IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Claim Nos: CL-2017-000583 and CL-2019-000644

BETWEEN:

EURASIAN NATURAL RESOURCES CORPORATION LIMITED

Claimant

-and-

(1) DECHERT LLP
(2) DAVID NEIL GERRARD

Defendants

-and-

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE

Defendant

B e f o r e :

MR JUSTICE WAKSMAN

EXECUTIVE SUMMARY OF JUDGMENT

HANDED-DOWN ON 16 MAY 2022

Introduction

1. This is a short précis of the lengthy written judgment handed-down today, after a trial which took place in May, June, July and September 2021. It does not form part of, nor is it a substitute for, the actual judgment to which reference should be made for my detailed findings and reasons.

2. Over the period 2011-March 2013, the Claimant ("ENRC"), an international mining conglomerate and at the time a FTSE 100 Plc, retained the services of the solicitors' firm Dechert which acted principally through its then partner, Mr Neil Gerrard. The initial purpose of Dechert's retainer was to lead an investigation into some of the activities of an ENRC subsidiary called SSGPO which operated in Kazakhstan. This had been prompted by a whistleblowing email from an employee in Kazakhstan in December 2010. Two further particular matters about SSGPO emerged in early 2011 with which Dechert was to deal, also.

3. On 9 August 2011, there appeared an article in *The Times* which was highly damaging to ENRC and clearly based on leaked documents, some of which were privileged ("the August Article"). Very shortly after, on 10 August, the Chief Investigator of the SFO, Mr McCarthy wrote to ENRC ("the SFO Letter"). He referred to recent intelligence and media reports concerning allegations of corruption and wrongdoing by ENRC. He then referred to the SFO's own 2009 Guidance on corporate self-reporting of corruption, and urged ENRC to consider it when conducting any internal investigations. He added that in the meantime, he, and the current director of the SFO, Mr Richard Alderman, would like to meet with ENRC to discuss its governance and compliance programmes, and the allegations referred to. He confirmed that at that stage, the SFO was not conducting a formal criminal investigation into ENRC.

4. Following advice from Mr Gerrard, on 9 November 2011 ENRC wrote to the SFO to say that it wished to engage with it. As a result, the investigation work to be done by Dechert substantially increased. It covered not only the existing Kazakhstan investigation but also an investigation into ENRC's activities in Africa, principally its prior acquisitions of three companies, namely Camec, Camrose and Chambishi. The first two had operations in the Democratic Republic of Congo and the latter in Zambia.

5. Over the period from October 2011 until 28 March 2013, there were 8 formal meetings between the SFO, representatives of ENRC and (in all cases) Mr Gerrard. These are referred to in the judgment as "open meetings" (OMs). In addition, there were 30 contacts, either at meetings or by telephone, between the SFO (mainly, but not exclusively, one or more of Mr Alderman, Mr Mark Thompson and Mr Dick Gould) on the one hand, and Mr Gerrard on the other. No representative of ENRC itself was present. These are referred to in the judgment as Disputed Contacts ("DCs").

6. There were further damaging newspaper articles about ENRC and the involvement of the SFO, in December 2011 ("the December Article") and in March 2013 ("the March 2013 Article") both, again, based on confidential leaked information.

7. As at March 2013, Dechert had produced to the SFO a lengthy and detailed report on Kazakhstan. The investigation into Africa was still ongoing. On 27 March 2013, ENRC terminated Dechert's retainer. On 25 April, 2013, the SFO announced a criminal investigation into ENRC focusing on allegations of fraud, bribery and corruption in relation to its activities or those of its subsidiaries in Kazakhstan and Africa. Some 9 years later, that criminal investigation is still ongoing without the announcement of the bringing (or not bringing) of any criminal charges.

8. Dechert's total fees for its work in relation to the investigation were £13m exclusive of VAT.

9. In June 2013 a collection of papers relating to ENRC was sent anonymously to the SFO in a brown envelope ("the June 2013 Material"). It contained confidential and in some cases privileged information.

The Claims: Dechert and Mr Gerrard

10. ENRC first brought proceedings against Dechert and Mr Gerrard in 2017. It then commenced separate proceedings against the SFO in 2019. Both were then managed and tried together.

11. The allegations against both sets of defendants are of the most serious kind. The core allegation against Dechert and Mr Gerrard is that over the period of the retainer (and in one case beyond it) Mr Gerrard acted not merely negligently but deliberately or at least recklessly, without the authority of ENRC and plainly against its interests.

12. ENRC says, first, that Mr Gerrard was himself the instigator of one or more of the leaks which led to the August, December, and March 2013 Articles. In this context it is said that he had one or more unauthorised communications with Mr Alderman (DC1) in which, at the very least, he told him that the August Article was forthcoming. Moreover, following the termination of the retainer it was he who sent the brown envelope containing the June 2013 Material to the SFO.

13. Second, and in relation to the 30 DCs, ENRC says that all of them were either themselves unauthorised or at the very least, what Mr Gerrard communicated to the SFO in them included information which was plainly against his client's interests and unauthorised.

14. Third, it is said that Mr Gerrard's conduct of the entire investigation was negligent, indeed reckless, in numerous respects.

15. The upshot of all the above, according to ENRC, was that the fees of Dechert and third parties on the investigation were massively more than they should have been. Dechert's own fees should have been no more than £2 million, so there were unnecessary fees of £11 million. There are also said to be £11 million worth of unnecessary third-party fees, along with around £250,000 worth of lost management and employee time. These are claimed as damages.

