

When Are Redactions Reasonable?

November 10, 2023

The long-running investigation by the Serious Fraud Office (SFO) into Eurasian Natural Resources Corporation (ENRC) has provided several points of instructive guidance during its lifetime – and that trend looks set to continue. The most recent matter before the High Court examined certain redactions the SFO made to a report it disclosed in the course of proceedings which were challenged by ENRC.

By way of background, ENRC alleges that employees of the SFO improperly leaked sensitive information acquired in the course of the SFO's investigation to journalists and other third parties. These allegations were internally investigated by the SFO. Its findings were contained in a document termed the Byrne Report, which concluded certain employees suspected of leaking information about ENRC – and other targets of SFO investigations – had a 'case to answer'. The Byrne Report was disclosed by the SFO during proceedings with redactions made to it on the basis of three distinct grounds:

- Public interest immunity (PII), as certified by the director of the SFO.
- Privilege.
- Irrelevance and confidentiality.

ENRC made an application to challenge the redactions made by the SFO, and each category of redaction was considered in turn.

Public interest immunity

The High Court affirmed that the test for whether PII can legitimately be asserted in respect of a document remains the three-stage test set out in [R v. Chief Constable of West Midlands Police, ex parte Wiley](#):

1. Is the information in question relevant and material to an issue in the proceedings?
2. If it is relevant and material, is there a real risk that disclosure of the information in question will cause 'substantial harm' to a public interest?
3. Even where a real risk of substantial harm can legitimately be said to arise, is the public interest in withholding inspection nonetheless outweighed by the public interest in the fair administration of justice?

The SFO argued that the PII redactions concerned the identities of human sources that provided information to it for the purposes of compiling the Byrne Report. The High Court was satisfied that there was a public interest in protecting the identities of these confidential sources, and that the potential harm to the public interest (primarily, of dissuading any other individuals from coming forward) outweighed the interest in the fair administration of justice. The High Court therefore dismissed ENRC's application on this ground.

Privilege

There were two substantive applications regarding the redactions made on the basis of privilege. ENRC argued that either the High Court should inspect the redacted material to determine whether privilege had been properly claimed, or the SFO should be ordered to provide an additional explanation for the basis on which it asserted the privilege claimed above the explanation it had already provided, in accordance with Practice Direction 57A.

The High Court considered each limb in turn:

1. Inspection

It was common ground that the High Court had the power to inspect documents before it, including, but not limited to, inspecting allegedly privileged documents to determine if privilege had been rightly claimed, but it was held that such a power must be exercised cautiously. The SFO relied on [National Westminster Bank PLC v. Rabobank Nederland](#) and [Atos](#)

[v. Avis](#) to argue that the court should not inspect documents in the face of a claim to privilege unless there is credible evidence that the lawyers responsible for the redactions have misunderstood their duty, that their assessment is not to be trusted, or where there is no reasonably practical alternative.

The High Court held that although the Byrne Report is a single document and the number of challenged redactions on the grounds of privilege were limited, this was not itself sufficient to conclude that inspection of the document was the only practical route forward. The High Court also was of the view that it would not have the necessary factual context to reach an informed decision on privilege in any event, even should inspection be granted, and that meant it was not desirable for the High Court to make such an order. Finally, the High Court also highlighted that it must be particularly cautious about looking at documents out of context at the interlocutory stage. Therefore, the High Court dismissed ENRC's application for inspection.

2. Additional explanation

It was common ground that in certain circumstances a party claiming privilege may be required to provide a relatively detailed explanation of the basis on which privilege has been claimed (particularly when the grounds for claiming that privilege are not self-evident). However, in this case, the High Court held that an order requiring further detail be added to the explanation already provided by the SFO would 'in all likelihood require the SFO in effect to disclose the substance of the communication' and defeat its very claim to privilege. The High Court dismissed ENRC's application for an additional explanation, as it considered that it went beyond what was required of the SFO by the authorities and the relevant Practice Direction.

Irrelevance and confidentiality

It was common ground that in order to redact on this basis the information must be **both** irrelevant and confidential. ENRC argued that nothing in the Byrne Report should be considered irrelevant.

The SFO sought to present what it considered a 'principled dividing line' between preserving the confidentiality of its internal operations while disclosing information relevant to the list of issues agreed between the parties. The High Court considered that this was too narrow of an approach, and that information must be considered relevant – and therefore be disclosed – if it relates to any point at issue between the parties, whether or not it has been included on the list of issues.

For the reasons discussed above, the High Court remained of the view that inspection was a poor method to consider which – if any – of the redactions should be unmade. Instead, the High Court directed the SFO to undertake a further review of the redactions made on the basis of irrelevance and confidentiality in light of its judgment.

Takeaways

The judgment in this matter is a helpful case study on the law surrounding the use of redactions in disclosed material. While PII will arise in relatively limited contexts, primarily when dealing with regulatory authorities, parties engaged in a redaction exercise would be well served to consider the guidance given in this case and be prepared to defend any redactions made in accordance with it.

[Eurasian Natural Resources Corporation Limited v. The Director of the Serious Fraud Office and Others](#) EWHC 2488.

1 AC 274.

EWHC 2332 (Comm) at .

EWHC 323 (TCC) at .

ENRC v. Dechert LLP, Gerrard and the Director of the SFO EWHC 1002.

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