

## Hand over documents related to internal investigations, says SFO

The High Court<sup>1</sup> has held that documents prepared during an internal investigation are not protected by legal professional privilege (“LPP”) and as such should be handed over to the Serious Fraud Office (“SFO”).

London-headquartered mining company Eurasian Natural Resources Corporation Ltd (“ENRC”) instructed lawyers and forensic accountants to conduct investigations between 2011 and 2013 relating to allegations of fraud, bribery and corruption in its business in Kazakhstan and Africa. ENRC released to the SFO its final report on the Kazakhstan investigation but not the underlying interviews and work product. A lengthy period of dialogue between ENRC and the SFO, which commenced in August 2011, culminated in the SFO starting an ongoing criminal investigation against ENRC in late April 2013 that may ultimately lead to prosecutions.

As part of investigations into these allegations, the SFO exercised its powers under s2(3) of the Criminal Justice Act 1987 (“CJA”) to compel production of undisclosed documents from ENRC. ENRC resisted disclosure of certain documents on the grounds that they were covered by LPP. The SFO disagreed and made an application to the High Court.

In a judgment delivered on 8 May 2017, Mrs Justice Andrews held that three of the four categories of documents presented before the court were not subject to LPP. These included interview notes and materials generated by forensic accountants. A fourth category, consisting of information presented to ENRC’s Nomination and Corporate Governance Committee and/or ENRC Board in March 2013, was found to be privileged.

### LPP

LPP is a fundamental human right guaranteed by the common law. Once a document is subject to privilege, the privilege of a client is absolute and cannot be overridden by public policy, although it can be waived by a client. The party claiming the privilege must establish that the document or communication is privileged with reference to specific contemporaneous material (which may include the document itself) to show how the document was created. ENRC faced problems in overcoming this evidential burden, not helped by the fact that individuals within ENRC responsible for directing the various investigations changed over time.

### Litigation privilege

LPP protects only confidential communications falling under two heads of privilege – Legal Advice Privilege or litigation privilege. Andrews J examined the SFO’s claim to see whether the contested documents were protected by either.

The purpose of litigation privilege is to enable someone to prepare for the conduct of reasonably anticipated litigation by protecting from disclosure documents prepared for that purpose. Litigation privilege can therefore cover communications between lawyers and/or clients and third parties. ENRC claimed that it had reasonable anticipation of criminal litigation throughout its engagement with the SFO. However, Andrews J held that advice given in connection with the conduct of actual or contemplated litigation only includes advice relating to the settlement of that litigation “once it is in train”.<sup>2</sup>

<sup>1</sup> In The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd [2017] EWHC 1017 (QB).

<sup>2</sup> Ibid, paragraph 60.

She rejected ENRC's submission that the documents were subject to litigation privilege because she held that these documents were created in order to obtain legal advice on how best to *avoid* contemplated litigation (even if that included seeking to settle the dispute before proceedings were issued). Andrews J said that "to decide what evidence you are planning to call if the case goes to court, and what tactics to employ, is something entirely different to equipping yourself with evidence that you hope may enable you (or your legal advisers) to persuade him not to commence proceedings against you in the first place".<sup>3</sup>

Following a whistleblower report in December 2010, ENRC had instructed a law firm to investigate the allegations and further corruption allegations that followed in 2011. Andrews J found that the law firm was conducting a "fact-finding investigation with a view to ENRC obtaining legal advice on what to do once the facts were known"<sup>4</sup> and therefore information provided to investigators by third parties was not subject to privilege. Andrews J found that ENRC was not at this stage concerned about litigation but was concerned at the prospect of a formal SFO *investigation*.

Rather than preparing for litigation, ENRC were instead taking actions to reduce the risk of external intervention and to show to the SFO that matters had been handled appropriately and the allegations taken seriously. These actions conversely made it harder for them to claim litigation privilege – they were taking the necessary steps to avoid proceedings against them.

ENRC considered but decided against self-reporting following the internal investigation, a fact relied on by Andrews J. "ENRC repeatedly promised that it would give full and frank disclosure of the results of its internal investigations to the SFO, but then changed its mind,"<sup>5</sup> Andrews J held. "[D]ocuments created with the specific purpose or intention of showing them to the potential adversary in litigation are not subject to litigation privilege".<sup>6</sup>

Following allegations in a national newspaper, the SFO wrote to ENRC, with a letter arriving on 11 August 2011, stating that the SFO was not carrying out an investigation into ENRC at this stage. Andrews J said that even at this point "objectively, criminal proceedings were not even a 'distinct possibility' let alone a real prospect", emphasising that "a fear of prosecution on a 'worst case scenario' is not good enough".<sup>7</sup>

Therefore, documents generated for internal investigations both before and after a company knows an investigation is underway cannot automatically be deemed privileged. Andrews J said that even if criminal proceedings were in reasonable contemplation, the documents generated were not created with the dominant purpose of being used in the conduct of litigation, drawing a distinction between an SFO investigation and "adversarial litigation". Andrews J held that "the reasonable contemplation of a criminal investigation does not necessarily equate to the reasonable contemplation of a prosecution".<sup>8</sup> This statement will cause concern for those under investigation, those that may be under investigation in the future and those that have already been under investigation or in dialogue with the SFO and regulators.

