SPEAKING NOTES FOR ENRC PRIVILEGE AND KBR SEMINAR

OVERVIEW

Factsheets have been provided on each of these cases. They are also on the 5SAH website under the seminar link and on my profile

This lecture will go through these judgments in context with the practicalities of what these decisions mean for companies going forward dealing with privilege in internal investigations and overseas document requests.

It will become apparent that whilst focusing on corporate best practice, if you are acting for a director in any subsequent trial and are seeking records which might be privileged, this seminar should help you in identifying whether any claim for privilege can or should be maintained

PART I - ENRC

What is privilege?

"Privilege is not 'interest' within the meaning of section 436(1) Insolvency Act 1986… It is not a marketable right, it has no commercial value and it cannot be realised or distributed to creditors. Moreover, it does not arise out of, nor is it incidental to, property in the documents containing the privileged information. **It is a right in respect of the information which arises out of the confidential relationship between the client and the lawyer**, and it has nothing to do with the status of the documents as chattels.**"**

Why does it exist?

Think of corporate reality – most senior individuals within a company don't lie awake at night thinking about privilege. What they do think about is what lawyers might term the "watershed moment" but what they term in the vernacular the "OMG moment" (or much worse!). It might come from some innocuous internal memo from compliance or a telephone call from the BofE (eg Libor submissions), it might come from a whistleblower or from a regulator. The corporate will be focused on damage limitation and reputational concerns, but the earlier the internal response considers privilege the better to allow the company to get the right legal advice, conduct internal investigations and respond to the inevitable litigation, whether civil, regulatory or criminal or all three.

The ENRC case used the definition in s.10 PACE to illustrate privilege at paragraph 62 of the judgment – this was an agreed appropriate example between the parties in ENRC.

"(1) Subject to subsection (2) below, in this Act "items subject to legal privilege" means—

(a)communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;

(b)communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and

(c)items enclosed with or referred to in such communications and made—

(i) in connection with the giving of legal advice; or

(ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings,

when they are in the possession of a person who is entitled to possession of them.

(2) Items held with the intention of furthering a criminal purpose are not items subject to legal privilege."

In ENRC definitions were also given of the two sub headings using the case of *Three Rivers (No.6) [2004] UKHL 48.* This is all dealt with at paragraphs 61 – 65 of the ENRC judgment.

Litigation privilege – paragraph 102 of Three Rivers (No. 6)

"Communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied:

(a) Litigation must be in progress or in contemplation;

(b) The communications must have been made for the sole or dominant purpose of conducting that litigation;

(c) The litigation must be adversarial, not investigative or inquisitorial."

Legal advice privilege - paragraph 111 of Three Rivers (No. 6)

"The test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege."

Three Rivers (No.6) [2004] UKHL 48 - this case clarified the ambit of legal advice privilege in English law.

Summary:

In this application, the claimants sought disclosure of the Bank's lawyer/client communications relating to the way in which the Bank's evidence was to be presented to the Bingham Inquiry. The claimants said this sort of material was merely "presentational" rather than "legal" advice and so was not protected by legal advice privilege. The Bank argued that legal advice should be interpreted widely so as to cover all advice and assistance from their solicitors or counsel relating to the evidence to be submitted and the submissions to be made to the Inquiry on behalf of the Bank.

The Court of Appeal held, in summary, that legal advice privilege protects advice as to legal rights and obligations but does not include "presentational" assistance in putting relevant factual material before an inquiry in an "orderly and attractive fashion".

The House of Lords allowed the Bank's appeal against that decision, unanimously rejecting the Court of Appeal's narrow interpretation of legal advice privilege. Approving the Court of Appeal's statement in *Balabel v Air India* [1988] 1 Ch 317 that legal advice includes *"advice as to what should prudently and sensibly be done in the relevant legal context"* their Lordships held that, although "presentational", the advice was as to what should prudently and sensibly be done in the relevant legal context of the Bingham Inquiry and the Bank's public law duties under the Banking Acts.

