

## Bargate Murray Dispute Resolution Update – Privilege: the fightback continues



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It has been announced that the SFO will not appeal the decision of the Court of Appeal in *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006.

In this article, Quentin provides an update on his previous article from September 2018, “A Victory For Litigation Privilege But Still No Clear Row Back From Three Rivers”.

In September, I discussed the Court of Appeal decision in *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006 (“SFO v ENRC”), full article to be found [here](#).

With that judgment, the Court of Appeal brought some welcome clarity to the law of privilege, by confirming that internal investigations undertaken in contemplation of legal proceedings would be protected by privilege, but questions remained concerning the narrow definition of “client” from the the earlier *Three Rivers* case.

On 02 October, the SFO announced that they would not be seeking to appeal the decision of the Court of Appeal to the Supreme Court.

So where do we stand now?

### Litigation Privilege

Litigation Privilege – we are in a better place. Internal investigations undertaken in contemplation of litigation are more likely to be protected from an obligation to disclose.

## Legal Advice Privilege

Legal Advice Privilege – no clear change. The narrow definition of “client”, in *Three Rivers District Council and Others v The Governor and Company of the Bank of England [2004] UKHL 4 (Three Rivers)*, remains a real issue, and not in line with current business practice.

There is still a risk that communications between a lawyer and client may not be privileged if the individual has not been expressly authorised to obtain that advice.

*Obiter* comments made in *SFO v ENRC* indicated that the test in *Three Rivers* was wrong, but the Court of Appeal declined to distinguish *SFO v ENRC* from *Three Rivers*, leaving that particular problem to be considered by the Supreme Court subsequently.

## Conclusion

It's an improvement, but no cigar.

Ambiguity in this important area is to be deprecated. *Three Rivers* is merely an incentive for aggressive litigants to engage in fishing expeditions. Careful planning and advice is needed but some limited protection can be secured by advance planning.

But the Supreme Court clearly needs to look at this whole area with a fresh eye soon, with a view to removing the ambiguity and uncertainty.

Some practical steps that can be taken in order to help protect yourself:

- Remember that information will lose privilege if it is no longer confidential. It is advisable to restrict the distribution of information and to mark all sensitive documents as ‘Confidential and Privileged’.
- Restrict circulation to those who will fulfil the definition of “client”.
- Ensure that all communications relating to any investigation or advice clearly state that the dominant purpose is anticipated or ongoing litigation. Ideally, have an external lawyer provide advice to that effect.
- If in doubt, always seek the advice of an experienced external lawyer.

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