

# Serious Fraud Office (SFO) v Eurasian Natural Resources Corp Ltd (ENRC) Judgment of the Court of Appeal 5 September 2018

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## A Case of “Order Being Restored”

Following the initial Judgment of Mrs Justice Andrews delivered in May 2017, the Court of Appeal has by a judgment delivered on Wednesday 5 September restored the historical and conventional position as to when and in what circumstances a party can assert Legal Professional Privilege, in particular, Litigation Privilege, in relation to an investigation into circumstances that may culminate in criminal proceedings being taken by a regulator.

The case involved certain documents generated during investigations undertaken by solicitors and forensic accountants acting on behalf of ENRC. The investigations focused on fraud, bribery and corruption in Kazakhstan and another African country. The SFO requested disclosure of the documents, which was resisted by ENRC on the basis that the documents were protected from disclosure by Legal Professional Privilege. The SFO made an application for the documents to be disclosed. It, therefore, fell to the court to decide if the documents were protected by Legal Professional Privilege or not.

Despite acknowledging that Legal Professional Privilege is a fundamental human right guaranteed by the Common Law and a principle central to the administration of justice, many commentators believe that the original decision seriously undermined the application of Legal Professional Privilege to internal investigations conducted by organisations.

The Court of Appeal disagreed with the Judge on a number of significant points:

1. At the point that ENRC was conducting the investigations, was a criminal prosecution reasonably in prospect? The Judge had concluded that because the SFO had initiated an investigation, that of itself did not make a subsequent prosecution a “real likelihood” rather than a “mere possibility”. The Court of Appeal said that their analysis of the evidence demonstrated the reverse, pointing to:
  - a. The SFO Guidelines on Self-Reporting, which said, “no prosecutor can ever give an unconditional guarantee that there will not be a prosecution”
  - b. ENRC had considered the issue of losing privilege if it engaged in the voluntary disclosure regime envisaged by the Self-Reporting Guidelines
  - c. Legal advice received by ENRC had recorded on numerous occasions that there was a real and serious risk that a criminal prosecution would result
  - d. Whilst every regulatory intervention will not be regarded as a manifestation that there is a real and serious risk of a criminal prosecution, “when the SFO specifically makes clear to the Company the prospect of its criminal prosecution and legal advisors are engaged to deal with that situation, as in the present case, there is a clear ground for contending that criminal prosecution is in reasonable contemplation”
  - e. The general principle advocated by the Judge 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” was wrong
  - f. The Court of Appeal found that ENRC was right to say that it was in reasonable contemplation when it initiated its investigation, several months before it received the SFO’s letter initiating its investigation
2. Dominant purpose of documents in order to exert Litigation Privilege:
  - The Judge was strongly influenced by the fact that the documents had been produced with a view to disclosing them to the SFO in order to persuade the SFO not to prosecute; the Judge concluded that the dominant purpose was compliance and remediation designed to avert a prosecution as opposed to defending a prosecution, and hence they were not protected by Litigation Privilege
  - The Court of Appeal determined that the documents could have a “Dual” dominant purpose, the documents were brought into existence for the dominant purpose of “resisting or avoiding” contemplated proceedings
  - The Court of Appeal also found that despite repeated assurances by ENRC that voluntary disclosure would be made, it never was; the mechanism by which voluntary disclosure would be made in these circumstances would be for ENRC to waive privilege in the material, but it never actually did so; notably, the SFO never contended that waiver had taken place
3. Interviews undertaken by lawyers:
  - Part of the investigation, the dominant purpose of which was to resist or avoid prosecution, therefore, covered by litigation privilege
4. Books and records review:
  - Part of the investigation, the dominant purpose of which was to resist or avoid prosecution, therefore, covered by litigation privilege

The Court of Appeal considered Legal Advice Privilege in the context of the solicitor/client relationship:

The Court of Appeal decided not to upset the principle that “Communications between an employee of a corporation and the corporation’s lawyers could not attract Legal Advice privilege unless the employee was tasked with seeking and receiving such advice on behalf of the client” but acknowledged the practical difficulties that posed with larger companies. The Court of Appeal said that whilst they would have departed from the principle it is a matter to be considered by the Supreme Court.

## Analysis

The dominant purpose test, in the context of showing a real likelihood of a prosecution, has been put back to the pre-May 2017 position, making Litigation Privilege easier to assert provided that the dominant purpose can be evidenced, if challenged. Remembering that the evidential burden of establishing that a document is privileged is on the party claiming the privilege.

The instruction of lawyers at an early stage is an indicator of the rationale that a prosecution is a real likelihood.

Instructions from a corporate client to the lawyer should come from someone who has authority from the company to give instructions and receive the resultant advice.

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