WHO IS THE CLIENT

THREE RIVERS DISTRICT COUNCIL V BANK OF ENGLAND (NO 5): COMC 4 NOV 2003

- Three Rivers (No.5) stated that only communications between solicitors and employees who were tasked with seeking and receiving legal advice on behalf of the company could attract privilege
- This is a narrow test.
- ENRC judgment makes clear they feel there is force in the arguments against this decision.
- But they would not decide the issue and made it clear that Parliament or the Supreme Court should bring about any changes/rule on this.
- They essentially all but invited an appeal to the Supreme Court on the matter.

ENRC judgment – English law is out of step with the international community on this issue (issue 4 in the judgment paragraph 128-129)

Decision in the Singapore Court of Appeal - *Enskilda Bank* case where it was held that only the BIU was authorized to communicate with the bank's lawyers, and that "since a company can only act through its employees, communications made by [authorised employees] would be in communications "made on behalf of the client", and can attract legal advice privilege".

Decision in Hong Kong Court of Appeal – *Citic Pacific Ltd v Secretary for Justice [2016] 1 HKC 157* held that a dominant purpose test in legal advice privilege was to be preferred to the narrow definition of the 'client' adopted in Three Rivers (No.5).

WHEN PRIVILEGE MAY NOT APPLY

Waiver of privilege – whether expressly or impliedly – satellite litigation best avoided

Examples:

- Press release – make sure this is not going to contain any potentially privileged material, lose right to retain privilege if information already disclosed.
- Cooperation with authorities (R (on the application of AL) v SFO [2018] EWHC 856 – involved a DPA with a cooperation clause requiring the company to disclose all material in their possession not protected by LPP. Court found that the SFO had failed to challenge the company's assertion of LPP over the product of an internal investigation which led to the self-report)

When documents are required by a regulator (e.g. FRC v Sports Direct)

- This is a landmark decision concerning the extent to which a client of an audit firm can claim LPP over documents in the context of a regulatory investigation into the audit firm. It extends the principle that privileged material can be provided by a regulated person to that person's regulator, where this takes place for the purposes of an investigation by the regulator into the conduct of the regulated person. The same rule now applies to the production of privileged material to the regulator by a client of the regulated person.

- Accountancy watchdog Financial Reporting Council is investigating the conduct of Sports Direct's auditor Grant Thornton. It relates to an arrangement with Barlin Delivery Limited, owned by John Ashley (brother of founder of SD Mike Ashley). SD said to have made undisclosed payments to Barlin Delivery. The FRC requested 40 documents and emails relating to information provided to Grant Thornton about the arrangements with Barlin. SD claimed legal privilege over these documents.
- The court ordered the documents to be handed over.
- SD have been given permission to appeal parts of the decision.

Commission of a crime

- Does not apply where the client seeks your advice on avoiding the commission of a crime or where you warn a client that their proposed actions could amount to the commission of a crime.
- No LPP can arise where your assistance has been sought to further a crime or fraud or any other equivalent underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interests of justice.

Liquidation of a company (e.g. Bona Vacantia – property that has no owner)

- If property has no owner, then who is the client?
- In Schlosberg v Avonwick [2016] EWCA Civ 1138, the Chancery Division ordered a law firm to stop acting for the main creditor of a bankrupt after it had reviewed documents privileged to that individual. The law firm, which also acted for the trustees in bankruptcy, claimed the privilege had transferred to the trustees and as such the individual could no longer claim privilege. The Court rejected this argument and held that privilege will transfer only where the legal advice is about property which forms part of the bankrupt's estate.
- The court said: "Privilege is not 'interest' within the meaning of section 436(1)… It is not a marketable right, it has no commercial value and it cannot be realised or distributed to creditors. Moreover, it does not arise out of, nor is it incidental to, property in the documents containing the privileged information. It is a right in respect of the information which arises out of the confidential relationship between the client and the lawyer, and it has nothing to do with the status of the documents as chattels."

PRIVILEGE SINCE ENRC

SFO have recently confirmed that they will not be appealing the decision.

There is an undecided issue in relation to legal advice privilege (see factsheet?)

- Three Rivers (No.5) creates a problem for multi-national corporations.

