

UPDATE

The difficulty in maintaining privilege over documentation produced by internal investigations (part 2)

Update prepared by Tim Richards (Counsel, Guernsey)

This is a follow-up briefing to an [article](#) we published back in June 2017 which highlighted the difficulties companies face in maintaining privilege over documentation produced by internal investigations. The English High Court has recently handed down another important judgment dealing with similar issues in the case of *Bilta (UK) Ltd in Liquidation & Others v Royal Bank of Scotland Plc and others* [2017] EWHC 3535 (**Bilta**). Once again the Court was asked to consider whether litigation privilege could be claimed over documents produced during a company's internal investigation. Given the frequency such issues are coming before the Courts of England and Guernsey, the manner in which internal investigations are conducted is clearly an issue which warrants careful consideration. Helpfully, the Bilta judgment appears to be something of a judicial row back from some of the more controversial elements of the earlier decision in *SFO v Eurasian Natural Resources Corporation* [2017] EWHC 1017 (QB) (**ENRC**). The key point being that in Bilta the Court held firmly that there is no general legal principle to be drawn from the ENRC judgment to the effect that where a party is mounting an investigation in order to potentially settle a dispute documentation produced during that investigation would not be subject to litigation privilege. The decision as to whether or not such documentation is subject to litigation privilege rather depends on the dominant purpose for which the documentation was produced, which in turn is fact specific to each instance..

The claimants, Bilta (UK) Ltd and various other associated companies in liquidation issued an application seeking disclosure of certain documents held by Royal Bank of Scotland plc (**RBS**). The key documents were 29 transcripts of interviews with RBS employees and ex-employees (the **Interviews**). These Interviews were undertaken by RBS in the course of an investigation that led to a lengthy report being submitted to HMRC in January 2014. The report followed HMRC alleging that it had grounds to deny RBS' claim for substantial VAT tax relief on the basis RBS knew or should have known that it was participating in transactions connected with fraud. The claim brought by Bilta (UK) Ltd against RBS also concerned related claims of fraud by representatives of RBS.

It was common ground in Bilta that the test for whether litigation privilege can be claimed was accurately stated by Lord Carswell in *Three Rivers District Council v Governor & Company of the Bank of England (No.6)* at paragraph 106:

'(a) litigation must be in progress or in contemplation;

(b) the communications must have been made for the sole or dominant purpose of conducting that litigation;

(c) the litigation must be adversarial, not investigative or inquisitorial.'

It was also common ground in Bilta that the documents in issue were brought into being when litigation was in contemplation and that the relevant litigation was adversarial. Therefore the sole issue for the Court to decide was whether the documentation had been created with the sole or dominant purpose of conducting the litigation.

The Court confirmed that the exercise of determining the sole or dominant purpose behind the creation of a document was in each case a determination of fact. Although both ENRC and Bilta involved internal investigations by corporate entities in the face of scrutiny by government authorities, the Court in Bilta held it was not possible to simply apply conclusions that were reached on one company's interactions with the Serious Fraud Office in the very different context of another company's interactions with HMRC. Further RBS's meetings and other co-operation with HMRC did not preclude the underlying investigations being conducted for the dominant purpose of litigation. The judge considered that the HMRC report was closely comparable to a response to a letter before action in commercial litigation. He held that RBS took steps to protect its position which were '*only consistent with its overarching purpose*' of being in preparation for litigation to contest the assessment from HMRC that it expected.

In ENRC the Court held that litigation privilege applies only to documents prepared for the sole or dominant purpose of conducting litigation (and not to documents produced with the purpose of enabling advice to be taken in connection with anticipated litigation) and also that litigation privilege does not apply to documents created with the purpose of obtaining advice about how to avoid contemplated litigation. The Court in Bilta, however, made clear that it could not accept that 'one can properly draw a general legal principle' from the approach of the Court in ENRC. Rather the Court considered that it was clear that 'one has to take a realistic, indeed, commercial view of the facts'. In the Bilta case '...fending off assessment was just one part of the continuum that formed the road to the litigation that was considered, rightly as it turned out, to be almost inevitable.'

The Court therefore concluded that the transcripts of the Interviews were brought into being by RBS for the sole or at least dominant purpose of the expected litigation. The requested documents were therefore covered by litigation privilege.

The Bilta case makes clear that the exercise of determining the sole or dominant purpose behind the production of documentation is in each case a determination of fact. As each case will turn on its own facts and given the governmental authorities recent success in challenging claims of litigation privilege (as for example in ENRC), it would not be surprising if further cases raising similar issues reach the Guernsey or English Courts. To avoid being subject to such an action, if an internal investigation is in prospect, our recommendation remains to instruct outside lawyers at an early stage so that the investigation is conducted in such a way as to maintain privilege over any documentation produced as far as this is possible.

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[Document Reference]