16. ENRC say that in acting as he did, Mr Gerrard was for the most part motivated by a desire to secure as much fee revenue as possible with a secondary motive, at times, being to ingratiate himself with the SFO. In relation to the leak leading to the August Article and first engagement

with Mr Alderman, this was done to provoke interest on the part of the SFO which was likely to (and did in fact) hugely expand the work which Dechert would then have to do.

The Claims: the SFO

17. ENRC alleges that the various representatives of the SFO (including Mr Alderman) were complicit with Mr Gerrard in the DCs, in that they knew or were reckless as to the fact that he was acting without authority and plainly against his client's own interests. In relation to DC1, which came before the publication of the August Article and then the SFO Letter, it is said that Mr Alderman knowingly took information from Mr Gerrard about (at least) the August Article and subsequently (at least) tipped him off about the forthcoming SFO Letter.

18. It is said that all of the above involved the SFO committing the tort of inducement to breach of contract on the part of Mr Gerrard, and/or the tort of misfeasance in public office.

19. There are then some separate specific allegations against the SFO which would involve misfeasance in public office only.

Findings in the Judgment: Dechert and Mr Gerrard

20. In my judgment, I found that Mr Gerrard was indeed the instigator of all three leaks to the press. I further found that he engaged with Mr Alderman without authority prior to the August Article, at least alerting Mr Alderman to it. Mr Alderman then tipped Mr Gerrard off about the forthcoming SFO Letter and Mr Gerrard was informed about it on the day it was sent.

21. I further found that Mr Gerrard was in at least reckless breach of duty in respect of DCs 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 15A, 17, 18, 19A, 20, 21, 23, 24, 25 and 25A.

22. As for the other allegations against Mr Gerrard I found that he was negligent (and for the most part reckless) in relation to his:

    (1) Failure to record in writing his own advice;

    (2) Wrong advice about ENRC's potential criminal liability, the risk of raids by the SFO, potential penalties, the risks involved in engaging with the SFO in the way that ENRC did, and not suggesting a different course;

    (3) Unnecessary expansion of the investigation;

(4) Failing to determine the scope of the SFO's concerns in relation to ENRC in the context of the investigation;

(5) Wrong advice about bringing documents into this jurisdiction;

(6) Failing to protect ENRC in relation to privilege;

(7) Failing to disclose to ENRC his knowledge of the fact that Mr Cary Depel, ENRC's then Head of Compliance had been interviewed by the SFO on 16 May, 2012; here, Dechert and Mr Gerrard admit those facts and that they amount to a reckless breach of duty;

(8) Being the sender to the SFO of the June 2013 Material.

Findings in the Judgment: the SFO

23. As for the SFO, I found that, acting by Mr Alderman and/or Mr Thompson and/or Mr Gould, it was in serious breach of its own duties in relation to 15 out of the 30 DCs, which included engaging with and taking information from Mr Gerrard which was plainly unauthorised and against his client's interests. On the facts, I found that (subject to proof of causation and loss) the tort of inducement to breach of contract on the part of Mr Gerrard had been established. Some, but not all of the elements of misfeasance in public office were also established, but not sufficient to make out the tort itself.

24. As for the other allegations against the SFO, I found that none of them was established. They were:

(1) Failing to deal with a whistleblowing letter sent in July 2012, referred to in the judgment as "WB2";

(2) Leaking to the press its decision to launch the criminal investigation before it had been made public;

(3) Making use of the June 2013 Material being at least reckless as to its privileged nature;

(4) Deliberately suppressing or destroying a notebook of Mr McCarthy's which covered the period July to December 2011, referred to in the judgment as the Beige Notebook; and

(5) Failing to remove any reference to Kazakhstan in the SFO website until January 2016.

25. I also found that in acting wrongfully as the SFO did, this was not because it had a particular desire to assist Mr Gerrard to earn more fees, rather, it was what I have referred to in the judgment as

"bad faith opportunism" in relation to the relevant pieces of information wrongfully communicated to it by him.

26. I did not grant any of the declaratory relief against the SFO which ENRC had sought.

Other matters

27. All questions of causation and loss are to be dealt with in a subsequent judgment and/or trial, if necessary. There are two exceptions to this, both of which concern the SFO only. Here, I have found that:

    (1) It is not the case that, but for the SFO's wrongful conduct in relation to DC1, it would not have sent the SFO Letter;

    (2) It is not the case that, but for the SFO's wrongful conduct in relation to DC1 and/or DC 4-DC7, ENRC would not have engaged with the SFO as it did, beginning with the 9 November Letter.

28. Dechert also alleged that in respect of any claim established against it and Mr Gerrard, there was, at least, some real contributory fault on the part of ENRC i.e. more than *de minimis*. I have found that there was no such real contributory fault. Accordingly, this matter will not be considered further.

29. In relation to a limitation of liability clause in Dechert's contract of retainer, I found as follows:

    (1) It does not apply to the first limb of damages claimed, being the fees paid by ENRC to Dechert;

    (2) It does not apply at all if there was reckless disregard by Mr Gerrard of his obligations to ENRC ("the Recklessness Exception"); as set out above, in fact, for the most part, there was such disregard;

    (3) For the Recklessness Exception to apply, it does not also have to be shown that the underlying liability was one which could not as a matter of law be limited or excluded in the first place;

    (4) A separate clause which Dechert argued prevented there from being any claim against Mr Gerrard personally (as opposed to Dechert the firm) did not so operate or at least for the most part did not do so.

30. I also found that none of the claims against Dechert, Mr Gerrard or the SFO were time-barred.