) A person shall not under this section be required to disclose any information or produce any document **which he would be entitled to refuse to disclose or produce on grounds of legal professional privilege in proceedings in the High Court,...**”*

## *KBR v SFO - what was decided?*

- A s.2(3) Notice **can extend extraterritoriality** to UK companies in respect of documents held outside the jurisdiction.
- No limit on who could be a recipient of a notice – it is capable of extending to **non-UK companies** in respect of documents held in and outside of the UK.
- **BUT** there must be a ‘sufficient connection’ with the UK.
- A s.2(3) Notice should be **given to a person within the jurisdiction.**



## *Are there problems with this?*

There may be practical concerns going forward which were not discussed within the judgment. For example:

- Data protection/privacy laws and issues.
- Potential for competing and costly foreign proceedings, e.g. privilege under the local forum.
- Domestic law issues overseas which prevent foreign companies from complying with any notice.



## *Are there other ways of obtaining information across jurisdictions?*

- **MLATs** - Mutual Legal Assistance Treaties.
- **EPOs** - European Production Order / European Preservation Order.
- **Crime (Overseas Production Orders) Bill**, introduced to Parliament in June 2018.
- **Other models?** E.g. The CLOUD Act in the US.



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