GIR INSIGHT

AMERICAS INVESTIGATIONS REVIEW 2020

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Preface

Welcome to the *Americas Investigations Review 2020*, a *Global Investigations Review* special report. *Global Investigations Review* is the online home for all those who specialise in investigating and resolving suspected corporate wrongdoing, telling them all they need to know about everything that matters.

Throughout the year, the *GIR* editorial team delivers daily news, surveys and features; organises the liveliest events ('GIR Live'); and provides our readers with innovative tools and know-how products. In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that go deeper into developments than our journalistic output is able.

The *Americas Investigations Review 2020*, which you are reading, is part of that series. It contains insight and thought leadership, from 34 pre-eminent practitioners from the region. Across 13 chapters, spanning around 160 pages, it provides an invaluable retrospective and primer. All contributors are vetted for their standing and knowledge before being invited to take part.

Together, these contributors capture and interpret the most substantial recent international investigations developments of the past year, with footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular topic. This edition covers Argentina, Brazil, Mexico and the United States, as well as multi-jurisdictional deals in Latin America; has overviews on data privacy, economic sanctions, extraterritoriality and privilege; covers how enforcements authorities interact and how to move forward after an investigation; and enforcer insight from the World Bank and the CGU.

If you have any suggestions for future editions, or want to take part in this annual project, we would love to hear from you.

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Maximising Privilege Protection under US and English Law

Scott S Balber, John J O'Donnell, Isha Mehmood and Kathryn Boyd
Herbert Smith Freehills

When learning of a potential criminal or regulatory issue – whether through receipt of an information request from the authorities or through an internal mechanism – a firm will usually conduct an internal investigation, whose purpose is to understand the scope of the issue, remediate the problem and formulate a response to regulators and prosecutors, civil plaintiffs and other constituencies.

It is imperative that the internal investigation be conducted so as to maximise the protections of legally applicable privileges. If privilege is protected from the outset, the company can then determine the extent to which privileged materials should be withheld from regulators or civil plaintiffs, or the extent to which the company will waive the privilege.

This article examines the differences in approach to privilege issues under US and English law, and suggests some measures companies can take to maximise the privilege protections in the conduct of internal investigations.

Privilege in the United States – applicability of privilege doctrines to internal investigations

Under US laws, there are two key types of privileges: the attorney–client privilege and the attorney work-product doctrine.

The attorney–client privilege

The attorney–client privilege protects confidential attorney–client communications for the purpose of giving or receiving legal advice from disclosure. In the context of an internal investigation, attorney–client privilege will be available where one of the significant purposes of the internal investigation was to obtain or provide legal advice.[1]

1 See *Upjohn Co v United States*, 449 US 383 (1981); see also *In re Kellogg Brown & Root Inc*, 756 F3d 754 (DC Cir. 2014); but see *Wultz v Bank of China*, 304 FRD 384, 392 (SDNY 2015) (holding that internal investigation documents were not protected by attorney–client privilege when none of the documents consisted of communications between bank and one of its attorneys, and none of the documents were produced at the direction of an attorney to allow the attorney to render legal advice).

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It is well established that under US laws, attorney–client privilege can apply to any employee of a company directly involved in providing information for the company's attorneys to use in advising the company. As a result, notes of witness interviews carried out by counsel with employees of their client company will generally be regarded as protected by attorney–client privilege.[2] Note, however, that underlying facts cannot be immunised from discovery by communicating them to counsel during the course of an investigation.[3]

This issue was examined in the recent *General Motors* case, in which the court considered an application by plaintiffs in a product liability dispute for access to interview notes underlying an internal investigation report, prepared by General Motors' counsel, but then provided to regulators and made publicly available.[4] The court determined that the interview notes were protected under both the attorney–client privilege and work-product doctrine because the interviews were conducted to assist counsel in providing legal advice to the company and in contemplation of litigation. The court held that the privilege covering the interview notes had not been waived by General Motors' public disclosure of external counsel's investigation report. Since General Motors had produced a significant volume of additional documentation to the plaintiffs, the court found that the case did not present 'the unusual and rare circumstances in which fairness requires a judicial finding of waiver with respect to related, protected information'.

