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For more information,
contact:

Aaron Stephens
+44 20 7551 2179
astephens@kslaw.com

Gareth Rees
+44 20 7551 2176
gdreese@kslaw.com

Hayley Ichilcik
+44 20 7551 7509
hichilcik@kslaw.com

Luke Clements
+44 20 7551 7530
lclements@kslaw.com

King & Spalding

London
LLP
125 Old Broad Street
London EC2N 1AR
Tel: +44 20 7551 7500

Court of Appeal decision in *SFO v ENRC*: litigation privilege wins the day (for now)

In an eagerly awaited judgment, the English Court of Appeal has today overturned an earlier decision narrowing the scope of litigation privilege in criminal investigations in the UK. The Court of Appeal ruled that interview notes produced by lawyers during internal investigations (as well as additional categories of materials) *are* covered by litigation privilege and that Eurasian Natural Resources Corporation (ENRC) was not obliged to turn them over to the Serious Fraud Office (SFO).

In May 2017, the English High Court had sought to clarify the parameters of litigation privilege. In doing so, it adopted a restrictive approach – stating that litigation privilege will not be available unless it can be shown that litigation was a real likelihood (rather than a mere possibility) when the material in question was created. The High Court ruled that a criminal investigation by the SFO is not, in itself, sufficiently adversarial to fulfil this requirement.

Moreover, the High Court had reached the surprising conclusion that a company carrying out an internal investigation into possible criminal conduct is only able to claim litigation privilege once it has uncovered sufficient evidence to support a prosecutor's decision to charge the company, but not before. Today's important decision by the Court of Appeal overturns this approach.

The SFO has not indicated whether it intends to appeal the decision, and we query whether it has the appetite for such litigation under new leadership. In the meantime, we are reviewing the full judgment and will provide further analysis shortly.



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