SENIOR SOLICITOR FOUND TO HAVE LEAKED INFORMATION ABOUT A CLIENT TO MAXIMISE BILLABLE WORK FOR HIS FIRM

Eurasian Natural Resources Corporation Limited v (1) Dechert LLP; (2) David Neil Gerrard; Eurasian Natural Resources Corporation Limited v The Director of the Serious Fraud Office [2022] EWHC 1138 (Comm)

Introduction

By a judgment handed down on 16 May 2022, the Commercial Court handed down judgment in *Eurasian Natural Resources Corporation Limited v (1) Dechert LLP; (2) David Neil Gerrard; Eurasian Natural Resources Corporation Limited v The Director of the Serious Fraud Office* [2022] EWHC 1138 (Comm). The judgment upheld very serious allegations of deliberate breach of duty made against a solicitor who had been engaged by the claimant to handle an investigation of its business activities by the UK's Serious Fraud Office.

Background

Following a whistleblowing from one of its employees in Kazakhstan, the claimant international mining company retained the first defendant international law firm to handle the investigation into one of its Kazakh subsidiaries. The first defendant acted principally through the second defendant, who was one of its then partners.

On 9 August 2011, an article damaging to the claimant was published in *The Times*, which was clearly based on leaked documents (including privileged material). The following day, the Chief Investigator of the UK's Serious Fraud Office wrote to the claimant, confirming that no formal criminal investigation was underway, but that the SFO would like to meet to discuss the claimant's governance and compliance programmes, as well as the underlying allegations.

On the second defendant's advice, the claimant engaged with the SFO – substantially increasing the amount of work to be done by the first defendant, extending their remit to cover investigations into the claimant's activities in Africa as well.

Between October 2011 and 28 March 2013, there were 8 "open meetings" between the SFO, the claimant's representatives and the second defendant. Additionally, there were 30 "disputed contacts" between the SFO and the second defendant, without any of the claimant's representatives present.

Other damaging media articles about the claimant, also based on leaked confidential information, appeared in December 2011 and March 2013.

The claimant terminated the first defendant's retainer on 27 March 2013 – by which time the first defendant had provided the SFO with a report on the Kazakhstan investigation, while the Africa investigation was ongoing. The first defendant's total fees for its work were £13m exclusive of VAT.

On 25 April 2013, the SFO announced a formal criminal investigation into the claimant focusing on allegations of fraud, bribery and corruption in relation to both Kazakhstan and Africa.

In June 2013, a brown envelope containing confidential and privileged information concerning the claimant was sent anonymously to the SFO.

The claimant commenced proceedings against the first and second defendants, and then separate proceedings against the SFO.

As against the first and second defendant, the claimant's allegations were that they acted deliberately (or at least recklessly), without the claimant's authority and against the claimant's interests, in particular in relation to the 30 disputed contacts. The claimant alleged the second defendant had instigated one or more of the leaks that resulted in the damaging media articles, had had one or more unauthorised conversations with the SFO in which forthcoming media articles were discussed, and that he was the sender of the brown envelope to the SFO in June 2013.

As a result of that conduct, it was claimed, the fees for the work on the investigations were substantially inflated by around £11 million. It was alleged that the second defendant was motivated by a desire to secure greater fee revenue and to ingratiate himself with the SFO.

As against the SFO, the claimant alleged that its representatives knew or were reckless as to the fact that the second defendant was acting without authority and against the interests of his client. In particular it was alleged that the SFO induced breach of contract by the second defendant and/or committed the tort of misfeasance in public office when SFO officers knowingly took information from the second defendant about the August 2011 article and tipped off the second defendant in advance about the SFO's letter dated 10 August 2011.

Judgment

The Commercial Court (Waksman J) gave judgment in favour of the claimant.

The second defendant was found to have instigated all three media leaks, had engaged with the SFO without authority, and had alerted the SFO to the August 2011 article, after which the SFO tipped him off about the forthcoming letter from the SFO dated 10 August 2011.

The second defendant was found to have acted in reckless breach of duty in respect of many of the disputed contacts, and to have been negligent and reckless in several different ways, including by failing to record his own advice in writing, giving incorrect advice regarding the claimant's potential criminal liability, unnecessarily expanding the investigation, failing to protect the claimant in relation to legal privilege, and by sending the brown envelope of confidential material to the SFO in June 2013.

Waksman J also held that the SFO had acted in serious breach of its own duties in relation to many of the disputed contacts, including by taking information from the second defendant which he was plainly not authorised to give and in circumstances where it was clear he was acting against the interests of his client. The SFO had engaged in "*bad faith opportunism*" in relation to the relevant information that was wrongly communicated to it by the second defendant. Waksman J held that the claimant had established that the SFO induced the second defendant to commit a breach of contract. However, issues of causation and loss were directed to be dealt with on a future occasion.

A series of other allegations against the SFO were dismissed by Waksman J, including the allegations that it had deliberately destroyed a notebook belonging to its Chief Investigator covering the July-December 2011 period.

Waksman J rejected the allegation of more than *de minimis* contributory fault on the part of the claimant, held that a limitation of liability clause in the first defendant's retainer contract did not apply, *inter alia*, in circumstances where there was reckless disregard by the second defendant of his obligations to the claimant, and further held that none of the claims were time-barred.

Concluding remarks

The judgment contains very serious findings of "*almost unimaginable*" misconduct on the part of a senior UK solicitor with substantial experience of acting for parties in their dealings with the Serious Fraud Office, and is a sharp reminder of the importance for lawyers of maintaining the highest standards of professional ethics in their practice at all times.

The judgment is likely to have serious implications for the already beleaguered SFO, whose working practices are currently being subjected to significant scrutiny in the form of the independent review being led by the former Director of Public Prosecutions (Sir David Calvert-Smith), appointed by the Attorney General.