However, the court's holding in *General Motors* is not without limits. In a recent employee retaliation case, the general counsel of Bio-Rad claimed that the company had wrongfully terminated him for reporting certain misconduct to the audit committee. The district court in California declined to follow *General Motors* to grant privilege protection to work product generated in the internal investigation conducted by outside counsel examining the alleged misconduct, finding that the company cannot use the conclusion from the investigation offensively at trial to defeat the plaintiff's retaliation claim while precluding the plaintiff from presenting related communications to rebut this evidence.[5]

The attorney–client privilege also generally extends to protect communications between an attorney and third-party experts working on an investigation, provided the investigation is being directed by counsel.[6]

2 See, eg, *US ex rel Figueroa v Covan World-Wide Moving, Inc*, 2014 WL 5461995, at *4 (DSC 27 October 2014) (holding that 'objective facts' are not protected by privilege).

3 See *Upjohn Co*, in which the Supreme Court stated that 'privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.' 449 US at 384.

4 In *re General Motors LLC Ignition Switch Litig*., 80 F Supp 3d 521, 531 (SDNY 2015).

5 See *Wadler v Bio-Rad Labs, Inc*, 212 F Supp 3d 829, 852 (ND Cal 2016).

6 Cf *Wultz*, 304 FRD 384 at 387.

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The attorney work-product doctrine

The work-product doctrine protects attorneys' mental impressions formed, conclusions reached or legal theories developed in anticipation of litigation. The work-product doctrine does not, however, offer a complete protection from disclosure. To the extent that an attorney's work contains relevant and non-privileged facts, it is disclosable in cases where the plaintiff has a substantial need for the information and cannot otherwise obtain equivalent information without undue hardship.

The United States adopts a broad interpretation of the requirement that litigation be anticipated. Thus, courts have routinely held that an 'investigation by a federal agency presents more than a remote prospect of future litigation' for the purposes of the work-product doctrine.[7] However, any materials alleged to be the subject of work-product protection must have been prepared because of such litigation.

Privilege waiver as cooperation with US authorities

The extent to which US authorities make 'credit' for cooperation conditional on a company's willingness to waive the privilege has been a subject of intense debate. The current version of the Department of Justice (DOJ) Manual states that waiving the attorney–client or attorney work product protections is not a prerequisite under the prosecution guidelines for a company to be viewed as cooperative. In fact, the manual states that while a corporation remains free to convey non-factual or 'core' attorney–client communications or work product – if and only if the corporation voluntarily chooses to do so – prosecutors should not ask for such waivers and are directed not to do so.[8] Eligibility for cooperation credit is not predicated upon the waiver of attorney–client privilege or work-product protection but rather on the company's disclosure of relevant facts. Recent DOJ guidance specifically requires companies to disclose 'all relevant facts' about misconduct to receive 'any consideration for cooperation'.[9] If a company seeking cooperation declines to initiate an investigation into the underlying facts or to provide the DOJ with complete factual information, its cooperation will not be considered a mitigating factor.[10]

The enforcement manual of the Securities and Exchange Commission (SEC) states that staff 'should not ask a party to waive the attorney–client privilege or work product protection without prior approval of the director or deputy director'.[11] It also notes that voluntary disclosure of information 'need not include a waiver of privilege to be an effective form of cooperation'. While the guidance sounds similar, in practice, it is more common for the SEC staff to have an expectation that the company will be willing to waive privilege than for the criminal authorities

7 *Pacamor Bearings Inc, v Minebea Co, Ltd*, 918 F Supp 491, 513 (DNH 1996); but see *State of Fla. ex rel Butterworth v Indus. Chemicals, Inc*, 145 FRD 585, 588 (ND Fla. 1991) (holding that the work product privilege did not apply to a state-level civil investigative demand because a State Attorney General need not 'anticipate litigation' before issuing a civil investigative demand).

8 US Attorney's Manual 9-28.710.

9 Id., at 9-28.700.

10 Id.

11 SEC Enforcement Manual, 4 June 2015: www.sec.gov/divisions/enforce/enforcementmanual.pdf.

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to do so. Companies should, nevertheless, understand that if it provides privileged materials to the SEC, the privilege will be waived for these materials in its entirety, meaning that the criminal authorities and civil litigants can also access these materials later.

