

A favourable decision on litigation privilege and regulatory investigation - ENRC reconsidered in Bilta

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In the recent decision of *Bilta (UK) Ltd (in Liquidation) v RBS*, the English High Court revisited the issue of whether documents created in the course of an internal investigation are privileged and subject to disclosure. It concluded that internal interviews and resultant interview notes were created for the dominant purpose of defending expected litigation with HMRC and were privileged from disclosure.

Bilta calls into doubt the general application of Mrs Justice Andrews' judgment in *Serious Fraud Office v Eurasian National Resources Corporation (ENRC)*, which held that interviews with employees conducted as part of an internal investigation to deter a criminal prosecution by the SFO were not privileged and should be disclosed. *ENRC* was decided last May and is awaiting appeal by the Court of Appeal (expected in July 2018).

The background to *Bilta*

In March 2012, and following an investigation lasting over 2 years, HMRC sent a letter to RBS alleging that RBS's participation in the trading of carbon credits was connected to VAT fraud, and threatened an assessment for overclaimed VAT of £86.2m. At this stage, RBS instructed external lawyers to investigate the alleged fraud; their lawyers conducted interviews with key RBS employees and ex-employees and produced 29 interview transcripts and a report on their findings.

In separate litigation, liquidators for Bilta and associated companies ("**the claimants**") are claiming compensation against RBS of at least £73m for RBS's (alleged) dishonest assistance. They contend that representatives of RBS wilfully shut their eyes to the VAT fraud affecting the UK market, and in consequence, that instead of accounting to HMRC for VAT, the directors of the claimant companies were able to fraudulently pay the VAT amounts to third parties before they went into liquidation.

The claimants sought disclosure of the RBS interview notes and report. Relying on *ENRC*, they argued that the documents were not created for the sole or dominant purpose of conducting litigation but rather (1) to inform itself of its position regarding HMRC's claim; (2) to supply a full and detailed account of relevant facts concerning VAT deductions to HMRC pursuant to its duties and obligations as a tax payer; and (3) to persuade HMRC not to issue an assessment. RBS asserted privilege over the documents, arguing that the dominant purpose and intention behind the interviews and the resultant documents was to resist HMRC's almost inevitable assessment when litigation ultimately commenced.

The decision

Dismissing the claimants' application for disclosure, the court held that even if the documents had been created for multiple purposes, the dominant purpose was to defend the expected litigation with HMRC and accordingly the dominant purpose test for litigation privilege was met.

The court made the following key points:

- HMRC's letter in March 2012 was a "watershed" moment. The letter stated that HMRC believed that it had sufficient grounds to recover the VAT, referred to and analysed the relevant law and invited RBS to comment on the facts. RBS knew at this point that it was highly likely that an assessment would follow and its appointment of external solicitors strongly suggested that RBS anticipated a claim. HMRC's letter and the lawyer's report to HMRC were, therefore, analogous to a letter of claim and letter of response in commercial litigation.
- The exercise of determining the sole or dominant purpose in each case is a determination of fact. Although both *ENRC* and this case involved internal investigations by corporates in the face of scrutiny by government authorities, "*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.*"
- There is a tension between the decision in *ENRC* and the Court of Appeal decision in *Re Highgrade Traders* on whether the litigation purpose was the sole or dominant purpose. Preferring the approach in *Highgrade*, that a subsidiary purpose of investigating can be subsumed into the dominant purpose of preparing for anticipated litigation, the court held that one has to take a realistic, commercial view of the facts and "*fending off the assessment was just part of the continuum that formed the road to litigation that was considered, rightly, as it turned out, to be almost inevitable.*"
- The collaborative and cooperative nature of RBS's interactions with HMRC after the March 2012 letter, which included

meetings with HMRC and providing updates on its investigation, did not preclude the investigation from being conducted for the dominant purpose of litigation.

What next?

This case offers some hope for any entities, including accountancy firms, seeking to conduct internal investigations and create resultant notes and reports when responding to regulator scrutiny. It suggests that where a corporation conducts an internal investigation to resist a regulator's claim and defend litigation which is considered likely, the dominant purpose test for litigation is satisfied.

Different regulators such as the FCA or FRC will have their own approach to investigating allegations of wrongdoing and the "watershed" moment that arose in *Bilta* when HMRC sent its March 2012 letter may arise at a different stage or may never arise in the course of other regulators' investigations. The simple opening of a file or notification by a regulator that it is investigating conduct is unlikely to satisfy the dominant purpose test without more, but correspondence from a regulator providing details about its investigation of potential wrongdoing may well be.

When *ENRC* is decided by the Court of Appeal later this year, it will have the opportunity to revisit litigation privilege in the context of internal investigations. We hope that the Court of Appeal will take a realistic and commercial view of the facts, being the approach favoured in *Bilta*, and confine *ENRC* to its facts.

Authors



Richard Highley

London - Walbrook
+44 (0)20 7894 6470
rhighley@dacbeachcroft.com



Francesca Muscutt

London - Walbrook
fmuscutt@dacbeachcroft.com