"If a multi-national corporation cannot ask its lawyers to obtain the information it needs to advise that corporation from the corporation's employees with relevant first-hand knowledge under the protection of legal advice privilege, that corporation will be in a less advantageous position than a small entity seeking such advice" ENRC para 127

GENERAL GUIDANCE POST ENRC

The following points are worth particular emphasis in light of the *ENRC* appeal:

1. **This remains a complex area in which clients should be encouraged to instruct specialist lawyers to structure and lead any investigation.**
   In concluding that the forensic accountants' work in ENRC had litigation as its dominant purpose, the Court of Appeal referred to the fact that it was 'commissioned at around the same time as the Dechert investigation' (Dechert being the lawyers leading the investigation) and 'formed part of that investigation'. This highlights just one reason why other professionals such as forensic accountants should work within a lawyer-driven structure.

2. **Since *Three Rivers (No 5)* remains good law at present, it continues to be important for the 'client team' who may seek and receive privileged legal advice on behalf of a corporate to be defined in instructions, engagement letters and in protocols within the client organisation.**
   This needs to be kept under review during the course of the engagement. Internal protocols should also set out rules around the use of privileged materials, since privilege may be lost by, for example, disseminating documents in such a way that confidentiality is lost.

3. **It is essential to be clear as to the purpose of any investigation.** If the purpose is for anticipated litigation, set that out clearly in, for example, the letter of engagement, letters inviting employees for interview, and instructions to forensic accountants. Detail should be included, for example as to why litigation is contemplated and as to the anticipated parties and issues. This must be in terms the client would be content to deploy in support of a claim to privilege. If the investigation has more than one purpose (for example, considering risk management changes while preparing for an anticipated claim), but the latter is dominant, that should be made clear. The position should be kept under review: even where litigation is not the dominant purpose at the outset, if matters develop so that it becomes the dominant purpose (for example, because of indications received from a regulator), it is important not to forget to document this.

4. Similarly, although as the law currently stands factual interviews with employees not in the 'client team' are unlikely to be privileged unless litigation privilege applies, **if they are being interviewed for the purposes of the information gleaned being used by lawyers so that they can advise the corporate, it is worth setting that out clearly,** to at least maximise the possibility of being able to claim that these fall within the 'continuum' of communications relating to legal advice (albeit this is a difficult argument on the current law).

5. Particular caution should be exercised around conducting employee interviews. If the employees are not in the 'client team' and litigation privilege does not apply, verbatim notes and purely factual summaries of what has been said will not currently be protected from disclosure. Consideration may be given to whether it is possible to sufficiently interweave advice into the notes to maximise the chances that they will attract legal advice privilege. Conversely, a decision may be taken to keep factual accounts and advice entirely separate, accepting that the former may be disclosable but maintaining privilege in the advice. This requires specialist expertise.

6. Effective self-reporting and cooperation with regulators and other agencies can be vital. However, while the Court of Appeal has confirmed that such engagement is not necessarily

fatal to an assertion of privilege, **detailed consideration must be given to the precise extent of any cooperation, including to the terms of any relevant guidelines or code of practice** and what is said between the parties, and the potential impact of this on privilege.

7. The Court of Appeal's judgment reminds us that **rules on privilege vary between jurisdictions**. In an investigation which has, or may develop, an international dimension, think carefully from the outset about the jurisdictions which are or may be involved, the law on privilege in each and how this impacts on the conduct of the investigation. Local law advice may well be needed.

10 STEP PRACTICAL GUIDE

Step 0 – review all relevant internal policies and procedures and revise as necessary:

Investigations manual

Dawn raid protocols

Employee contracts/terminations – ensure privilege and confidentiality is covered

Preserver all documents which may form part of the investigation and conduct an initial privilege review with all LPP documents clearly labelled and separated.

1. Be clear on the "client" and who is part of the client group

To maintain privilege over an investigation, it is essential that outside counsel establish with clarity whom they represent and to whom they are reporting. In many cases, the issue will be relatively straightforward because outside counsel will be representing a company, and the investigation will be overseen by in-house counsel. Board committee investigations add a layer of complexity. While communications between a board committee and its counsel are the classic type of attorney-client communications that would generally be privileged, the case for protection of communications between committee counsel and other stakeholders in an investigation, such as company counsel (inhouse or outside) and management, is less clear.