Companies should also be cautious as to how much detail they share with the government regarding information gathered during their investigation because the extensive disclosure of facts will waive privilege over related work-product. For example, in *SEC v Herrera*, a federal magistrate judge found that work-product protection is waived where counsel provided oral summaries of witness interviews to the SEC during an investigation.[12] The court found that the 'oral download' of the interviews to the SEC constituted a 'sufficiently detailed' summary such that it was the 'functional equivalent' of the interview memoranda. The court stated that counsel's argument would have been stronger if it had provided only 'vague references', 'detail-free conclusions' or 'general impressions' to the SEC staff. In contrast to the interview memoranda, the court deferred making a decision as to whether work-product protection for notes taken during the meeting were similarly waived until it had reviewed them under seal. In another case, *Bio-Rad*, the court held that a 41-page PowerPoint presentation by Bio-Rad's outside counsel to the SEC can lead to the waiver of privilege of other documents when fairness so requires.[13]

In some cases, companies have entered into a non-waiver agreement with the government whereby the company discloses privileged information pursuant to an agreement that the production does not constitute a privilege waiver and the information will be kept confidential. *Herrera* and *Bio-Rad* reflect the majority view that courts will not enforce this sort of limited or selective waiver of privilege. However, some courts have found that disclosures will not constitute a privilege waiver where the company had entered into a non-waiver agreement with the government. In *In re: Ex Parte Application of Financialright GmbH*, for example, the court found that disclosure of privileged information to the government pursuant to an agreement stating that the company did not intend to waive privilege did not operate as a waiver. The court was swayed by 'the strong public interest in encouraging disclosure and cooperation with law enforcement agencies.'[14]

A decision to waive privilege in the United States may have far-reaching consequences. Therefore, any waiver of privilege over investigation documentation to a regulator may result in a complete loss of privilege as against third parties. When disclosing documents, parties should insist that there is no general subject matter waiver and it should reserve the right to claw

12 Order on Defendants' Motion to Compel Production from Non-Party Law Firm, *SEC v Herrera, et al*, No. 17-20301 (SD Fl 5 December 2017).

13 See *Walder*, 212 F Supp 3d at 852.

14 *In re: Ex Parte Application of Financialright GmbH*, 2017 WL 2879696, at *6–7 (SDNY 23 June 2017).

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back any inadvertent disclosures. Additionally, parties should be aware that agreeing to disclose attorney–client communications to third parties at the inception of an investigation can result in a loss of the attorney–client privilege.[15]

It is worth noting that courts are increasingly critical of excessive government involvement in internal investigations that are conducted by entities cooperating with a government inquiry. In a recent decision, *United States v Connolly*, the court made clear that outside counsel – and not the government – is in charge of such internal investigations, including when and how to conduct interviews and present findings. In its sharp criticism of the DOJ, the court found that the DOJ had effectively 'outsourced' its investigation of Deutsche Bank to the bank – 'the original target of that investigation' – and its outside counsel. The court found that rather than the internal investigation being conducted independent from the DOJ, the DOJ instructed the bank on how to conduct their investigation. The decision has broad implications for internal investigations and corporate cooperation. Government agencies that attempt to exercise a more significant role in the investigation risk not being able to use statements made to outside counsel in a subsequent trial or, in the most severe case, that charges may be dismissed.[16] Companies may find this useful when seeking to resist burdensome government requests or attempts to micromanage internal investigations.[17]

Privilege in England and Wales

English law recognises two main heads of privilege: the legal advice privilege, which applies to confidential communications between a lawyer and client for the purpose of giving or receiving legal advice; and the litigation privilege, which applies to confidential communications between the lawyer and client, or between either of them and a third party, for the sole or dominant purpose of gathering evidence for use in legal proceedings, or for giving legal advice in relation to such proceedings. Litigation privilege only applies where litigation has commenced or is reasonably anticipated. While these two concepts are broadly analogous to the US attorney–client privilege and work-product doctrines, there are some important differences.

