INTRODUCTION

The High Court's narrow interpretation of litigation privilege in *Dir. of the Serious Fraud Office v. Eurasian Nat. Res. Corp.*, [2017] EWHC 1017 (QB) ['*ENRC*'] creates a substantial inconsistency with the confidentiality protections afforded to similar material under U.S. law. Whilst the National Association of Criminal Defense Lawyers ('NACDL') would not be so presumptuous as to suggest to an English court how to apply English law, we wish to inform the Court of the very real practical and negative consequences – as viewed by our skilled and experienced membership – the decision will have, particularly in U.K./U.S. cross-border investigations and litigation.

INTEREST OF *AMICUS CURIAE*

The NACDL is a not-for-profit professional association that works in the U.S. and internationally to ensure due process for defendants and those under criminal investigation. Our goal is to foster the integrity, independence, and expertise of the criminal defense profession with the effect of promoting the fair administration of justice.

Founded in 1958, NACDL has approximately 40,000 members in 28 countries, and 90 state, provincial, and local affiliate organizations. Our members include private practitioners, public defenders, military defense lawyers, law professors, and judges. We regularly file *amicus curiae* briefs in the U.S. courts, including the U.S. Supreme Court, in matters involving issues of broad importance to criminal justice. We respectfully suggest this is such a matter.

I. The U.K. and U.S. Systems of Justice Enjoy a "Special Relationship".

The connection between the U.K. and the U.S. – first characterised as the "special relationship" by Winston Churchill – is particularly evident in our legal systems. Five signatories of the

Declaration of Independence were Middle Templars, so it is natural that the English common law would provide the framework for the American system of justice[1], and that it has a lasting effect on American law to this day.

The U.S. Supreme Court "has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances[2]" – particularly opinions from the nations of the Commonwealth. Justices of the U.S. Supreme Court will thus routinely cite and discuss sources of the law of England & Wales, from Blackstone's *Commentaries* to recent court decisions and statutes. Indeed, in the past three years, the U.S. Supreme Court has cited or discussed Blackstone's in more than one of every ten cases[3]. In the same period, it has cited decisions of the courts of England & Wales no fewer than 17 times[4]. In the other direction, Her Majesty's Government has sought to assist in the interpretation of American law, having filed *amicus* briefs in 14 cases pending before the U.S. Supreme Court in the last 15 years[5].

It is against this background, and the increasingly global nature of commerce, crime, and investigations (both internal and by law enforcement), that NACDL respectfully seeks to inform the Court of the inevitable extra-territorial effect of the important issues to be decided in this case.

[1] See *United States v. Reid*, 53 U.S. 361, 363 (1852) (recognizing the foundational importance of English common law to American jurisprudence).

[2] *Knight v. Florida*, 120 S. Ct. 459, 463-64 (1999) (Breyer, J., dissenting).

[3] See, *e.g.*, *Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1874 (2017) (Breyer, J., dissenting); *Shaw v. United States*, 137 S. Ct. 462, 466 (2016).

[4] Decisions dating to the 1600s and 1700s – the time period surrounding the American founding – are often cited but current jurisprudence is used as well.

[5] See, *e.g.*, Brief of the Government of the United Kingdom of Great Britain and Northern Ireland, *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018); Brief of the United Kingdom of Great Britain and Northern Ireland, *Carty v. Thaler*, 559 U.S. 1106 (2010).

II. U.K. Litigation Privilege and the U.S. Work-Product Doctrine Are Related Protections of Confidentiality with a Common Purpose.

The law of both the U.K. and the U.S. has long recognised that the administration of justice, indeed, society as a whole, is served by a lawyer having the freedom to render proper legal advice to a client in confidence[6]. To do so, a lawyer must be able to assemble facts, analyse them, and apply the law[7]. The more complex the issue faced by the client, the more complex the process may be. Often, and particularly where the situation is complex, the process is evolutionary – with a lawyer's view and advice shifting over time as more facts become known and greater legal analysis is done. "That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests[8]".

Attorneys' analytical work is found in their "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways" (*ibid*). If such documents and materials do not remain confidential, "much of what is now put down in writing would remain unwritten" (*ibid*). The result of an absence of confidentiality is undesirable, and was forecast by the Supreme Court in *Hickman*: "Inefficiency, unfairness and sharp practices would inevitably develop . . . [a]nd the interests of the clients and the cause of justice would be poorly served". There remain principled reasons for privilege.

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[6] See *Three Rivers Dist. Council v. Governor and Co. of the Bank of Eng. (No. 6)*, [2004] UKHL 48, ¶52 ['*Three Rivers (No. 6)*']: in the adversarial system, "each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations" *ibid* at 85. See also *Hickman v. Taylor*, 329 U.S. 495, 515-16 (1947) (Jackson, J., concurring).

[7] *Hickman*, 329 U.S. at 511, *Three Rivers (No. 6)*, [2004] UKHL 48 at 85. See also *United States v. Nobles*, 422 U.S. 225, 238 (1975) "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case".

[8] *Hickman*, 329 U.S. at 511.