Complications can also arise when an investigation (whether the client is the company itself or a board committee) involves allegations of wrongdoing by officers or directors, or when in-house counsel may have been involved in the conduct under investigation. An investigation may not be credible if it is overseen by the individuals whose conduct is at issue in the investigation. Leaving credibility issues aside, there are also very real waiver risks in such situations. For example, as discussed further below, if counsel reports the findings of an investigation to members of management or board members who have engaged in conduct that could make them adverse to the company, a waiver may result. Additionally, particularly with respect to witness interviews, a lack of clarity over whether outside counsel represents both the company and individual directors and officers can have serious ethical and privilege implications.

To mitigate these risks, it may be desirable for outside counsel to be clear in their engagement letter about not only whom they represent, but also whom they do not represent. Additionally, outside counsel should be mindful that potential conflicts that are not apparent at the outset of an engagement may arise as facts are developed. For example, if, as an investigation progresses, it becomes apparent that the in-house counsel who is overseeing the investigation had substantive

involvement in the events under investigation, outside counsel might consider recommending an alternative reporting line, or, if necessary, that oversight of the investigation be transferred to a board committee. These decisions are often complicated and highly sensitive, but outside counsel must satisfy itself from the outset that the engagement has been structured in a manner that most effectively safeguards the company's interests, including with respect to privilege.

2. Be careful about using non-lawyers to assist

Privilege traps can also arise when non-lawyers conduct or assist in an investigation. While non-lawyers, such as forensic accountants, often play a critical role in the fact-development process, careful thought must be given to how they are employed and how their work is overseen.

The use of a non-lawyer to lead an investigation carries with it the risk that the investigation will not be privileged. Recall that, for an investigation to be privileged, it must be shown that the investigation was conducted for the ultimate purpose of providing legal advice to the client. Because non-lawyers cannot provide legal advice, this predicate for the privilege may be lacking in an investigation led by a non-lawyer, even if counsel plays a role in advising on how to conduct the investigation. Courts may well reject such an approach as a "gimmick" wherein counsel is not allowed to conduct the internal investigation but is retained "in a watered-down capacity to 'consult' on the investigation in order to cloak the investigation with privilege." As one court has put it, "when an attorney is absent from the information-gathering process, 'the original communicator has no intention that the information be provided [to] a lawyer for the purposes of legal representation.'"

If non-lawyers are employed to assist in an investigation, in order to maintain the privilege, it is critical that they act as agents for in-house or outside counsel, under the direction and control of such counsel, and for the purpose of assisting counsel in providing legal advice. The classic example of this is an accountant reviewing and analysing a company's books and records to assist in an investigation. There are several practical steps that counsel can take to help preserve the privilege in such circumstances.

First, if third-party consultants will be retained, it is preferable that outside counsel retain them directly, and that the purpose and nature of the engagement be memorialized in a written agreement.

A separate engagement letter along these lines should be prepared for all third-party vendors, even if they regularly work for the client, including under a master services agreement.

Second, counsel should closely oversee and direct the work of consultants. To be sure, cost and efficiency considerations may dictate that communications between third-party consultants and company employees occur without counsel present. In this regard, it is not necessary for counsel to observe and approve every minute aspect of the consultant's work. That said, in order to maintain privilege, such communications should nonetheless be made "at the direction of counsel, to gather information to aid counsel in providing legal services."

3. Make clear the purpose of the investigation – advice/litigation – Mind the gap!

If a company or a board committee intends to maintain privilege over an internal investigation, it should say so explicitly. This can be accomplished through various means—i.e., in board minutes, through an email, orally if later memorialized in a file memo, or through a more formal, direct

communication from management or the board authorizing counsel to undertake an investigation for the purpose of providing legal advice. If possible, in order to help substantiate a claim for LPP, the communication should identify actual or anticipated litigation or Government investigations arising from the conduct under investigation.