## Legal Advice Privilege

This attaches to all communications passing between the client and its lawyers acting in their professional capacity in connection with the provision of legal advice. There is no need for litigation to be contemplated for documents to be protected by this head of privilege. However, if the communication is between the lawyer and someone other than the client, it will only be subject to LPP if it satisfies the litigation privilege test. If the client is a corporation, the communication with the lawyer must be to or from a person authorised to seek and receive legal advice on behalf of the corporation. An ordinary employee of the corporation is not "the client" for these purposes.

In the context of ENRC, Andrews J found that there was no evidence that any of the persons interviewed were authorised to seek and receive legal advice on behalf of ENRC and the communications between those individuals and the law firm – in the form of an interview, "were not communications in the course of conveying instructions on behalf of the corporate client".<sup>9</sup> Accordingly, a note of such an interview does not attract Legal Advice Privilege even if prepared by a lawyer. Andrews J held that "a document ... does not acquire a privileged statement just because a lawyer has created it".<sup>10</sup> It must instead "betray the tenor of legal advice".<sup>11</sup>

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3 Ibid, paragraph 61.

4 Ibid, paragraph 104.

5 Ibid, paragraph 204.

6 Ibid, paragraph 170.

7 Ibid, paragraph 118.

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8 Ibid, paragraph 154.

9 Ibid, paragraph 177.

10 Ibid, paragraph 178.

11 Ibid, paragraph 95.

The only documents that Andrews J found to attract Legal Advice Privilege were five documents containing advice on the factual evidence presented to ENRC's Nomination and Corporate Governance Committee and/or ENRC Board in March 2013. The meeting notes, materials generated by forensic accountants and documents referred to in a letter sent by ENRC's legal advisers to the SFO were not deemed privileged.

Andrews J's judgment therefore affirms recent case law regarding Legal Advice Privilege, notably the RBS Rights Issue Litigation,<sup>12</sup> which also emphasised the narrow definition of who is considered the "client" for the purposes of Legal Advice Privilege.<sup>13</sup>

## Reaction to judgment

We have previously examined how both the SFO and FCA have expressed frustration at firms and companies under investigation that have resisted disclosing documents to them on grounds of LPP, an issue that has been taken up by the Law Society in its recent [Practice Note](#) on the subject, following consultation.<sup>14</sup> In a [letter](#), the Law Society has described this High Court decision as "deeply alarming as it appears to narrow the scope of LPP available to corporations facing criminal investigations".

## Practical steps

ENRC says it plans to appeal the decision but for those engaged in a dialogue with the SFO or a regulator, the ruling has far reaching implications.

Firstly, it is clear that contemporaneous evidence establishing the primary purpose for the creation of documents is necessary. With ENRC, this documentary evidence was lacking. However, this may have not altered the High Court's decision in that if documents are created as part of an internal investigation to assess a fact pattern or to avoid an investigation, litigation privilege cannot be claimed, no matter what the client's views were about the purpose of creating certain documents.

Furthermore, where an investigation is being conducted as a fact-finding mission, documents will not be subject to Legal Advice Privilege unless they form part of the instructions to or advice from lawyers. A written record of an interview (whether verbatim or not) will not be privileged.

In the past, lawyers have tried to conduct an internal investigation by ensuring that the only documents created are those that are subject to Legal Advice Privilege because they fall within that definition of lawyer-client communications. So for example, a note of an interview would not be privileged but a lawyer's note of advice which refers to the gist of an interview would. However, not only is the SFO unlikely to take account of the outcome of any internal inquiry conducted in this fashion, either in determining whether or not to commence its own investigation or in giving credit for cooperation, but the RBS Rights Issue Litigation<sup>15</sup> has also shown that such an approach will not be regarded by the SFO as privileged from production and that direction of travel has been reaffirmed in ENRC.

### ***Guy Wilkes***

Partner, London  
E: [gwilkes@mayerbrown.com](mailto:gwilkes@mayerbrown.com)  
T: +44 20 3130 3355

### ***Mark Compton***

Partner, London  
E: [mcompton@mayerbrown.com](mailto:mcompton@mayerbrown.com)  
T: +44 20 3130 3388

### ***Alistair Graham***

Partner, London  
E: [alistair.graham@mayerbrown.com](mailto:alistair.graham@mayerbrown.com)  
T: +44 20 3130 3800

### ***Chris Roberts***

Senior Associate, London  
E: [croberts@mayerbrown.com](mailto:croberts@mayerbrown.com)  
T: +44 20 3130 3543

### ***Lauren Smith***

Associate, London  
E: [lsmith@mayerbrown.com](mailto:lsmith@mayerbrown.com)  
T: +44 20 3130 3134

<sup>12</sup> [RBS Rights Issue Litigation](#) [2016] EWHC 3161 (Ch).

<sup>13</sup> As discussed in our December 2016 [alert](#).

<sup>14</sup> As detailed in our alerts, published [September 2016](#) and [February 2017](#).

<sup>15</sup> [RBS Rights Issue Litigation](#) [2016] EWHC 3161 (Ch).