The legal advice privilege

The legal advice privilege is similar to the US attorney–client privilege in that it protects communications for the purposes of giving and receiving legal advice. However, the doctrine is narrower because it only covers lawyer–client communications and, therefore, does not protect communications with a third party. In an investigation, this means that reports prepared for

15 Some federal circuit courts have left open the possibility that selective waivers could be possible in particular circumstances. For examples of circuit courts that have rejected the concept of selective waiver, see *In re Pacific Pictures Corp*, 679 F3d 1121 (9th Circ 2012) and *Westinghouse Electric Corp v Republic of the Philippines* 951 F2d 1414 (3d Circuit 1991). The Eighth Circuit expressly permitted a selective waiver in the form of disclosure to the SEC in response to a subpoena in *Diversified Indus. Inc, v Meredith*, 572 F2d 596 (8th Circ 1978).

16 *United States v Connolly*, Memorandum Decision and Order Denying Defendant Gavin Black's Motion for Kastigar Relief, 16 Cr 0370 (CM) (SDNY)

17 Id.

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a company by third parties (such as forensic accountants or IT experts) will not be protected by legal advice privilege (although they may be covered by the litigation privilege where that applies). The Supreme Court confirmed in 2013 that the legal advice privilege does not apply to any professional other than a qualified lawyer, rejecting an argument that documents containing legal advice on tax matters from an accounting adviser were privileged.

An important limitation of the legal advice privilege is the limited definition of 'client' established by the English courts. The Court of Appeal's decision in *Three Rivers* (No. 5) placed restrictions on who may be considered to be the client and gives rise to uncertainty over the scope of legal advice privilege for corporate clients. The Court of Appeal limited the definition of the client to the small group of employees who had been given responsibility for coordinating communications with the lawyers, meaning that all other employees were regarded as third parties and that legal advice privilege could not be claimed over their communications. The Court of Appeal's reasoning was not followed in other Commonwealth jurisdictions, but in 2016 and 2017, a series of High Court decisions found that solicitors' interviews with client company employees were not covered by legal advice privilege, as the employees in question did not form part of the client for privilege purposes. In particular, in the *RBS Rights Issue Litigation* case, the High Court noted that the effect of *Three Rivers* was to limit the client to those authorised to seek and receive legal advice on behalf of the client corporation, and that the authority to provide information to the lawyers was not sufficient for these purposes. The High Court did not consider it necessary to determine the question of whether the client should be regarded as comprising only those individuals who represent the 'directing mind and will' of the client, and the judge suggested that he inclined to this view. The narrow view taken in the *RBS Rights Issue* case was subsequently endorsed in the *ENRC* case discussed below. The *Three Rivers* (No. 5) decision was also applied in *Glaxo Wellcome UK Ltd v Sandoz Ltd*,[18] where the High Court held that communications between an employee of the business and an in-house lawyer were protected by legal advice privilege for some purposes, on the basis that the employee was the lawyer's 'client', but not for others, such as where the in-house lawyer had contacted the 'client' to seek and obtain information, to be provided to external lawyers to obtain their legal advice.

Legal advice privilege has also been considered in the context of the lawyer holding two 'positions' while providing advice to the client. The High Court in *UTB LLC v Sheffield United Ltd & others*[19] considered a claim of privilege in respect of communications with a lawyer who was acting as the client's 'man of business', alongside his legal role. The court found that the existence of such dual roles will not preclude claims of privilege over those communications that satisfy the requisite test of having been made in a relevant legal context, but that communications that took place in a business advisory context must be excluded. Legal advice privilege will also cover the entire continuum of communications between a lawyer and client relating to a transaction in which the lawyer has been instructed, provided they are directly related to the solicitor's performance of his professional duty as a legal adviser. In *Raiffeisen Bank*

18 [2018] EWHC 2747 (Ch).

19 [2019] EWHC 914 (Ch).

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International AG v Asia Coal Energy Ventures Ltd[20] this meant that instructions regarding the holding and transfer of escrow monies were privileged, even if they did not contain advice on matters of law.