This type of formal communication has the advantage of establishing and articulating the purpose of the investigation in a manner that is best protective of the privilege. Ideally, the purpose of the investigation should be clearly articulated early and often as the investigation proceeds—for example, when counsel seeks assistance from company personnel in preserving and collecting data, in Upjohn style warnings during witness interviews, in presenting findings to management or the board, and, if necessary, when interacting with enforcement authorities. In other words, it should be clear from the entire record of the investigation that outside counsel had been retained to conduct an investigation for the purpose of providing the company with legal advice and/or for the dominant purpose of contemplated or actual litigation. The existence of such a record will help a company to rebut an argument that no privilege attached to the investigation.

4. Consider the extent of *Upjohn* style warning to employee interviews

Conducting effective interviews is an essential element of a thorough investigation. Preserving the company's privilege, however, may require that lawyers give an adequate Upjohn style warning before beginning the interview. If the lawyer glosses over the warning or leaves out key aspects of it, he or she may jeopardize the privileged nature of the interview. In contrast, if a lawyer takes an overly prosecutorial tone in delivering the warning, it may chill the witness's willingness to cooperate fully, or even at all.

As a technical matter, the Upjohn style warning might wish to cover the following points:

· Lawyer for the company and not to represent the employee personally.

· The purpose of the interview is to learn about [the issue] in order to provide legal advice to the company/for the purpose of contemplated litigation as specified.

· The conversation is privileged, but the privilege belongs to the company, not the employee. It is up to the company whether to waive the privilege, including with respect to the regulatory or other third parties.

· The conversation should be kept confidential in order to preserve the company's privilege.

Once those foundational points have been made clear, the lawyer should inquire whether the employee has any questions. Before moving to the substantive focus of the interview, the lawyer should receive a clear affirmation that the witness understands the warning and is willing to proceed with the interview.

If delivered effectively, the Upjohn style warning will adequately advise the employee of the implications of the interview, without chilling the witness's willingness to cooperate. The following are some practical tips that can lead to cooperative, privileged interviews:

· Confer with the client in advance of interviews to understand whether particular witnesses present any unique sensitivities. In such circumstances, it may be helpful for in-house counsel or the employee's manager to have a brief discussion with the employee outside the presence of outside counsel in order to provide some context for the interview.

· Do not deliver the Upjohn warning in a rote, mechanized way; be friendly and casual.

· Emphasize the importance of the investigation to the company and the need for complete and accurate information. Express appreciation for the witness's assistance in helping the company to understand the relevant facts.

· If applicable, explain that the company is interviewing a number of individuals and is not singling out that particular employee.

As an additional precaution, the lawyer should remind the witness at the conclusion of the interview not to discuss the substance of the interview with anyone else.

Former employees?

Counsel must be particularly sensitive to privilege considerations when conducting interviews of former employees.

Counsel conducting an investigation should use great care to focus the interview on matters that occurred during the former employee's tenure, unless otherwise necessary.

Counsel also should consider the circumstances of the witness's departure from the company when assessing whether the witness is likely to be cooperative or to maintain the confidentiality of the interview. In the absence of a contractual provision (e.g., in a severance agreement) obligating an employee to cooperate in an investigation and maintain confidentiality, a company may have no effective remedy against a former employee who fails to maintain confidentiality. If a company has real concerns that the employee will not maintain confidentiality, it should think carefully about whether to proceed with the interview.

5. Draft interview summaries with a view to LPP preservation

Two different strategies:

A. Memorializing the content of the interview is essential to a credible investigation. When crafted well, interview summaries should avoid the need to revisit topics with witnesses and can serve as a resource to the rest of the investigative team. To ensure that the content of such summaries remains privileged, interviews should not be recorded or transcribed verbatim. A recorded or transcribed interview summary will be considered more easily discoverable than a written summary that contains an attorney's mental impressions. The summary should state expressly that it does not constitute a transcript and that the content is not presented sequentially. Moreover, the written summary should state that it contains the thoughts, mental impressions, and conclusions of the lawyer. The written summary also should confirm that the Upjohn style warning was delivered, describe the content of the warning, and indicate that the witness understood and agreed to proceed with the interview.
B. Record the interview separately and keep any memorandums entirely separate of the lawyer's impressions.

The determination for the strategy is likely to hinge on any advance decision to share with any third parties, in particular regulators or other enforcement agencies.

