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English Court Makes First Big Move on Privilege since the ENRC Decision

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The case of *Bilta & Ors v. RBS & Anor ("Bilta")* handed down at the end of 2017 was the first test of the principles in the earlier case of *Serious Fraud Office v. Eurasian Natural Resources Corporation Limited* ("*ENRC*") (previously discussed by Ropes & Gray). Whilst *ENRC* threatened to change the entire approach to privilege in internal investigations in the UK, in *Bilta* Sir Geoffrey Vos (Chancellor of the High Court) limited ENRC to its facts, making clear that the principles from *ENRC* cannot simply be ascribed to all cases involving interactions between companies and regulators. As we await the ENRC appeal this summer, *Bilta* provides some useful assistance in helping to put *ENRC* into context.

The Claimants in this case (Bilta (UK) Ltd (in Liquidation) & Ors) are suing Royal Bank of Scotland plc ("RBS") in a matter relating to an alleged fraud. As part of their case, the Claimants issued an application seeking disclosure and inspection of documents (including interview transcripts) created during the course of an internal investigation that was conducted by external lawyers ("the Documents") that led to a report that was provided to Her Majesty's Revenue and Customs ("HMRC"). The report was prepared *after* HMRC wrote to RBS to say that it might have grounds to deny RBS' VAT reclaim. The relevant external lawyers were not, in fact, instructed until after that letter had been received.

The Claimants argued that the Documents could not be withheld on the basis of litigation privilege because they failed the "dominant purpose" test – i.e., they were not prepared for the sole or dominant purpose of conducting litigation.[1] The Claimants argued that the Documents were prepared (i) to inform RBS of its position concerning the HMRC allegations; (ii) pursuant to RBS' Code of Practice and its general duties and obligations as a taxpayer; and (iii) to persuade HMRC not to issue an assessment.

Sir Geoffrey Vos dismissed the application and ruled that the Documents were covered by litigation privilege. Whilst he accepted that they may have had multiple purposes (and that litigation privilege did not require litigation to be the sole purpose), he reiterated the position that determining the dominant purpose of a document is a question of fact, bearing in mind the "commercial reality" of the situation. In this particular case, the receipt of the letter from HMRC marked a turning point for RBS and, Sir Geofrrey Vos found, was similar in nature to a letter before claim in ordinary commercial litigation. He further noted that *"although both cases, that is ENRC and this case, involve 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."* In *Bilta*, the Court appears to have taken corporate realties into account far more than Andrews J did in *ENRC* in determining the dominant purpose and the parameters of privilege.

Bilta should offer some comfort to those involved in internal investigations after *ENRC* appeared to narrow the applicability of litigation privilege last year, particularly when cooperating with or interacting with regulators. Whilst

[1] The test for establishing litigation privilege was accurately stated by Lord Carswell in *Three Rivers District Council v. Governor & Company of the Bank of England (No 6)* [2005] 1 AC 610.

the findings in *ENRC* taken in the round did appear to be an assault on privilege, the courts have reaffirmed that the applicability of litigation privilege will always be decided on the facts.