Global Attorney-Client Privilege Guide - England and Wales

05 - Investigations

July 4, 2022

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# Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

Legal professional privilege generally operates in the same way irrespective of whether the situation is civil, criminal, regulatory or investigatory. That said, it is important to note that litigation privilege is "essentially a creature of adversarial proceedings" [**[1]**](https://resourcehub.bakermckenzie.com/en#UK5_ftn1) and does not extend to investigative or inquisitorial proceedings.

However, the fact that an investigation may be the precursor to any litigation does not necessarily mean that litigation privilege will not be available when the investigation is being carried out. In the context of investigations, the important points are: (a) identifying the point at which litigation is in reasonable contemplation of the parties — usually, criminal litigation in the form of prosecution; and (b) understanding that when an investigative report is commissioned for a range of reasons, a claim to litigation privilege can be difficult, given the requirement to demonstrate that the report is prepared for the dominant purpose of the litigation. Ultimately, many investigations will be inquisitorial in nature at the beginning. This may change during the course of the investigation or it may not and if it does not, litigation privilege will not apply.

In the Court of Appeal decision in *The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006, the court found that litigation (in the form of criminal proceedings) was reasonably in contemplation at the time when ENRC had instigated its own investigation and certainly by the time the SFO had written a letter urging ENRC to consider carefully the Self-Reporting Guidelines even though it had confirmed that the SFO was not, at that stage, carrying out an investigation. Further, and very importantly, the Court of Appeal decision confirmed that, contrary to the decision of the first instance judge, there is no general principle that litigation privilege cannot attach until either a defendant knows the full details of what is likely to be unearthed or a decision to prosecute has been taken.

In the recent case of *The State of Qatar v. Banque Havilland SA* [2021] EWHC 2172 (Comm), the court refused a claim to litigation privilege over an accountants' investigative report. Although the issue addressed in the report was a serious one (with the potential for serious legal and regulatory consequences), there was insufficient evidence on the facts that it had been commissioned for the sole or dominant purpose of adversarial litigation.

[**[1]**](https://resourcehub.bakermckenzie.com/en#UK5_ftn1a) Paragraph 42, *Property Alliance Group v. Royal Bank of Scotland* [2015] EWHC 1557 (Ch) (quoting Lord Jauncey in *Re L (a minor) (Police Investigation: Privilege)* [1997] AC 16).

# Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

The starting point is that where interviews are themselves not privileged, verbatim notes or transcripts cannot be privileged.

A good example of this can be found in *The RBS Rights Issue Litigation* case. RBS had notes of interviews with 124 individuals, some of whom were ex-employees, across a number of divisions, locations (including the US) and levels of seniority. The interview notes compromised information gathered from employees or former employees preparatory to and for the purpose of enabling RBS, through its directors or other persons authorized to do so on its behalf, to seek and receive legal advice. Hildyard J. considered that these interview notes did not meet the requirements for legal advice privilege: "The individuals interviewed were providers of information as employees and not clients: and the Interview Notes were not communications between client and legal adviser."

In *The RBS Rights Issue Litigation* case, RBS also argued, in the alternative, that the interview notes were privileged because they were "lawyers' working papers." Under English law, lawyers' working papers are privileged if they would betray the trend of advice which the lawyer is giving the client. RBS argued that the interview notes were not simply verbatim recitals of the interviews, but were notes that evidenced the impressions of the lawyer in the sense that they reflected the work undertaken in preparation for the interviews thus revealing the train of inquiry. Further, as these notes were not verbatim transcripts, they reflected a selection by the author of the points being recorded. Hildyard J did not consider this to be sufficient and said that there was a real difference between reflecting a train of inquiry and reflecting — or giving a clue to — the trend of legal advice. A claim for privilege on the basis that interview notes were "lawyers' working papers" was also rejected at first instance in *The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd* as the judge concluded that there was insufficient evidence that the notes would give a clue as to the legal advice or any aspect of the legal advice being given to ENRC. The Court of Appeal declined to give a view on this and considered that it would be better for the question of the extent to which lawyers' working papers are covered by legal advice privilege to be considered by the Supreme Court. As such, the position on lawyers' working papers remains as outlined above.

If adversarial litigation is reasonably in contemplation and the other ingredients for litigation privilege are present, then interviews with employees and third parties may be covered by litigation privilege. For example, in *Bilta (UK) Ltd (in liquidation) & Ors v. Royal Bank of Scotland PLC & Ors* [2017] EWHC 3535 (Ch), interviews with former and current employees which were conducted by RBS as part of an investigation were found to be covered by litigation privilege. Also, in the Court of Appeal decision in *The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd*, the court held that (contrary to the decision at first instance), the notes of interviews with employees, former employees, officers of the company and subsidiary companies and other third parties were covered by litigation privilege. The Court of Appeal considered that the contemporaneous documents showed that ENRC was "aware of circumstances which rendered litigation between itself and the SFO a real likelihood rather than a mere possibility" (adopting the test in *United States of America v. Philip Morris* [2003] EWHC 3028 (Comm)).

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