

The ENRC Saga – Not Just a UK Concern

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On 21 December 2023, Mr Justice Waksman handed down his judgment in the second trial of the Eurasian Natural Resources Corporation (ENRC) saga. The judgment, along with its earlier companions, is extraordinary in many ways and has been much written about as a result. We write to identify an additional level of concern with regards to the possibility of ENRC-like misconduct in the context of international investigations.

The background to this matter is well-documented in Mr Justice Waksman's comprehensive judgments, which we will not rehearse again here. It is enough to understand that between 2013 and 2023 ENRC was put under investigation by the UK Serious Fraud Office (SFO) after self-reporting potential criminal conduct in Kazakhstan, the Democratic Republic of Congo and Zambia. Mr Justice Waksman found that this had occurred because ENRC's lawyer, Neil Gerrard of Dechert LLP, and the SFO had acted wrongfully in their conduct of the investigation. In short, the court found that Mr. Gerrard had disclosed information to the SFO and the press that was confidential and against ENRC's interests in circumstances when he had no authority to do so and that the SFO had inappropriately induced Mr. Gerrard to make some of those disclosures. The court expressly found that this criminal investigation would not have been initiated but for the misconduct of the SFO during the investigation.

This is not the first time that prosecutors in high-stakes criminal investigations have engaged in prosecutorial misconduct to advance their investigations. Nor will it be the last. This is also not the first time that defence lawyers representing the targets of those investigations have gone astray trying to meet the informational demands of prosecutors who control their clients' fate (and, again, it will not be the last). It is not simply a one-off problem.

Given the current trend of sprawling international investigations, it is also not a problem limited to the UK. Almost every international investigation of criminal misconduct now involves a "joint task force" of prosecutors being assembled representing different prosecutorial authorities and jurisdictions where criminal conduct might have occurred (and where it might be prosecuted). The classic foreign bribery facts in ENRC, for example, could have triggered investigations in Kazakhstan, Zambia or the DRC too. Assuming that certain facts could be established, it was also an appropriate subject for inquiry under the UK Bribery Act and the US Foreign Corrupt Practices Act.

This raises the question of whether information secured by prosecutors as a fruit of their misconduct in one jurisdiction can be used by prosecutors in another jurisdiction where no misconduct occurred and whether defence lawyers in a jurisdiction where no misconduct

occurred can use the fact of misconduct in another jurisdiction as a defence in theirs. The answer to both questions, unfortunately, is “maybe”. It turns on the laws in the various jurisdictions involved and the degree of the respective prosecutors’ cooperation with each other. There is a real potential danger for clients here, because not every jurisdiction will have a Mr Justice Waksman holding misbehaving prosecutors and/or defence counsel to account.

As a result, it is essential that clients presented with such international investigations being run by multiple prosecutorial entities retain counsel expert in each of the jurisdictions involved. It would be unjust, for example, if information improperly obtained by US authorities for use in an FCPA prosecution somehow found its way to the UK where the rules against using improperly obtained evidence are considerably less strict.

Mr Justice Waksman’s decisions to date in ENRC, along with the SFO’s change in leadership, will have some deterrent effect to prevent such patently unfair results in the UK, but it will not set a precedent in any other jurisdiction. Instead, it will be up to robust and internationally skilled defence counsel to protect clients’ rights elsewhere.

The full judgment can be read [here](#).