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PRIVILEGES

Three Perkins Coie attorneys examine a recent decision by a U.K. court rejecting privilege claims by a multinational mining conglomerate under criminal investigation by the U.K. Serious Fraud Office. The authors warn that companies must remain vigilant and take proper steps during internal investigations to preserve privilege protections while also balancing cooperation with enforcement agencies.

U.K. Criminal Prosecutors Obtain Disclosure of Internal Investigation Documents, Prompting Privilege Concerns

BY GINA LAMONICA, COURTNEY ROLDAN, AND
CHELSEA CURFMAN

In a controversial ruling, London's High Court has held that interview notes and other documents created by outside legal counsel and forensic accountants as part of an internal investigation into foreign bribery allegations are not protected by the legal professional privilege. While the appeals process is already underway, the May 8th decision by the Honourable Mrs Justice Andrews is a noteworthy victory for the U.K.'s Serious Fraud Office (SFO), an agency akin to the U.S. Department of Justice (DOJ).

Eurasian Natural Resources Corporation (ENRC), the U.K. division of a multinational mining conglomerate operating in the Middle East and Africa, is the subject of an ongoing SFO criminal investigation. ENRC was allegedly first made aware of possible criminal problems back in December of 2010, when it received a whistleblower complaint alleging bribery and corruption in its

Kazakhstan subsidiary. At times, following the SFO's involvement, ENRC appears to have been in a cooperation posture with the enforcement agency; but earlier in 2017, the SFO filed a petition seeking to force ENRC to produce confidential internal investigation documents the company claimed were privileged. The London High Court agreed with the SFO, ruling that almost all of the documents at issue were not privileged and should be disclosed to the SFO.

Background

The SFO's petition sought four categories of documents on the basis they were not subject to any type of privilege protections under U.K. law:

(1) ENRC's outside counsel's notes of interviews with employees, former employees, and other third parties;

- (2) Forensic accountants' reports and analyses;
- (3) Slides and investigation-related materials presented to ENRC's board; and

(4) Email exchanges between an ENRC senior executive and an in-house mergers and acquisitions department attorney.

ENRC claimed the U.K.'s "litigation privilege" attached to all four categories of documents. Alternatively, ENRC asserted that the U.K.'s "legal advice privilege" also attached to each of the categories, with the exception of the forensic accountant's books-and-records reports. Ultimately, the London High Court ruled that only one category of documents—outside counsel's communications with the ENRC board of directors—was protected by the legal professional privilege. The court ordered that the rest of the documents must be turned over to the SFO, and ENRC has already taken steps to appeal the decision.

Legal Professional Privilege

Under U.K. law, two types of privilege—the "litigation privilege" and the "legal advice privilege"—make up the legal professional privilege. The litigation privilege protects documents prepared for civil disputes and criminal prosecutions, or where such actions are "reasonably contemplated." As a previous U.K. court ruled in *Three Rivers (No. 6)*, for the litigation privilege to apply, such litigation cannot merely be investigative or inquisitorial. For instance, documents created to provide legal advice on how to avoid litigation cannot be protected by the litigation privilege.

On the other hand, the U.K.'s legal advice privilege attaches to all confidential communications between attorneys and their clients (or their agents) for the purpose of giving or obtaining legal advice, even at a stage when litigation is not in contemplation. However, legal advice privilege cannot attach to communications between the lawyer and a third party, or the client and a third party. This differs most significantly from the litigation privilege because, even if the documents do not expressly request legal advice, the material can be privileged if it is part of the continuing attorney-client relationship.

ENRC High Court Judgment

The London High Court ruled that virtually all documents at issue in the case were not privileged, ordering troves of documents created by ENRC's outside counsel and forensic accountants during the internal investigation to be turned over to the SFO. In reaching this decision, the High Court discussed at length whether the various categories of documents could qualify for protection under either the litigation or advice privilege.

First, the court found that the litigation privilege could not apply because prosecution was not "reasonably contemplated" by ENRC at the time the documents were created. Mrs Justice Andrews cited the fact that certain documents were created before ENRC was even under investigation, and other documents were created while ENRC was cooperating with the SFO. In the words of Mrs Justice Andrews, a "fear of prosecution on a 'worst case scenario' is not good enough" to invoke the litigation privilege.

In addressing legal advice privilege, Mrs Justice Andrews found the first category, attorney interview notes, could not be protected because it is "wholly artificial to treat the employees as 'instructing' the [attorney] on the client's behalf. . .when they are plainly not standing in the shoes of the client for the purpose of obtaining the legal advice." Thus, the court found that interviews with various individuals did not constitute communications with the "client"—invoking a very narrow interpretation of that term as only applying to individuals who are expressly authorized to obtain legal advice on a company's behalf. Likewise, the court found that communications between ENRC's executive and in-house merger and acquisitions lawyer could not be protected because the lawyer was acting in his role as a businessman, and not as a legal advisor. In fact, the only category of documents that the court held were protected under the legal advice privilege were the slides and materials presented to ENRC's board at its request for legal advice. Mrs Justice Andrews found that the slides were prepared by outside counsel, with the sole purpose to provide legal advice to ENRC, even though the slides contained some factual information. Because the slides were "part and parcel of the confidential solicitor-client communication," legal advice privilege protected the material.