6. Draft document production letters with clawback provisions

Few experienced practitioners have avoided entirely the problem of an inadvertently disclosed privileged document. The scope, scale, and complexity of investigations today create a significant risk of inadvertent production of privileged material. To mitigate that risk, document production letters should include unequivocal language, preserving the client's ability to recover inadvertently disclosed documents.

Of course, no language is a substitute for a painstaking privilege review of all documents in advance of production, but incorporating this language can ensure that any documents escaping such a review can be recovered without effectuating a privilege waiver.

7. Consider need for Joint/Common interest agreements

Sharing of information among counsel for clients with a common interest can yield substantial efficiencies and may be helpful in developing an accurate and comprehensive understanding of the facts. Doing so, however, can imperil the privilege, as such collaboration will often involve the disclosure of confidential information. Joint defence or common interest agreements address this concern by bringing confidential communications among outside counsel and their clients within the ambit of LPP. Carefully drafting joint defence agreements will ensure that lawyers can conduct an efficient investigation with other outside counsel, while preserving the privilege and other applicable protections.

Some tips on drafting these agreements follow:

· Meticulously define the scope of the common interest and thus the scope of the agreement.

· Indicate that the parties may, at their discretion, share information concerning the relevant matters without waiving any applicable privileges.

· Note that nothing in the agreement—nor the simple sharing of information pursuant to the agreement—shall constitute a waiver of any applicable privilege or protection.

· Include clawback language regarding inadvertent disclosures of privileged information.

· Provide for unilateral withdrawal from the agreement by any party for any reason, while noting that the agreement will continue to protect all shared information prior to withdrawal.

8. Be careful about provision of commercial (non-legal) advice

In any internal investigation, outside counsel may be asked to advise on topics that are ancillary to the core legal issues under investigation. A prominent example is advice on issues relating to termination of commercial relationships or employee discipline.

There is a real disclosure risk in providing advice of a "business-related character" when assisting clients in conducting an internal investigation. Any such communications not only should be labelled with privilege legends, but also should include reference to providing litigation strategy or advice.

Communications related to the structure and scope of an internal investigation must be continually tied back to the provision of legal advice and the prospect of future litigation.

9. When reporting findings, consider the audience and method

The manner in which outside counsel elects to report the findings of the internal investigation has significant consequences for the privilege. For some investigations, clients may have little choice regarding the form of disclosure, as the investigation will inevitably lead to some public disclosure of findings. In contrast, other investigations are conducted with the expectation that the findings will remain closely held by the client. Between those two poles are internal investigations conducted in parallel with Government investigations, in which lawyers may be expected to proffer factual information learned during the course of their investigation.

Reporting in the context of a Government investigation presents a unique form of risk, given the possibility of a broad subject-matter waiver of the privilege. To guard against this risk, counsel is typically well served both to limit the disclosure of investigative findings (whether delivered orally or in writing) to those audiences with a need to know, and to be clear that such communications are confidential. Additionally, counsel should be mindful that subject-matter waiver occurs only when there is a voluntary disclosure of privileged information. Generally, investigative reports or presentations, to the extent possible, should be limited to a detailed recitation of the investigative process and the relevant facts. If counsel is able to avoid preparing a written report and can instead prepare a presentation consisting of source documents, coupled with an oral presentation of relevant facts, the risk of a privilege waiver can be substantially mitigated.

As noted above, special attention must be given to the risk of waiver in circumstances where counsel is communicating findings to potentially adverse parties. For example, if outside counsel has been retained by a board committee and subsequently presents to the entire board, there is a risk of waiver to the extent the facts suggest the board members did not receive and consider the presentation in their roles as fiduciaries of the company, but rather in their personal capacities as defendants (potential or actual) in litigation.

10. Be sensitive to complexities of multi-jurisdictional issues

If the subject matter of an internal investigation has the potential to draw the attention of foreign regulators or litigants, counsel cannot safely assume that English law will govern subsequent adjudications of privilege issues. In a number of foreign jurisdictions, in-house counsel do not enjoy the same privilege and work-product protections as under English law. For instance, in 2010, the European Court of Justice held in Akzo Nobel Chemicals Ltd. v. European Commission that, because in-house counsel are unable to exercise independence from the companies that employ them, their communications with the company are not privileged. Thus, for investigations that may ultimately be the focus of litigation in the European Union, companies should evaluate the privilege risks that flow from having in-house lawyers lead such investigations. As a more general matter, in light of the differing legal standards that operate in foreign jurisdictions, counsel should take time at the outset of an investigation to research the relevant jurisdiction's privilege law when deciding which personnel will conduct which aspects of the investigation.