In the *RBS Rights Issue* case, the High Court also discussed the extent to which interview notes may be regarded as subject to legal advice privilege, even where the interviews themselves are not (applying the restrictive interpretation of 'client' outlined above) on the basis that the interview notes form part of the lawyers' working papers. The judge concluded that, to be protected by legal advice privilege, there must be some attribute of the notes that distinguishes them from verbatim transcripts of the interviews. He found that Royal Bank of Scotland had not demonstrated that this was the case on the evidence. However, in appropriate circumstances, it may be possible to argue that interview notes are subject to legal advice privilege on the basis that they give a clue as to the trend of lawyers' advice.

In light of *Three Rivers* (No. 5) and subsequent case law, it is therefore advisable for companies conducting internal investigations to consider expressly nominating the individuals who will be responsible for directing outside counsel. To the extent that interviews are conducted with individuals outside the nominated client group, these are unlikely to be covered by the legal professional privilege (since they are communications between a lawyer and third party) and notes of such interviews may be disclosable, unless litigation privilege applies.

Companies will also need to be mindful that they may not be able to object to the disclosure of their privileged documents in the context of an investigation into a regulated person and that documents subject to legal advice privilege that are provided to their auditors in particular could end up in the hands of the Financial Reporting Council (the FRC, the regulator of audit firms). In the recent case of *The Financial Reporting Council Ltd v Sports Direct International Plc*,[21] the High Court held that there was no infringement of the legal advice privilege in Sports Direct International's documents by virtue of their disclosure to the FRC by its auditor Grant Thornton UK LLP (a regulated person) for the purposes of an investigation by the FRC into Grant Thornton's conduct. This means that where a regulated person holds documents belonging to its client that are subject to legal advice privilege, and those documents are demanded by a regulator pursuant to its statutory powers, they cannot be withheld on the grounds of privilege.

The litigation privilege

In the context of internal investigations, there are substantial limitations on the scope of litigation privilege. The scope of this doctrine is unclear in the context of regulatory investigations since the litigation privilege has been held only to apply in circumstances where the contemplated proceedings are adversarial, rather than inquisitorial. This distinction was considered by the Competition Appeal Tribunal (CAT) in 2012 in the context of an investigation involving the Office of Fair Trading (OFT) and Tesco. The CAT determined that the proceedings were 'sufficiently adversarial' by the time the company began to gather its evidence since the OFT

20 [2019] EWHC 3 (Comm).

21 [2018] EWHC 2284 (Ch).

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had already issued two 'statements of objections' alleging competition violations and Tesco was contesting the OFT's case. Some commentators have sought to apply this decision to other regulatory investigations by analogy arguing, for example, that a Financial Conduct Authority investigation in which it has issued a warning notice would likely be regarded as 'sufficiently adversarial' in the same way as the OFT proceedings.

The English courts have, however, recently considered whether a criminal investigation by the Serious Fraud Office (SFO) satisfied the 'litigation' limb of the test for litigation privilege. At the first instance in *SFO v Eurasian Natural Resources Corporation Ltd*,[22] the High Court had found that the test of whether litigation is in reasonable contemplation is not met just because a criminal investigation is contemplated. Only a prosecution, not an investigation, amounts to litigation for these purposes and contemplation of a criminal investigation does not necessarily equate to the contemplation of a prosecution. This view was endorsed by the Court of Appeal in *R (For and on behalf of the Health and Safety Executive) v Jukes*.[23] However, the Court of Appeal in *SFO v ENRC*[24] disagreed with the High Court's strict approach, finding that the whole subtext of the relationship between the relevant company and the authorities was important. In this case, the relationship between ENRC and the SFO meant that there was possibility, if not likelihood, of prosecution if the self-reporting process did not result in a settlement. The court said that where the SFO made explicitly clear in its communications to the company that there was the prospect of a criminal prosecution, and external legal advisers were engaged to deal with that possibility, there was a clear ground for contending that criminal prosecution and therefore litigation was in reasonable contemplation at the time the notes of the interviews were prepared.