Looking Ahead

ENRC has indicated that it will seek permission to appeal the decision, after Mrs Justice Andrews declined the company's initial request to do so.

Although the ENRC decision raises concerns for multinationals, the SFO has long maintained a strong stance against what it considers to be "spurious" claims of legal privilege. In the past, SFO Director David Green has criticized privilege claims that "amount to a strategy of deliberate obstruction," and indicated that the SFO will scrutinize assertions of privilege over materials created during an internal investigation. Moreover, in the civil litigation context, U.K. courts have recently

Gina LaMonica is a partner with Perkins Coie LLP in Chicago in the firm's White Collar & Investigations practice group. She has extensive experience representing companies and individuals in a wide range of white collar criminal matters, as well as complex securities and civil litigation. She can be reached at RLaMonica@perkinscoie.com.

Courtney Roldan, an associate in Perkins Coie's in Chicago in the firm's White Collar & Investigations practice group, has experience in a range of domestic and international commercial litigation matters. She can be reached at CRoldan@perkinscoie.com.

Chelsea Curfman, counsel at Perkins Coie in Denver in the firm's White Collar & Investigations practice group, conducts internal investigations for corporate clients facing issues involving bribery, corruption, accounting and securities fraud, violations of company policy, or other misconduct. She can be reached at CCurfman@perkinscoie.com.

issued other decisions rejecting claims of privilege over outside counsel's employee interview notes and witness statements.

In contrast to these developments in the U.K., the U.S. DOJ has generally not pushed for such narrow confines on attorney-client privilege, especially in the context of corporate internal investigations. Further, the DOJ's assessment of cooperation credit does not currently hinge on the disclosure of documents and communications protected by the privilege. Nonetheless, multinationals and their outside counsel should remain vigilant to take proper steps during internal investigations to maximize privilege protections, while at the same time structuring cooperation with government authorities in a productive manner—wherever such investigations are based.

To that end, the following are a few steps companies and their outside counsel can take that may help protect a privilege claim in the context of an internal investigation:

(1) Document concerns about future litigation/criminal prosecution. The ENRC decision made clear that when assessing a claim of litigation privilege, U.K. courts will look for contemporaneous evidence of discussion by the company regarding why it anticipates facing litigation and the factors that led it to seek legal advice. For example, such concerns might be documented in engagement letters with outside counsel and/or board meeting minutes.

(2) Ensure engagement letters clearly describe outside counsel's role. The ENRC decision also suggests that the litigation privilege would only protect documents prepared by counsel if counsel were engaged for the purpose of helping the client construct a legal defense against potential litigation. In her opinion, Mrs Justice Andrews drew a distinction between the kind of "fact-gathering" work counsel conducts during a "compliance review" (where the end goal is merely to advise the company on what to do based on the factual find-

ings), and work specifically aimed at assembling a legal defense (arguing that privilege would only apply in the latter case). Thus, how counsel's role is defined may affect whether privilege attaches.

(3) Consider language used in communications with government regulators/enforcers. In her opinion, Mrs Justice Andrews noted that ENRC consistently denied any criminal wrongdoing in contemporaneous communications with the SFO, and made use of this fact to bolster her conclusion that ENRC could not have reasonably contemplated criminal prosecution during the course of its internal investigation. To help preserve a claim of litigation privilege, companies should be careful not to downplay the risk of potential liability before the internal investigation is complete. Both internal communications and communications with government regulators/enforcers during the course of the investigation should reflect this.

(4) Clearly identify/define corporate "clients." For corporate clients, companies may have a stronger claim for legal advice privilege if they document, in an engagement letter, work plan, or other communication, which individuals (or groups of individuals, such as the audit committee) within the company are authorized to seek and receive legal advice on the company's behalf. While U.S. privilege protections may extend beyond this specifically-enumerated group, the ENRC opinion suggests that the U.K. legal advice privilege requires evidence of a specific designation of authority.

(5) Avoid *verbatim* accounts of employee interviews. The ENRC opinion stressed that an employee's factual statements do not become privileged merely because they are conveyed to, and recorded by, outside counsel. As a result, when preparing interview notes and memoranda, counsel should include their thoughts and mental impressions of the employee's statements (including the relevance thereof), and identify items for additional inquiry, all with a view toward providing legal advice to the client.