

# Client Update

## Litigation Privilege in UK Internal Investigations Revived?

The English High Court judgment in *Bilta (UK) Ltd v Royal Bank of Scotland plc*,<sup>1</sup> upholding a claim of litigation privilege covering witness interviews conducted during an internal investigation, is of particular interest in light of its previous decision in *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation* (“ENRC”).<sup>2</sup> In *ENRC*, the High Court held that internal investigation materials—including interview notes—were not protected by litigation privilege. The potential ramifications of the *ENRC* decision remain hotly debated: depending on the particular facts of each case, it could directly affect the ability of companies to conduct internal investigations in the criminal and regulatory sphere without running the risk of generating non-privileged documents accessible to adversaries (or the investigating authorities themselves) in any ancillary litigation. While the important questions raised by *ENRC* are pending appeal, *Bilta* has provided some, albeit limited, respite by confirming that such internal investigation materials can be protected by litigation privilege when disclosure of them is sought in separate proceedings.

*Bilta* brought an application for the disclosure of internal investigation materials, in particular 29 witness interview transcripts, prepared by Royal Bank of Scotland (“RBS”) lawyers during an investigation by HM Revenue and Customs (“HMRC”) relating to an alleged failure by RBS properly to account for Value-Added Tax (“VAT”) in the trading of EU carbon credits in 2009. Sir Geoffrey Vos, Chancellor of the High Court, held that the interviews were covered by litigation privilege and dismissed *Bilta*’s application. The judge did not view *ENRC* as determinative in this case and stated that it would be incorrect to draw a general legal principle from the judge’s approach to the facts in *ENRC*.

Importantly, the interviews were carried out after HMRC had sent a letter to RBS in March 2012 asserting that it had sufficient grounds to deny RBS’ VAT reclaim of nearly £90 million. By

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<sup>1</sup> [2017] EWHC 3535 (Ch)

<sup>2</sup> [2017] EWHC 1017 (QB); see our client update on this case at <https://www.debevoise.com/insights/publications/2017/05/english-high-court-rejects>

that time, HMRC had been investigating the issue for two years. The court accepted that this letter represented the end of HMRC's investigation and the beginning of a tax dispute. The court also found that HMRC's letter was analogous to a letter before claim in litigation, since it analysed relevant law, applied this to the facts, and sought RBS' response.

Bilta argued that the investigation materials were not prepared for the dominant purpose of litigation (an essential element in establishing litigation privilege), but rather for the purpose of gathering facts for RBS' internal investigation, complying with its obligations as a taxpayer and under its own codes of practice, and persuading HMRC not to issue an assessment. However, the judge was satisfied that the investigation materials were created for the dominant purpose of litigation, with those other alleged purposes being "*effectively subsumed under the purpose of defeating the expected [tax] assessment*". The judge stated that "*one has to take a realistic, indeed commercial view of the facts*" and, in doing so, he concluded that the interviews carried out after RBS received the HMRC letter were for the dominant purpose of defending the expected claim by HMRC and that "*RBS was not spending large sums on legal fees here in the hope that HMRC would be dissuaded from issuing an assessment*".

Some key points can be extracted from the *Bilta* judgment:

- Matters of privilege turn on the specific facts of each case and the precise nature of the government investigation at issue. While both *ENRC* and *Bilta* concerned "*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*".
- A claim to litigation privilege will require an assessment of whether the documents in question were created for the dominant purpose of adversarial proceedings that were reasonably in prospect at that time. In *Bilta*, the finding of privilege was based on the judge's view that the HMRC letter was a "*watershed moment*" that made it "*very likely*" that a tax assessment and a subsequent appeal by RBS to the tax tribunal would follow. This was supported by the fact that, subsequent to receipt of the HMRC letter, the matter was passed within RBS to its litigation department, which in turn instructed specialist tax litigators. The judge's analysis as to the high likelihood of litigation also placed considerable emphasis on the low liability threshold inherent in the legal standard applicable to the tax dispute in question, as well as HMRC's assertion in its letter that it had evidence to that standard supporting its case against RBS. Further, the judge examined "*the wider context*" of HMRC's approach to pursuing other market participants in similar cases, which again pointed to the likelihood of an assessment.
- The case underscores the importance of contemporaneous evidence to record the likelihood of litigation and the fact that the internal investigation was being carried out with that purpose in mind. RBS bolstered its claim to privilege by producing witness evidence (including contemporaneous emails) from relevant employees in its tax and legal

departments, as well as its external solicitors, all of which documented a belief as to the likelihood of litigation consistent with the position found by the judge. Following *ENRC* and *Bilta*, it is advisable that companies engaging in internal investigations make such contemporaneous internal records, ideally also reflecting the point in time at which it was understood that litigation became a realistic prospect.

- The judge rejected *Bilta*'s arguments that the fact that RBS had adopted a cooperative stance in discussions with HMRC after the HMRC letter, including through the production of a solicitors' report drawing on the fruits of the internal investigation, changed the position with respect to privilege by precluding the internal investigation being conducted for the dominant purpose of litigation. It appears that the judge's findings in this respect are closely tied to the peculiarities of an HMRC investigation/assessment and are of limited broader application. The judge held: "*In the context of a relationship between a corporate taxpayer and HMRC, which both parties accept is very different from that between ordinary parties to civil litigation, it seems to me that the [solicitors'] report was a close comparable to a response to a letter before claim in ordinary commercial litigation*". According to the judge, the "*commercial reality*" of the position in *Bilta* was that whatever steps RBS took following receipt of the HMRC letter were taken "*to protect its position which were only consistent with its overarching purpose being preparation for the litigation...that it fully expected to be necessary*". Unlike in *ENRC*, the judge in *Bilta* found that any "*subsidiary purpose is subsumed into the dominant litigation purpose*".

While this decision is a welcome reassertion of the general principle of litigation privilege in the context of internal investigations, it does not (and did not need to) grapple with the difficult issues at the core of the *ENRC* decision. What is the equivalent "*watershed moment*" in the context of a criminal investigation? Where on the spectrum of the dominant purpose test do internal investigation materials generated in the context of an intended corporate self-report lie? What effect, if any, should a "*collaborative and cooperative*" approach towards the authorities, which may include presenting the fruits of an internal investigation, have, even absent self-reporting?

We await the outcome of the *ENRC* appeal with great interest.

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Please do not hesitate to contact us with any questions.

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