The scope of privilege in internal investigations revisited by the English Court

In *Bilta (UK) Ltd (In Liquidation) & Ors v Royal Bank Of Scotland PLC and Another* [2017] EWHC 3535 (Ch), a judgment made public on 1 February 2018, the Chancellor of the English High Court, Sir Geoffrey Vos, considered again the issue of whether documents created as part of an internal investigation are protected by litigation privilege. The case follows a line of decisions in the last few years addressing the scope of privilege in the context of internal investigations, regulatory enforcement and potential criminal litigation. In contrast to the first instance decision in *SFO v ENRC* (which the Court of Appeal will hear in July), in *Bilta* the Court ruled that a letter from HMRC challenging input VAT was analogous to a letter before claim in civil proceedings so that litigation privilege applied to documents created as part of an internal investigation undertaken by the bank thereafter.

The Claimants sought disclosure of documents created by Royal Bank of Scotland PLC ("RBS") as part of an internal investigation in connection with a challenge by Her Majesty's Revenue and Customs ("HMRC") to the bank's claim for input VAT of £86,247,876 related to carbon credit trading by Bilta (UK) Ltd ("Bilta"). The bank resisted disclosure on the basis that it said the relevant documents were protected by litigation privilege.

The test for when litigation privilege applies was most recently set out by Lord Carswell in *Three Rivers District Council v Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610 at 675:

> *"Communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation attract litigation privilege when, at the time of the communication in question, the following conditions are satisfied:*
>
> *1) Litigation is in progress or reasonably in contemplation;*
>
> *2) The communications are made with the sole or dominant purpose of conducting that anticipated litigation.*
>
> *3) The litigation must be adversarial, not investigative or inquisitorial."*

Last year in *Director Of The Serious Fraud Office v Eurasian Natural Resources Corp Ltd* [2017] EWHC 1017 (QB), Andrews J held at first instance that internal investigation documents which the defendant ENRC was seeking to withhold from the SFO were not protected by litigation privilege. An appeal is due to be heard in July.

In this case, the SFO had investigated ENRC for bribery, fraud and corruption, with a view to pursuing a possible prosecution. It issued notices compelling the production of documents, including statements and evidence provided by the company's employees and officers and reviews of books and records by forensic accountants to identify systems weaknesses and potential improvements, which ENRC resisted on the basis that these documents were protected by litigation privilege.

Somewhat surprisingly, the *ENRC* case is the first time that the High Court has had to consider a claim for litigation privilege against a background in which the adversarial litigation said to have been reasonably in contemplation by the party claiming privilege was criminal, rather than civil, in nature.

Andrews J held that a criminal investigation by the SFO was not "litigation"; it was a preliminary step taken prior to a decision to prosecute. Whilst in civil proceedings, a company might reasonably anticipate that a dispute would be resolved by litigation and an investigation into the rights and wrongs of the dispute

would not preclude litigation from being in reasonable contemplation; by contrast reasonable contemplation of a criminal investigation did not automatically equate to reasonable contemplation of a prosecution. She held that criminal proceedings could not reasonably be contemplated unless the prospective defendant knew enough about what the investigation might unearth to appreciate that a prosecutor stood a good chance of securing a conviction.

It is important to note that whilst Andrews J held in the *ENRC* case that a criminal investigation by the SFO was not "litigation", in the *Bilta* case the parties agreed that at the time the documents in question were created not only was litigation in contemplation but such litigation was adversarial. The question was whether the relevant documents had been created "for the sole or dominant purpose of conducting that litigation".

The Court in *Bilta* noted that there was a tension between the approach taken in the *ENRC* case and in the appeal case of *In Re Highgrade Traders Ltd* CA (Civ Div) 1984, which had not been cited directly to Andrews J in *ENRC*. Highgrade's liquidator sought disclosure of reports prepared by insurers in contemplation of a claim under a fire policy where arson by an officer of the insured was suspected. The Court of Appeal held that the documents were created to enable the insurers to decide whether to resist the insurance claim on the ground that the fire was or was probably caused by the insured, and that this purpose was within the scope of litigation privilege. Similarly in *Bilta*, RBS was undertaking investigations so that it could decide whether to challenge the assessment for VAT that HMRC was threatening.

Sir Geoffrey Vos C said that the exercise of determining whether documents had been created for the sole or dominant purpose of conducting litigation is a determination of fact in each case. It was also important to look at the "commercial reality" of what was happening. On the facts, Sir Geoffrey Vos C found that a letter from HMRC stating for the first time that it had sufficient grounds to deny RBS the input VAT relating to the carbon credit trading was a "watershed moment". He held that HMRC's letter was analogous to a letter before claim in civil litigation. Documents created during an internal investigation carried out after receipt of this letter, including interviews with employees, were therefore subject to litigation privilege. Further, he held that the ostensibly collaborative and cooperative nature of RBS' interactions with HMRC following receipt of the letter did not change the position.

Although it is tempting to see patterns or disagreements between different decisions, each case must be judged on its facts – or as the Court put it in *Bilta*: "*one cannot 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.*" In our view, whilst bearing in mind that each case turns on its facts, the decision in *Bilta* is in line with other judgments as to when litigation privilege can be claimed in the context of regulatory investigations, notably the Competition Appeal Tribunal case of *Tesco v Office of Fair Trading* [2012] CAT 6: that is that litigation privilege applies from the time that the regulator indicates that it intends to take enforcement action. The documents in question were held to have been created for the purpose of deciding whether to contest that action. It will be interesting to see how the *Bilta* decision is viewed by the Court of Appeal when it rules on the *ENRC* case later this year.

If you have any questions or comments in relation to the above, please contact the authors or your usual Mayer Brown contact.

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