



Legal Update

Bilta & Ors v RBS & Anor

The law regarding the privileged status of investigations has been in flux since Serious Fraud Office (SFO) v Eurasian Natural Resources Corporation Ltd [2017] EWHC 1017 (QB) ("ENRC") was handed down in May 2017. The recent decision of Bilta & Ors v RBS & Anor [2017] EWHC 3535 (Ch) ("Bilta"), in which Pinsent Masons acted on behalf of RBS, is therefore an important decision as it confirms that ENRC is not a determinative statement of principle as privilege can apply to investigations on the right set of facts.

Imagine that you are a decision maker in a large corporate organisation and that you have just received a letter from a third party alleging that your organisation has done something seriously wrong. Quite naturally, your first instinct might be to set about investigating matters. However, what would you do if the third party could look over your shoulder and see all of the documents you created during this investigation?

This was the sort of scenario that many thought would occur following ENRC. This was because part of Mrs Justice Andrews's judgment in ENRC suggested investigations where the purpose was to equip "yourself with evidence that you hope may enable you (or your legal advisers) to persuade [the third party] not to commence proceedings against you in the first place" did not have a litigation purpose and therefore litigation privilege might not apply to documents created during the investigation. ENRC is set to be appealed in July 2018, but Vos LJ sitting in the Financial List has recently steadied the ship in Bilta by stating that ENRC is not to be considered determinative on the principle of litigation privilege.

The facts in Bilta were that RBS conducted a large internal investigation following its receipt of a letter from HMRC. HMRC's letter alleged that the bank had participated in various transactions connected with fraud and that HMRC had grounds to deny RBS's claim for VAT input tax. The claimants in Bilta were interested in seeing the documents produced in the course of RBS's investigation, especially the transcripts of various interviews conducted by RBS' legal representatives, Pinsent Masons, and sought disclosure from RBS. RBS maintained that the documents were covered by litigation privilege. The claimants in turn made an application for specific disclosure.

The test for whether litigation privilege can be claimed was articulated by Lord Carswell in Three Rivers District Council v Governor & Company of the Bank of England (No 6) [2005] 1 AC 610 as follows:

- "(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."*

The thrust of the claimants' argument was that the second element of Lord Carswell's test was not made out. The claimants instead said that the documents were created (i) to inform RBS of its position regarding HMRC's allegations, (ii) to supply a full and detailed account of the relevant facts to HMRC pursuant to RBS's duties as a taxpayer, and (iii) to persuade HMRC not to issue an assessment.

Dismissing the claimants' application, Vos LJ found that there was nothing special about investigations when first principles were applied. He found that the correct approach to assessing whether litigation privilege should be applied was "to take a realistic, indeed commercial, view of the facts". While Vos LJ acknowledged that RBS's documents may have been created for dual purposes, it was clear to him that the dominant purpose was for conducting litigation. Any other purposes that may have existed were subsidiary to their requirement for litigation.

The critical factors in Vos LJ's were that:-

- HMRC's letter was a "watershed" moment as it was analogous to a letter before claim and the response produced by RBS was a close comparable to a response to a letter before claim
- RBS's decision to instruct Pinsent Masons' specialist tax litigation team at the outset *"strongly suggest[ed] that RBS anticipated a claim and was gearing up to defend it"*.
- RBS's collaborative and cooperative approach to interacting HMRC after receipt of HMRC's letter did not change the fact that that bank was preparing for litigation. This was evidenced by the terms of the response provided to HMRC, being that it was the fruits of Pinsent Masons' investigation which provided a detailed, legal and factual analysis explaining why HMRC was not entitled to deny RBS's input tax claim.

Bilta serves as a reminder that large corporates seeking to launch an investigation should seek specialist legal advice at the earliest opportunity. Solicitors are not only able to advise in privileged circumstances, but their being on the scene can help evidence the dominant purpose of an investigation being for a litigation purpose if this is ever called in to doubt. Solicitors can also help scope the investigation appropriately and advise on the practical steps to be taken to maximise the chance of the privileged status of documents created during the investigation surviving a future specific disclosure application.

Please contact Alan Sheeley or Stuart Walsh on the below details should you have any queries in relation to this case, an investigation or privilege generally.

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