

# High Court supports SFO bid to obtain documents claimed as privileged

May 23, 2017

In a landmark ruling on 8 May 2017, the High Court ordered that the Eurasian Natural Resources Corporation (“ENRC”) should hand over to the SFO documents prepared during an internal investigation, despite the fact that the documents had been generated by lawyers (including external solicitors).

In 2011, ENRC began an internal investigation into allegations of corruption, bribery and fraud within its operations, remaining in regular contact with the SFO whilst doing so. In 2013, the SFO launched its own criminal investigation into the company.

As part of their investigation, the SFO compelled ENRC to hand over certain documents under a Section 2 Notice. ENRC refused on the basis that the documents were protected by legal professional privilege (“LPP”).

Mrs Justice Andrews largely rejected ENRC’s claims to privilege. She held that there was no legal advice privilege because the documents in question, which included interview notes, did not contain legal advice. With regard to litigation privilege, Andrews J held that this could not protect the documents as they were not prepared with the sole or dominant purpose of conducting litigation. She made a distinction between “the reasonable contemplation of a criminal investigation” and “the reasonable contemplation of a prosecution”.

Part of her reasoning was that ENRC had, when conducting its investigation, intended to report to the SFO: documents produced with the intention of later disclosing them to the SFO could not attract privilege. In addition, she cited the fact that at the time ENRC was conducting its investigation, it did not know what had occurred and whether litigation or prosecution was in reasonable contemplation.

The Judgment has been met with concern by many commentators. The Law Society of England and Wales has branded it as “harmful” and an erosion of the fundamental right of LPP. Others see it as a logical interpretation of the rules of privilege.

It remains to be seen whether companies will be dissuaded from self-reporting and engaging with the SFO, as by doing so they may find themselves dealing with a ‘contemplated investigation’, rather than a ‘contemplated prosecution’. In the meantime, companies should be aware that all documents produced during internal investigations could potentially be disclosable to the SFO if they do not attract LLP.

ENRC has indicated that it intends to appeal the decision.

[SFO v Eurasian Natural Resources Corporation Ltd EWHC 1017 \(QB\)](#)

## Contributors

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