



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

SFO Fights Mining Giant's Landmark Legal Privilege Appeal

By **Richard Crump**

Law360, London (July 3, 2018, 4:47 PM BST) -- The Serious Fraud Office and an international mining firm appeared before a London court on Tuesday in a landmark appeal with major ramifications for banks facing attempts by U.K. enforcement agencies to make them reveal privileged documents during routine investigations.



The Serious Fraud Office and an international mining firm are battling it out at the Court of Appeal in a landmark case on litigation privilege. (AP)

Eurasian Natural Resources Corp. Ltd., the firm at the center of a corruption and bribery case brought by the SFO, is fighting attempts by the U.K.'s fraud squad to make it reveal documents it drew up during an internal investigation.

Bankim Thanki QC, the attorney representing ENRC, told the Court of Appeal that Judge Geraldine Andrews was **wrong to rule** at the High Court in May 2017 that litigation privilege did not apply to documents created with the purpose of obtaining advice about how to avoid prospective litigation.

"The concept is much broader than the judge allowed for," Thanki said at Tuesday's hearing. "Avoiding litigation is not an excluded purpose but very much of the rationale of litigation privilege. She is plain wrong — the judge can't be right that avoidance of litigation is incapable of attracting litigation privilege."

The three-day appeal hearing will determine the scope of so-called litigation privilege, which applies to communication between lawyers and clients in connection with adversarial litigation that has started or can reasonably be expected to start.

The appeal raises fundamental issues about the scope of legal professional privilege and litigation privilege. In particular it raises the issue of the proper interpretation of who may be considered to be the "client" for the purposes of privilege in legal advice and the meaning of documents prepared principally for "conducting" litigation.

The mining company had claimed that papers drawn up by lawyers and forensic accountants during an internal investigation should be protected under litigation privilege. But it failed to persuade the High Court, after a **similar ruling** in January 2017 forced Royal Bank of Scotland PLC to turn over

documents during a claim brought by shareholders.

ENRC succeeded in claiming that documents from a presentation given by its then-legal representative Dechert to the company board in March 2013 were subject to legal privilege because the firm accompanied the information with legal advice.

However, documents produced by a unit of the Forensic Risk Alliance Group in its review of ENRC books covering London, Zurich, Kazakhstan and Africa between May 2011 and January 2013 were not subject to privilege, Judge Andrews decided.

The SFO has been investigating ENRC since 2013 over its activities in Africa and Kazakhstan, although the agency began discussions with the firm about cooperation in August 2011, according to court documents. No charges have been brought and ENRC denies it has committed any offense which merits an investigation.

Both the ENRC and RBS cases resurrect the controversial Three Rivers (No. 5) decision and raise fresh questions over who is said to be the client when legal advice privilege is claimed by a corporate body.

The landmark 2005 decision of the Court of Appeal in the case of Three Rivers District Council v. the Governor and Bank of England arose in the context of litigation brought against the BOE after the collapse of the Bank of Credit & Commerce International.

ENRC is represented by Bankim Thanki QC and Tamara Oppenheimer of Fountain Court Chambers, instructed by Hogan Lovells International LLP.

The SFO is represented by Jonathan Fisher QC of Red Lion Chambers, James Segan and Eesvan Krishnan of Blackstone Chambers, instructed by Eversheds Sutherland LLP.

The case is The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd., case number HQ16X00363, the Court of Appeal of England and Wales.

--Additional reporting by Alex Davis and Mark Taylor. Editing by Ed Harris.