English law protects a lawyer's work in this regard under "litigation privilege" which protects from disclosure a lawyer's communications when those communications are made for the purpose of obtaining information or advice in connection with existing or contemplated litigation[9].

Under the laws of England & Wales, there are three requirements which must be fulfilled for a claim of litigation privilege to succeed:

> *First,* litigation must be "in progress or in contemplation[10]". The party claiming privilege must "show that he was aware of circumstances which rendered litigation between himself and a particular person or class of persons a real likelihood rather than a mere possibility[11]".
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> *Second*, the communications must be "made for the sole or dominant purpose of conducting that litigation[12]". Thus, "documents are protected . . . when they have been made with a view to such litigation, either for the purpose of obtaining advice as to such litigation, or of obtaining evidence to be used in such litigation, or of obtaining information which might lead to the obtaining of such evidence[13]".
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> *Third*, the litigation must be "adversarial[14]".

The U.S. "work-product doctrine" may be considered the American cousin of litigation privilege. It allows attorneys to maintain attorney/client confidentiality over materials "prepared in anticipation of litigation or for trial[15]". In the U.S., a document is prepared in anticipation of

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[9] *Three Rivers (No. 6)*, [2004] UKHL 48 at 102. See also *ibid* at 10 "Litigation privilege covers all documents brought into being for the purposes of litigation"; and *United States v. Philip Morris Inc. (No. 1)*, [2003] EWHC 3028 (Comm) ['*Philip Morris (No. 1)*']: "[C]onfidential communications between a solicitor and his client or a third party for the dominant purpose of considering, preparing or conducting a defence . . . are covered by litigation privilege".

[10] *Three Rivers (No. 6)*, [2004] UKHL 48, at 102.

[11] *Philip Morris (No. 1)*, [2003] EWHC 3028.

[12] *Three Rivers (No. 6)*, [2004] UKHL 48 at 102.

[13] *ibid* at 99 (quoting *Wheeler v. Le Marchant*, [1881] 17 Ch. D. 675, 680-81).

[14] *ibid* at 102.

[15] Fed R. Civ. P. 26(b)(3)(A)-(B); *Hickman*, 329 U.S. at 508.

litigation when "the document can fairly be said to have been prepared or obtained because of the prospect of litigation[16]". In other words, "production of the material must be caused by the anticipation of litigation" to qualify for work-product protection[17]. Documents that are prepared in the ordinary course of business do not meet that standard. Work-product protection can attach to both "documents and tangible things[18]", or "intangible" work product such as an attorney's thoughts or recollections[19].

Thus, litigation privilege and the work-product doctrine were substantially co-extensive prior to the narrow interpretation of litigation privilege at first instance in this case. For the most part, what was protected by one would be protected by the other.

III. The High Court's Interpretation of Litigation Privilege Jeopardises the Confidentiality of Material Protected by the Work-Product Doctrine.

We respectfully summarise the High Court findings to explain the impact on the work-product doctrine. The High Court's interpretation of litigation privilege radically alters the contours of the protection that the privilege provides. The High Court held that certain documents prepared by, or at the direction of, counsel as part of an internal investigation into corporate wrongdoing were not protected by litigation privilege[20]. Those documents included: attorney notes from witness interviews (at 26-28); materials and analyses created by forensic accountants during the internal investigation (at 29-31); and documents containing the substance of information uncovered during the investigation that attorneys relayed to ENRC's board of directors (at 32-33).

The High Court found that litigation privilege did not apply, because it concluded that ENRC had not shown that litigation was reasonably in contemplation when the documents were created

[16] 8 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 2024.

[17] *Musa-Muaremi v. Florists' Transworld Delivery, Inc.*, 270 F.R.D. 312, 321 (N.D. Ill. 2010).

[18] Fed. R. Civ. P. 26(b)(3)(A).

[19] *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003).

[20] *ENRC* at 171-173.

(at 149). The High Court acknowledged that ENRC may have reasonably contemplated an SFO *investigation* (as opposed to an SFO *prosecution*) at the time of its internal investigation but such investigations were not sufficiently "adversarial" to qualify for litigation privilege (at 151). Even if litigation were reasonably contemplated, the High Court continued, the documents were still not privileged because they were not created with the "dominant purpose" of being used in the litigation (at 164). According to the High Court, ENRC did not plan to use the fruits of its internal investigation *to defend* itself in a criminal case brought by the SFO, but rather to "persuade the SFO to go down the route of civil settlement instead of prosecution" (at 168). In other words, the documents created in the internal investigation were created for the purpose of *avoiding* adversarial litigation, and not for defending litigation (see 164, and 168). The High Court thus concluded that work papers and attorney notes from a corporate internal investigation are not covered by litigation privilege.

