

# ***SFO v ENRC [2018] EWCA Civ 2006***

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## **THE FACTS**

In 2011, following a whistle-blower report, Eurasian Natural Resources Corporation Limited ("ENRC") started an internal investigation into alleged corruption and fraud in its Kazakh and African operations.

The SFO contacted ENRC, highlighted the SFO's self-reporting guidelines and suggested a meeting. There were various communications between the ENRC and the SFO, including a series of meetings in which ENRC updated the SFO on the progress of its internal investigation.

The SFO opened a criminal investigation into ENRC in April 2013 requesting disclosure of various documents created by ENRC's lawyers and accountants during their internal investigation. These documents were categorised as follows:

1. Notes taken by the solicitors (instructed by ENRC) of interviews with various individuals (including employees and former employees of ENRC, its subsidiaries, suppliers and other third parties);
2. Materials generated by forensic accountants as part of "books and records" reviews carried out between 2011-2013 to identify controls and systems weaknesses and potential improvements;
3. Documents indicating or containing factual evidence presented by ENRC's solicitors to its board and sub-committees in 2013; and;
4. Documents referred to in a letter sent to the FRC (Financial Reporting Council) by ENRC's solicitors.

ENRC refused to comply, arguing that the documents were covered by litigation privilege or legal advice privilege. The SFO sought a declaration from the High Court that the documents were not privileged.

## **THE HIGH COURT JUDGEMENT**

On 8 May 2017, Andrews J rejected ENRC's claims of privilege and found the following:

- The documents were not subject to litigation privilege because no criminal prosecution was in contemplation when they were created. The fact that an SFO investigation was imminent was not sufficient, as the investigation itself was not adversarial litigation, unlike a prosecution.

- The dominant purpose for creating the documents was not litigation, but to avoid litigation and to report to the SFO. Documents created for the purpose of avoiding litigation are not privileged.
- Applying *Three Rivers (No 5) [2003] EWHC 2565 (Comm)*, legal advice privilege extends only to communications between a lawyer and a client, and the "client" in a corporate entity is limited to individuals authorised to obtain legal advice on the client's behalf.
- Legal advice privilege did not extend to employees' communications with the defendant's lawyers (where those employees were outside the narrow category of the "client"), nor to notes of interviews with employees.

Permission to appeal the High Court Judgment was granted by the Court of Appeal on 2 October 2017 in relation to categories 1, 2 and 4.

## THE ISSUES TO BE DECIDED:

The court of appeal judgment broke down the arguments into 9 separate issues:

### Litigation Privilege:

#### ➤ Issue 1:

**Was the judge right to determine that, at no stage before all the Documents had been created, criminal legal proceedings against ENRC or its subsidiaries or their employees were reasonably in contemplation?**

It was held that Andrews J had been wrong to conclude that after 10 August 2011 (a letter was written by the SFO stating no criminal investigation had been started but that ENRC should look at the guidelines carefully) a criminal prosecution was not a reasonable prospect [para 91]. "The whole subtext of the relationship between ENRC and the SFO was the possibility, if not the likelihood, of prosecution if the self-reporting process did not result in a civil settlement" [para 93].

#### ➤ Issue 2:

**Was the judge right to determine that none of the Documents was brought into existence for the dominant purpose of resisting contemplated criminal proceedings against ENRC or its subsidiaries or their employees?**

The court found that she was not. It was held that in both the civil and criminal context legal advice given so as to head off, avoid or even settle reasonably contemplated proceedings is as much protected by litigation privilege as advice given for the purpose of resisting or defending such contemplated proceedings [para 102].

➤ **Issue 3:**

**In the circumstances, which if any of the Category 1, 2 or 4 documents are protected by litigation privilege?**

All of the documents in categories 1, 2 and 4 (except for 2 emails for which litigation privilege was not claimed) were held to be protected. The court stated that all of the documents were part of a fact-finding process at a time when criminal prosecution was in reasonable contemplation, and were also undertaken for the dominant purpose of resisting or avoiding that prosecution [para 120-122].

**Legal advice privilege:**

The court held that their conclusions for issues 1 to 3 made the remaining questions less important. However, they did go on to make the following comments in relation to legal advice privilege:

➤ **Issue 4:**

**What did *Three Rivers (No. 5) [2003] EWHC 2565 (Comm)* actually decide?**

The court stated that *Three Rivers (No. 5)* had decided communications between an employee of a corporation and the corporation's lawyers could not attract legal advice privilege unless that employee was tasked with seeking and receiving such advice on behalf of the client [para 123-124].

The court held that if it had been open to them to depart from *Three Rivers (No.5)* they would have been in favour of doing so. It was said that the English law is out of step with the international common law on the issue [para 129]. However, they felt that only Parliament or the Supreme Court should decide the matter [para 130].

➤ **Issue 5:**

**Does a claim for legal advice privilege require the proponent to show that the information was obtained for the dominant purpose of obtaining legal advice?**

The court stated that it was not appropriate to reach a final conclusion on this submission given their judgment so far. However, they said it was hard to see why an additional component was needed when the privilege can, by definition, only be claimed when legal advice is being sought or given [para 132].

➤ **Issue 6:**

**Was the judge right to conclude that none of the Documents was protected by legal advice privilege on the basis:**

- a) **that the information they contained was not communicated to ENRC's solicitor by anyone authorised to give or receive legal advice on behalf of ENRC or its subsidiaries?**

If only legal advice privilege had been claimed then the judge would have been right to follow *Three Rivers (No.5)* and decide category 1 documents were not protected by legal advice privilege. This

also applies to the 2 emails in category 4. The court made it clear they would have reached a different conclusion were the court not bound by *Three Rivers (No.5)* [paras 133-143].

- b) that the information they contained was not communicated to ENRC's solicitor for the purpose of obtaining legal advice, but rather for the purposes of that solicitor's investigation of the facts?**

The court held it was clear that the dominant purpose in the preparation of the interview notes and documents review was to resist or avoid contemplated criminal proceedings. [para 136].

- c) that there was overwhelming evidence that ENRC had always intended and/or agreed to share the information they contained with the SFO as part of a self-reporting process?**

The court did not feel that the documentation provided showed that ENRC intended or agreed to share the information with the SFO [dealt with at para 112]. This was held not to be a valid reason for depriving ENRC of legal advice privilege [para 137].

➤ **Issue 7:**

**Are the answers to issue 6 above different if the employees in question are ex-employees at the time that the information is imparted?**

In light of the conclusions already reached, it was said that this issue did not really arise. This was an issue to be considered when the Supreme Court hears a challenge in relation to *Three Rivers (No.5)* [para 140].

➤ **Issue 8:**

**Was the judge right to hold that lawyers' working papers are only protected by legal advice privilege if they would betray the tenor of the legal advice?**

As it was held the interview notes were protected by litigation privilege the court found it was not necessary to resolve this question. "It seems to us that it would be better if it were considered in the context of the Supreme Court's future consideration of legal advice privilege" [para 142].

➤ **Issue 9:**

**If not, was the judge right to deny any or all of the Documents the benefit of legal advice privilege as lawyers' working papers?**

The court found that it was not necessary to answer this question for the same reasons as issue 8 [para 143].