A second limitation on the scope of the litigation privilege arises in the context of the 'dominant purpose' requirement. The English courts highlighted the narrow scope of this requirement in a recent case involving the production of reports prepared by a firm of accountants on the instruction of joint liquidators of a group of companies owned by the Tchenguiz brothers and used to hold investments and carry out derivatives and futures trading. The liquidators provided the reports to the SFO in connection with its investigation into the brothers. The Tchenguiz brothers subsequently brought a claim against the SFO for allegedly unlawful raids on their premises and sought disclosure of the reports. The liquidators argued that the reports were covered by litigation privilege. The Court of Appeal held that it was not possible to establish that the reports were prepared for the dominant purpose of litigation where they had been commissioned for dual purposes: both to obtain advice in relation to litigation and to carry out the liquidators' statutory duty to assess the relevant companies' assets and liabilities. The Court of Appeal stated that the real difficulty was that 'in circumstances which call for clarity and precision' the liquidators had 'made no effort to grapple with the obvious need to establish which of dual or even multiple purposes was dominant if a plausible claim to privilege was to be made out'. Assessing the dominant purpose is a fact-sensitive exercise, as emphasised by the

22 [2017] EWHC 1017 (QB).

23 [2018] EWCA Crim 176.

24 [2018] EWCA Civ 2006.

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High Court in *Sotheby's v Mark Weiss Ltd*.[25] Mr Justice Teare commented that 'it is unsafe to use the determination of dominant purpose in one case to assist in identifying the dominant purpose in another', which underlines the difficulty for commercial parties in assessing, in any case where a document or communication may be considered as having a dual purpose, whether or not it will be protected by litigation privilege.

The *ENRC* case also considered the 'dominant purpose' test, with the Court of Appeal finding that the need to investigate the existence of alleged corruption was a subset of defending the litigation and hence that notes made in interviews during the investigation stage were made for the dominant purpose of litigation.

The Court of Appeal in *WH Holding Ltd v E20 Stadium LLP*[26] did not consider that the *ENRC* case extended the scope of litigation privilege beyond the recognised categories of obtaining advice or evidence, but that it did confirm that the conduct of litigation includes its avoidance or compromise. The court in *WH Holding* emphasised that for the privilege to apply, it is not sufficient that the documents are created for the conduct of litigation more broadly. Therefore, emails between a company's board members that had been prepared to discuss a commercial proposal for the settlement of a dispute were not covered by the privilege. The decision was also unclear on whether litigation privilege is limited to communications between parties or their lawyers and third parties, rather than applying to internal communications within a party.

The High Court considered the first instance decision in *ENRC* in *Bilta (UK) Ltd v Royal Bank of Scotland Plc & Anor*[27] and held that it was not determinative on the facts. In *Bilta*, RBS claimed litigation privilege over documents, including transcripts of interviews, which had been created as part of an internal investigation. RBS conducted the investigation following receipt of a letter from HM Revenue & Customs (HMRC), which asserted that there might be grounds to deny RBS's VAT reclaim in relation to certain carbon credit trades on the basis that RBS 'knew or ought to have known' that the trades were connected to VAT fraud. The High Court held that the dominant purpose of the documents was litigation and that they were subject to litigation privilege. While RBS had other purposes in conducting the internal investigation (such as trying to persuade HMRC not to pursue an assessment, maintaining a good relationship with HMRC and adhering to RBS's internal protocols), these purposes were 'effectively subsumed under the purpose of defeating the expected assessment'. The court stressed that the exercise of determining the dominant purpose of documents would, in each case, be a question of fact.

In the context of internal investigations, the onus will be on the party seeking to assert litigation privilege to establish that litigation was the 'dominant' purpose. It may be difficult to claim litigation privilege over documents created as part of an internal investigation in certain circumstances, for example, those prepared in connection with an investigation conducted:

- pursuant to a regulatory or statutory obligation;
- for the purpose of reporting to shareholders; or

25 [2018] EWHC 3179 (Comm).

26 [2018] EWCA Civ 2652.

27 [2017] EWHC 3535 (Ch).

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- to respond to complaints where it is unclear that the complainant intends to bring legal proceedings.

