

**ENGLISH HIGH COURT RULES DOCUMENTS NOT SUBJECT TO
LEGAL PROFESSIONAL PRIVILEGE IN INTERNATIONAL MINING
CORRUPTION INVESTIGATION**

Serious Fraud Office v Eurasian Natural Resources Corporation [2017]
EWHC 1017 (QB)

Introduction

In *Serious Fraud Office v Eurasian Natural Resources Corporation [2017]* EWHC 1017 (QB), Mrs Justice Andrews DBE ruled, in a decision handed down 8 May 2017, that certain documents generated by the Eurasian Natural Resources Corporation during internal investigations, undertaken between 2011 and 2013 by solicitors and accountants, into claims of corruption relating to mines it had acquired in Africa and Kazakhstan were not subject to legal professional privilege.

Background

This case related to an ongoing criminal investigation by the SFO, which began in late April 2013, relating to the activities of ENRC, its subsidiaries, officers and employees. The investigation followed a period of dialogue between ENRC and the SFO which the SFO claimed (although this was disputed by ENRC) was engagement by ENRC in a self-reporting process in accordance with the SFO's 2009 Self-Reporting Guidelines (now replaced by the 2012 Guidelines). The Guidelines dealt with overseas corruption and outlined a process whereby, in return for full and frank cooperation by a corporate body which discovers a problem concerning overseas corruption and reports it to the SFO, the SFO might agree to a civil settlement in lieu of prosecution or agree to accept a plea of guilty to a lesser charge.

As part of the investigation, the SFO exercised its powers pursuant to s.2(3) of the Criminal Justice Act 1987 and issued notices against various entities and individuals, including ENRC, to compel the production of documents.

ENRC sought to resist disclosure of certain documents (the “Disputed Documents”) generated during investigations undertaken between 2011 and 2013 by solicitors and forensic accountants into the activities of ENRC and its subsidiaries, on the basis that the Disputed Documents were subject to legal professional privilege (relying on claims to both litigation privilege and/or legal advice privilege. The Disputed Documents fell into four categories:

- Category 1: notes of interviews taken by the law firm Dechert in the course of its investigation.
- Category 2: materials generated as part of ‘books and records’ reviews carried out by a forensics consultancy firm with a focus on identifying controls and systems weaknesses and potential improvements.
- Category 3: documents indicating the factual evidence presented by a partner at Dechert, who had conduct of the investigations at all material times, to ENRC’s Board on 14 and 15 March 2013, regarding advice as to ‘potential allegations of criminality and the steps that the company should take in respect of those potential allegations.’
- Category 4: books and records reports, and included emails written by a qualified Swiss lawyer who was employed by ENRC at that time as its Head of Mergers and Acquisitions; he had previously been its General Counsel.

The SFO sought a declaration that the Disputed Documents were not subject to legal professional privilege.

Judgment

Mrs Justice Andrews DBE granted the SFO the declaration it sought in respect of all classes of Disputed Documents, except Category 3.

Applicable principles

Legal professional privilege is divided into two categories:

- Litigation privilege: Communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation attract litigation privilege when, at the time of the communication in question, the following conditions are satisfied: (1) Litigation is in progress or reasonably in contemplation; (2) The communications are made with the sole or dominant purpose of conducting that anticipated litigation. (3) The litigation must be adversarial, not investigative or inquisitorial.

- Legal advice privilege attaches to all communications passing between the client and its lawyers, acting in their professional capacity, in connection with the provision of legal advice, which "relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law". There was no need for litigation to be contemplated. In the corporate context, privilege comprises direct communication of information by an employee or officer of a company to give instructions to the lawyer or to seek his legal advice.

The evidential burden of establishing that a document or communication is privileged lies on the party claiming privilege, regardless of whether that party is the claimant or the defendant in the action.

Whether a document or communication is privileged is to be determined by the Court in the light of the evidence taken as a whole. The mere assertion of privilege, or statement of the purpose for which the document was created, is not in itself determinative.

Litigation Privilege

Mrs Justice Andrews ruled that none of the documents was protected by litigation privilege.

- As to the first and third categories of documents, Mrs Justice Andrews held that criminal proceedings cannot be reasonably contemplated unless the prospective defendant knows enough about what the investigation is likely to unearth, or has unearthed, to appreciate that it is realistic to expect a prosecutor to be satisfied that it has enough material to stand a good chance of securing a conviction. Mrs Justice Andrews held that there was no evidence that any official who might be identified as representing the mind and will of ENRC regarded the company's being prosecuted as anything other than a possibility.
- Furthermore, she held that none of the documents created in the course of the investigations was created for the dominant purpose of deployment in, or obtaining legal advice relating to the conduct of, anticipated criminal proceedings; rather, the documents were created to persuade the SFO to pursue civil settlement under the 2009 Guidelines; they were created for the purpose of avoidance of adversarial litigation and were intended to be shared with the SFO. In other words, the relationship between ENRC and

SFO was collaborative, rather than adversarial, at the time they were created.

- The other categories did not attract litigation privilege as they were created in the course of regulatory compliance.

Legal Advice Privilege

Mrs Justice Andrews ruled that only Category 3 documents were protected by legal advice privilege – these were plainly privileged, as they were communications from a lawyer in the character of legal advice.

- Category 1 documents were not protected by legal advice privilege, as there was no evidence that the persons interviewed were authorised to seek and receive legal advice nor were the communications to convey instructions; they were merely interview notes.
- Category 4 documents were not protected; the objective evidence established that the employee in question was engaged at the time of the communications not as a lawyer but as the Head of M&A and a "man of business," with the effect that legal advice privilege did not attach to communications of this nature, even if legal advice was being sought and was given in the exchange. Even if the employee, who was a qualified lawyer, felt that he was acting as a lawyer for most of the time that he was the Head of M&A, that was not enough for privilege to attach to the emails – at the time of the communications, his professional duty was not to act as a legal adviser to ENRC and if the sender of the communications had wanted privileged legal advice he should have sent it to General Counsel.
- No legal advice privilege was claimed in respect of the Category 2 documents – only litigation privilege.

Concluding Remarks

With the increased focus of the SFO on cooperation with companies under investigation, resulting in a number of Deferred Prosecution Agreements this year alone, this case should serve as a timely reminder to those already or potentially under investigation as to the limits to legal professional privilege in such circumstances.