CROSS-BORDER ISSUES

USA

- Follows privilege along the same lines as the UK but yet raid carried out on President Trump's personal lawyer.

German "dieselgate" case

- Munich prosecutor's office conducted a raid to seize materials from the German office of a U.S. law firm.
- Germany's federal constitutional court recently held that Munich prosecutors could use the information seized during the raid.

How should you consider multi-jurisdictional issues be considered in a corporate investigation?

- Be aware of countries in which privilege is applied differently (i.e. Germany for example where a raid made be more commonplace due to their strict interpretation of privilege).
- Need to think about who is being interviewed, whether they are part of the client group?
- The availability of privilege may turn on where documents are stored – BUT be aware of s.2(16) CJA 1987:

"Where any person—

(a) knows or suspects that an investigation by the police or the Serious Fraud Office into serious or complex fraud is being or is likely to be carried out; and

(b) falsifies, conceals, destroys or otherwise disposes of, or causes or permits the falsification, concealment, destruction or disposal of documents which he knows or suspects are or would be relevant to such an investigation,

he shall be guilty of an offence unless he proves that he had no intention of concealing the facts disclosed by the documents from persons carrying out such an investigation."

- So you cannot just send documents out of the jurisdiction to protect privilege.

PART II

KBR – a win for the SFO

S2(3) Criminal Justice Act 1987

KBR v SFO concerned the reach of s.2 notices.

This remains a key statute and notice for the SFO to use when gathering information for the purposes of their investigation or prosecution.

Just one of the options available to the SFO as we will come onto later.

The case caused some interesting thoughts on the retrospective intention of Parliament in 1987.

Can withhold due to privilege

This is how the ENRC case arose. S.2 (3) notice issued and the ENRC claimed privilege. Interestingly, this point was not discussed in the judgment as to intention.

Can be subject to a JR:

This is how the KBR case has arisen, was determined last month. Judicial review on the basis of the notice issued, 3 grounds – see factsheet for those.

Jurisdiction - The *s.2 (3)* notice was *ultra vires* as it requested documents held outside the UK by a company incorporated in the US;

Discretion - The Director of the SFO erred in law by exercising his *s.2(3)* powers despite his power to seek Mutual Legal Assistance from the US authorities; and

Service - The *s.2(3)* notice was not effectively served on a KBR representative who was temporarily present in the jurisdiction.

WHAT WAS DECIDED?

The following was decided:

S.2(3) capable of extending to documents held overseas by UK companies

- There is a general principle that statutes are restricted to operate only in the UK, unless specified otherwise.
- BUT it was held that these notices had extraterritorial reach.
- It was said to be ‘‘scarcely credible’’ that a UK-based company could refuse to provide documents solely because the documents were contained on a server abroad.
- Danger that companies would move documents overseas to avoid the notices.
- This issue becomes all the more relevant in an age in which documents are stored online.

Also can extend to non-UK companies

- There was no express statutory limitation on who could be a potential recipient of a section 2 notice.
- The court concluded that section 2 was directed at facilitating the investigation and prosecution of top end fraud, which by its nature would have an international dimension.
- The court recognised the strong public interest in section 2 having an extraterritorial ambit, and concluded that section 2 notices could be validly issued to non-UK companies for documents held both in and outside of the UK.

But the test is that there must be a “sufficient connection” with the UK

- The court applied a new limitation - a section 2 notice can only validly be given to a non-UK company in respect of documents held outside the UK where there is a ‘‘sufficient connection’’ between the company and the UK.
- The following factors, said the court, would not, without more, amount to a ‘‘sufficient connection’’ between a non-UK company and the UK:

  – the non-UK company is the parent company of a company under UK investigation;

– the non-UK parent company cooperates to a degree with the SFO's request for documents and remains willing to do so voluntarily; or

– a senior officer of the non-UK parent company attends an in-person meeting with the SFO.