The result of *ENRC* and *Jukes* is that it is likely to be easier to establish that litigation privilege applies in the context of civil proceedings. While the Court of Appeal decision in *Jukes* suggests that, where a criminal investigation is under way but no proceedings have been commenced, litigation privilege might not be available in respect of documents prepared in connection with that investigation, the later Court of Appeal decision in *ENRC* takes a more relaxed position.

Waiver of privilege as a 'badge of cooperation' in the United Kingdom?

Recent statements by the SFO indicate that the SFO respects the doctrine of privilege but considers that waiver of privilege, while not compulsory, does demonstrate cooperation. The director of the SFO, Lisa Osofksy said in a recent speech:

> *Of course, Legal Professional Privilege is what it says, a privilege afforded to client-attorney communications . . . but companies can waive that privilege if they wish to cooperate with the Serious Fraud Office . . . . and waiving privilege over that initial investigative material will be a strong indicator of cooperation and an important factor that I will take into account when considering whether to invite a company to enter into DPA negotiations; it also highlights whether a DPA is in the public interest in that case.*[28]

Senior SFO officials have suggested that they intend to take a more aggressive approach to claims of privilege by companies that self-report serious fraud or corruption, which they consider to be overly broad, and the recent High Court decisions in relation to privilege are likely to make privilege claims more difficult to justify in the context of internal investigations. This is consistent with the SFO's statement on the self-reporting process that indicates that 'all supporting evidence including but not limited to emails, banking evidence and witness accounts' must be provided as part of the self-reporting process.[29]

Despite the SFO's rhetoric, in *AL v SFO*,[30] the High Court was critical of the SFO's approach in challenging claims to privilege by a company in the context of a criminal trial of individuals following entry into a deferred prosecution agreement (DPA). AL, a former employee of XYZ Limited (a company which entered into the United Kingdom's second DPA with the SFO in 2016) applied for judicial review of the SFO's decision not to pursue XYZ for breach of its duty of cooperation under the terms of its DPA. The High Court ultimately denied AL's application on the basis that it was brought in the wrong forum; however, the court was critical of the SFO and stated that, had it been the proper forum, it would have quashed the SFO's decision and remitted the issue for reconsideration. AL's application centred on his request to the SFO to disclose notes

28 Lisa Osofsky, Director, speaking at the Royal United Services Institute in London on 3 April 2019 – https://www.sfo.gov.uk/2019/04/03/fighting-fraud-and-corruption-in-a-shrinking-world/.

29 https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/.

30 [2018] EWHC 856.

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taken by XYZ's lawyers during interviews of senior employees (including AL), conducted during an internal investigation before XYZ took the decision to self-report. The SFO requested access to these notes but XYZ refused on the basis that they were privileged and instead provided the SFO with 'oral proffers'. The SFO took no further action against XYZ to force disclosure of the original interview notes. The High Court criticised the use of oral proffers as 'highly artificial' and expressed surprise that the SFO did not more robustly demand the written summaries, which it considered not to be privileged following the *ENRC* case.

The judgment is likely to result in the SFO adopting a more robust approach to challenging privilege claims, especially in circumstances where a corporate is obliged to cooperate with the SFO under the terms of a DPA. It also raises the prospect that, in multi-agency settlements, there might be a divergence of approach between agencies that are content to receive oral proffers (eg, the US DOJ) and those which are not.

Under English law (in contrast to the US position), provided that confidentiality is not waived in respect of privileged communications, privilege can be maintained against the rest of the world following a specific waiver in favour of a regulator or third party.[31] Information will not cease to be confidential unless it is known to a 'substantial number of people', as held by the High Court in *Winstone v MGN Ltd*.[32] In this case, the contents of the privileged material had come into the hands of a small group of journalists, at least one investor and possibly others; however the requisite quality of confidentiality had been maintained.

Conclusions for multinational investigations

We have set out in this article some of the key differences between US and English law in relation to the availability of privilege claims in internal investigations. Managing internal investigations that involve multiple jurisdictions necessarily involves the consideration of complex issues arising from different legal systems and regulatory expectations. Differing privilege standards are a key area to consider when managing a cross-border investigation. In light of the increased cooperation and information-sharing between different regulators, a company cooperating with one body should expect to share the same information with investigatory agencies in different countries. In this context, privilege issues should be considered with great care since a limited waiver of privilege when providing information to one regulator (in line with its expectations of cooperation) may lead to collateral privilege waivers in respect of other regulators in other jurisdictions.

