

Dispute Resolution
Case Law Update
Rosling King LLP



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The Background

Following a tip-off from a whistle-blower, Eurasian Natural Resources Corp. Ltd (ENRC), a mining company, commenced an internal investigation into “fraudulent practices allegedly committed in Kazakhstan and Africa”. The Serious Fraud Office (“SFO”) subsequently commenced criminal proceedings against ENRC in which it engaged its rights pursuant to section 2(3) of the Criminal Justice Act 1987 (the “Act”) whereby it issued notices demanding ENRC provide certain documents. The rights provided by the Act, however, do not extend to documents that would be protected by legal professional privilege.

ENRC claimed privilege over documents produced by its lawyers, Dechert LLP, who were instructed by ENRC to undertake the internal investigation, prior to the commencement of criminal proceedings. These documents included four types (i) interview notes with current and former employees, (ii) a review undertaken by forensic accountants, (iii) presentations made to the board and (iv) internal communications between managers. The SFO argued that these documents would not be protected by legal professional privilege and commenced civil proceedings.

At first instance, the Honourable Mrs Justice Andrews ruled that only the documents presented to the board would be protected by legal advice privilege. She held that the remaining documents were merely a fact finding expedition in which documents were created before the point in time in which litigation could reasonably have been contemplated and would not be protected by legal advice privilege. Furthermore, she found that an investigation did not constitute litigation and the documents, therefore, would not be protected by litigation privilege.

By undertaking an internal investigation, Andrews J believed that the prospect of potential litigation remained uncertain, or at an unknown point in the future, that was deemed to be too remote to protect documents under litigation privilege. She also applied a narrow interpretation of “client” as defined in the case of *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No. 5)* [2003] QB 1556 (“Three Rivers (No. 5)”).

ENRC appealed the decision to the Court of Appeal.

The Appeal

ENRC appealed on the basis that Andrews J was incorrect in ruling that no criminal prosecution had been contemplated and that “none of the documents were created with the sole or dominant purpose of defending anticipated criminal proceedings”. They also argued that Andrews J had misinterpreted the decision in *Three Rivers (No. 5)* with regards to the type of documents that could be protected by way of legal advice privilege. It was argued that it was incorrect to rule that legal advice privilege would only protect advice given to an employee who was specifically authorised by the client to seek legal advice and that it should also extend so as to cover information given by employees authorised by the client to provide the lawyer with information.

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A decision was reached quickly due to mounting pressure from the legal industry to the extent that the Law Society intervened. Christina Blacklaws, President of the Law Society, stated that the Law Society's intervention was to uphold the principles at stake saying that "the rule of law depends on all parties being able to seek confidential legal advice without fear of disclosure".

Decision

The Court of Appeal ruled that the remaining document types (namely interview notes with current and former employees, a review undertaken by forensic accountants and internal communications between managers) would also be protected by litigation privilege.

The Court of Appeal held that the content of the documents made it clear that if matters were not resolved then litigation was plausible and that this was substantiated by the fact that lawyers had been instructed to undertake the internal investigation. As such, the Court of Appeal ruled that litigation was within reasonable contemplation and, moreover, this was to apply to both civil and criminal proceedings. Furthermore, the Court of Appeal found that to rule otherwise would negate the benefits associated with an internal investigation and potentially exacerbate matters by creating documents that later become disclosable. The Court of Appeal ruled that the documents created with the purpose of avoiding litigation would also be protected within the scope of litigation privilege.

However, the Court of Appeal felt that the issues raised regarding the application of a narrow definition of "client", as per *Three Rivers (No. 5)*, were not relevant to the present case and, as such, followed the decision reached by the Court at first instance.

Conclusion

The decision will come as a welcome one for clients and lawyers alike. However, the Court of Appeal maintains that each case will be fact specific and therefore parties should tread carefully when conducting internal investigations and may wish to obtain professional advice as to how to retain privilege in their work.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.