The court found a sufficient connection between KBR Inc and the UK for the July Notice to be valid. The SFO's investigation focused on a large number of suspected corrupt payments made by KBR Inc's UK subsidiaries to Unaoil. The SFO formed the view that those payments required express approval by KBR Inc's US-based compliance function and were processed by KBR Inc's US-based treasury function. A corporate officer of KBR Inc was also based in the group's UK office and appeared to carry out his functions from the UK.

Service

- KBR challenged the fact that the SFO had required someone from KBR to attend the SFO meeting for the purpose of serving on them the notice.
- Whilst the court found this unappealing it did not affect the validity of service.
- Nothing more required than the giving of the notice, although the SFO did not contest the fact that the notice had to be given in the UK – nb court did not rule on this as the notice was clearly given to KBR Inc. through its employee while present in the jurisdiction.

ARE THERE PROBLEMS WITH THIS?

Difficult to know how a non-UK company can protect itself other than not sending any officials into the UK – avoiding the s.2 notice being served altogether.

This was raised within the judgment by Lord Justice Gross when he stated that there were 'unappealing features' in the case (i.e. the SFO requesting someone from the 'client' to be present and then serving them with the notice).

ARE THERE OTHER WAYS OF OBTAINING DOCUMENTS ABROAD?

This may just result in the SFO falling back on other methods to obtain information, such as Mutual Legal Assistance.

Crime (Overseas Production Orders) Bill

- Started in the House of Lords
- Has had second reading
- Currently: Report stage: House of Lords | 22.10.2018
- This is the stage before the third reading, then the matter moves to the House of Commons for a series of readings before amendments / royal assent.

- Specific law enforcement agencies could apply to the courts for an order (OPO) requiring overseas service providers to produce or grant access to electronic data for the purposes of investigating and prosecuting serious crimes.

Requirements

1. an indictable offence has been committed and an investigation has begun or a prosecution is underway;
2. the data is likely to be of substantial value to the criminal proceedings or investigation for which it is being requested;
3. the person against whom the OPO is sought has some or all of the data covered by the application;
4. it is in the public interest for the data to be made available; and
5. an international agreement is in place between the UK and the territory where the relevant provider is based.

Still issues to be worked out, for example how compliance would be enforced. Talk of contempt proceedings being issued or just resorting to existing MLAT procedure.

MLAT

- Under an MLAT a national law enforcement agency can obtain assistance from an overseas counterpart through Central Authority Intermediaries.
- However, response times are slow (around 10 months for US)
- The KBR judgment it was held that the MLA regime provides an additional, alternative route to obtain documents for the SFO but its availability does not affect the lawfulness of the SFO's decision to issue a section 2 notice to a non-UK company with sufficient connection to the UK. Even when there is an available MLA regime, there may be good practical reasons for the SFO to proceed with a section 2 notice.

EPO

- European Commission's proposal in April 2018.
- Would allow a judicial authority in one member state to request electronic evidence directly from a service provider offering services in the EU and established / represented in another member state regardless of the data's location.
- Compliance within 10 days or 6 hours in an emergency.
- Also a European Preservation Order – obliges retention of material pending a request under an EPO
- Brexit issue? Would have to negotiate bi-lateral agreements in the same way the UK has done with the US.

Other?

- Domestically under s8 of PACE pursuant to s20 search warrants can require a company in the UK to provide any document which is "accessible" from the premises searched, including electronic data located elsewhere.
- Governments have been considering other measures to expedite acquisition of overseas-held electronic evidence.
- Example – US CLOUD Act
- Been in force since March 2018
- Requires US data and communications companies to provide electronic data on US citizens wherever it is located in response to a US warrant.
- It does provide a mechanism for challenge where the target is not a US citizen in the US or where providing the data would violate privacy laws of the foreign country hosting the data and it is in the IOJ to quash or modify the warrant.
- It also allows for agreements with other foreign governments permitting law enforcement agencies to seek data from providers in each other's country.

DAVID STERN

9TH OCTOBER 2018