As companies conduct internal investigations, they should:

- involve counsel at the outset of the investigation and ensure that counsel is responsible for directing the investigation;

31 See *Gotha City v Sotheby's* [1998] 1 WLR 114, in which privileged information was found to remain so after it had been shared with a third party on the understanding that they would keep the communications in confidence, and *Property Alliance Group v The Royal Bank of Scotland plc* [2015] EWHC 1557 (Ch), in which documents provided to regulators on a confidential 'non-waiver' basis and pursuant to agreements under which privilege and confidence were expressly maintained remained privileged as against a civil litigant.

32 [2019] EWHC 265 (Ch).

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- create a written record demonstrating that the investigation is being conducted for the purpose of the company obtaining legal advice in connection with anticipated litigation;
- ensure that all non-legal advisers are retained or supervised by counsel overseeing the investigation;
- ensure that the record reflects that key decision-makers at the company are within the client group so that there is no doubt that their communications with counsel are protected;
- in creating written reports of the investigation or witness interviews, be mindful of the distinction between 'facts' on the one hand, and 'legal advice, mental impressions or analysis' on the other hand, and consider whether the written reports will be protected under the privilege laws in each jurisdiction that the company can face potential litigation or enforcement actions; and
- take steps to avoid inadvertent waiver by ensuring the investigation and any related documents or reports are treated as confidential and not disclosed outside the investigation team.

Companies conducting internal investigations should strive to protect the privilege at the outset so as to retain the flexibility to decide later whether and to what extent a privilege waiver is advisable. Where a company has structured its internal investigation to maximise its privilege, the company will have more control over how and when to disclose the relevant information.

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Scott Balber is the managing partner of Herbert Smith Freehills' New York office and is the US head of investigations and financial services litigation for the firm. As a litigator and trial lawyer with 25 years of experience, Scott's practice focuses on internal investigations, securities and financial services litigation, and white-collar criminal defence.

He has extensive experience representing companies and financial institutions and their employees in connection with investigations by US federal and state criminal and regulatory bodies, as well as in connection with civil litigation in trial courts and appellate courts around the country. He has handled dozens of investigations, involving issues of insider trading, financial fraud, violations of the Foreign Corrupt Practices Act and of the federal securities laws, money laundering, tax evasion, import-export violations and anticompetitive conduct.

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HERBERT SMITH FREEHILLS

Operating from 27 offices across Asia Pacific, Europe, the Middle East and Africa, and North America, Herbert Smith Freehills is at the heart of the new global business landscape providing premium-quality, full-service legal advice. The firm provides many of the world's most important organisations with access to market-leading dispute resolution, projects and transactional legal advice, combined with expertise in a number of global industry sectors, including banks, consumer products, energy, financial buyers, infrastructure and transport, mining, pharmaceuticals and healthcare, real estate, TMT and manufacturing and industrials.

Our global investigations team has experience representing clients in relation to internal and government initiated investigations and enforcement issues and defending clients charged with white-collar crime. We have dedicated corporate crime and investigations specialists across our international network and have managed investigations in the United Kingdom, Europe, Australia, China, South-East Asia, Africa and the Middle East.

As part of the global investigations team, our New York office has experience defending companies and individuals from around the world against US federal criminal charges and in responding to investigations by the US Department of Justice and other agencies such as US Securities and Exchange Commission, the Financial Industry Regulatory Authority, the US Department of the Treasury Office of Foreign Assets Control, the Federal Reserve Bank of New York, and State Attorneys General. By way of example, these matters have included alleged money laundering, mail and wire fraud, insider trading, violations of the Foreign Corrupt Practices Act, financial fraud and antitrust.

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The *Americas Investigations Review 2020* contains insight and thought leadership from 34 pre-eminent practitioners from the region. Across 13 chapters, spanning around 160 pages, it provides an invaluable retrospective and primer.

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