That same material, however, would be protected under the U.S. work-product doctrine. Attorney memoranda are protected under the work-product doctrine because "[w]ork-product protection applies to attorney-led investigations when the documents at issue 'can fairly be said to have been prepared or obtained because of the prospect of litigation'[21]". Additionally, the District Court of Massachusetts concluded that attorney notes from witness interviews were protected work product[22]. When "the internal investigation commenced, it was anticipated that any facts which were developed which demonstrated criminal violations of the antitrust laws could result in both criminal and/or civil litigation" (*ibid* at 151). Although "there was no litigation pending or imminent at the time of [the] interviews, it is obvious that one of the primary reasons for undertaking the investigation was to determine whether or not violations had occurred and to prepare [for] any litigation which might result from such violations". That was precisely the purpose of ENRC's investigation: "to find out if there was any truth in the whistleblower's allegations (and then to decide what to do about it if there was . . .)" (*ENRC* at 165)[23].

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[21] *Sandra T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612, 622 (7th Cir. 2010).

[22] *Massachusetts v. First National Supermarkets, Inc.*, 112 F.R.D. 149 (D. Mass. 1986).

[23] *See also Upjohn Co. v. United States*, 449 U.S. 383, 401-02 (1981) (notes and memoranda from internal investigation were protected work product); *In re Grand Jury Subpoena*, 599 F.2d 504, 511-12 (2d Cir. 1979)

Significantly, in the U.S., if material protected under the work-product doctrine is disclosed to a party outside the attorney-client relationship, with rare exceptions, its confidentiality is lost as against the rest of the world[24]. Even involuntary or compelled disclosure can waive confidentiality under the work-product doctrine[25]. A party cannot invoke work-product protection once material otherwise deemed protected is disclosed. Thus, were an English court to deem material not covered by litigation privilege in the U.K., that same material would likely not remain confidential under the work-product doctrine in the U.S., even though the requirements of the work-product doctrine would have otherwise been met.

IV. The Practical Consequences of the High Court's Interpretation of the Litigation Privilege Are Vast and Grave Given the Extensive and Growing Number of U.K./U.S. Cross-Border Legal Proceedings.

The shift in the law brought about by the High Court's decision will unquestionably have a substantial and negative effect on U.K./U.S. cross-border proceedings and investigations. Lawyers and their clients will be prejudiced by an inability to provide or receive proper, well-developed advice without the risk that what went into forming that advice – indeed, even the advice itself – may be discovered by an opponent. Thus, the fundamental purpose of privilege will be undermined.

The realities of modern commerce have rendered national borders less important and separate legal jurisdictions less distinct. Frequently, transactions – particularly those involving the financial and insurance markets – have a trans-Atlantic component. Consequently, recent years have seen an increasing number of cross-border investigations. Of late, the SFO has frequently

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(similar); *Lafate v. Vanguard Grp., Inc.*, No. 13-cv-5555, 2014 WL 5023406, at *6 (E.D. Pa. Oct. 7, 2014) "Generally, documents created as part of an internal investigation, such as the one at issue in this case, are considered to be made in anticipation of litigation for the purposes of the work product doctrine".

[24] See *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179, 1193 (3d Cir. 2006) (voluntary disclosure to government agency can waive work-product protections as to all); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302, 306-07 (6th Cir. 2002) (same); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 234 (2d Cir. 1993) (same).

[25] *United States v. Ary*, 518 F.3d 775, 783-84 (10th Cir. 2008).

partnered with the U.S. Department of Justice to conduct parallel investigations involving conduct on both sides of the Atlantic – formally agreeing to share the "facts of the case" and "key evidence", among other forms of cooperation[26].

The scope and breadth of the cooperation between law enforcement authorities in the U.K. and the U.S. is well documented. At least 24 times in the past four years, the Department of Justice has thanked the SFO for its cooperation and assistance when announcing resolutions of a criminal case or investigation in the U.S. (for example LIBOR and Rolls Royce). Additional assistance has been afforded to the U.S. Securities and Exchange Commission by the FCA and the City of London Police. Assistance afforded by the sharing of "key evidence" can have a consequent impact that extends to parallel civil litigation that often accompanies a criminal or regulatory investigation.

"Key evidence" of course, could include documents and information that were treated as non-privileged following the High Court's decision in this case, and obtained by the SFO. The SFO then could make the documents available to U.S. authorities under the cooperation agreement, notwithstanding that the documents would otherwise be protected under the American work-product doctrine. We respectfully submit that this is an unintended consequence of the judgment in this case but, nonetheless, an unintended consequence with far-reaching and harmful effects.

As a consequence of the first instance decision, a lawyer advising a client in a U.S. proceeding or investigation that may have a U.K. aspect to it, must consider whether providing the most thoughtful analysis and forthright advice might ultimately work to the client's detriment. This will have a negative impact on the robust adversarial system that is central to the administration of justice in both the U.K. and the U.S.

[26] See *Agreement for Handling Criminal Cases with Concurrent Jurisdiction Between the United Kingdom and the United States of America*, at para 10, https://publications.parliament.uk/pa/ld200607/ldlwa/70125ws1.pdf.

CONCLUSION

Litigation privilege provides an important, time-honoured protection that allows for proper legal analysis and advice, and thus, promotes the preservation of due process and liberty. The High Court's decision jeopardises those fundamental elements, not only in the U.K., but in the U.S. as well.