LATHAM&WATKINS

Client Alert Commentary

Latham & Watkins White Collar Defense & Investigations Practice February 21, 2018 | Number 2279

English High Court Decision Reinforces Application of Litigation Privilege in Internal Investigations

The decision indicates that company counsel should consider early how best to anticipate challenges to privilege claims over investigation materials.

Introduction

A recent English High Court decision has important consequences for the application of legal professional privilege in internal corporate investigations. The decision, *Bilta (UK) Ltd v Royal Bank of Scotland Plc* [2017] EWHC 3535 (*Bilta*), has reconfirmed that litigation privilege under English law can apply in "internal investigations by corporates in the face of scrutiny by government authorities." As such, *Bilta* provides some contrast to last year's decision in *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (*ENRC*). *ENRC* held that litigation privilege did not apply in an internal investigation conducted for the purpose of engaging in discussions with, and responding to, the Serious Fraud Office (SFO).

The Court of Appeal will hear an appeal of the *ENRC* decision in July 2018. Pending the outcome of that appeal, there are currently contrasting High Court decisions on the application of litigation privilege to materials generated during an internal investigation. Accordingly, companies should anticipate that litigants, whether in civil or criminal proceedings, might challenge litigation privilege claims with respect to such materials. It is difficult to predict how an English court at first instance will approach a claim of litigation privilege on facts similar to *Bilta* or *ENRC*, pending potential clarification from the Court of Appeal. Nevertheless, the facts of *Bilta* illustrate certain steps that companies can take to seek litigation privilege protection in internal investigations.

The *Bilta* decision is important not just for corporations based or operating in the UK, but also for US or other cross-border regulatory investigations that may have a connection with the UK or be subject to parallel civil proceedings in the UK. Indeed, as confirmed in the decision *RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch), investigations involving US regulators can lead to parallel civil litigation in an English court, which will apply the English rules of privilege. For more information on this decision, see Latham's previous *Client Alert*. *Bilta* is also worth contrasting with the position under US law, and company counsel should ensure they consider the implications of these differences.

Decision and Factual Background

The claimants, the liquidators of Bilta (UK Ltd) and associated companies (Bilta), commenced proceedings against Bilta's directors. The claimants alleged fraud and breach of fiduciary duty for failing to account to the UK tax authority, Her Majesty's Revenue and Customs (HMRC), for value added tax (VAT) in relation to carbon trades. The claimants also alleged that representatives of the Royal Bank of Scotland plc (RBS) and its indirect subsidiary, RBS Sempra Energy Europe Ltd (RBS Sempra), "wilfully shut their eyes to what was an obvious fraud." The liquidators issued an application seeking disclosure and inspection of certain RBS-held documents, including 29 transcripts of interviews with key RBS employees and ex-employees.

Litigation Privilege

Under English law, the party claiming litigation privilege must establish the following three elements: "(a) litigation must be in progress or in contemplation; (b) the communication must have been made for the sole or dominant purpose of conducting that litigation; [and] (c) the litigation must be adversarial, not investigative or inquisitorial."[1] Of these three elements, only (b) was in dispute in *Bilta*.[2]

RBS had created the interview transcripts after receiving an assessment letter from HMRC, and the claimants therefore conceded that litigation was in reasonable contemplation when RBS created the documents. Accordingly, the dispute before the Court concerned whether RBS created the documents for the "sole or dominant purpose of conducting that litigation." The claimants argued that RBS's predominant purpose in creating the documents was so that it could make disclosure to the HMRC, whereas RBS successfully contended that the dominant purpose in creating the documents was to defend against a threatened tax assessment that the HMRC asserted in a March 2012 letter (the HMRC letter).

"Sole or Dominant Purpose" of Litigation

The claimants argued that RBS had conducted its internal investigation not for the sole or dominant purpose of expected litigation, but rather for the purpose(s) of: (1) avoiding adversarial proceedings; (2) cooperating with governmental authorities; and (3) fact-gathering. The claimants relied principally upon *ENRC* to support their position that litigation privilege did not apply if any of these reasons were the dominant purpose of the internal investigation. However, RBS directed the judge to a Court of Appeal decision, *In re Highgrade Traders* [1984] BCLC 151 (*Highgrade*), which the court did not cite in the *ENRC* judgment. *Highgrade* supported RBS's argument that "assembling evidence to ascertain the strength of one's position is an ordinary part of any litigation and not separate from the litigation purpose."

The Court rejected Bilta's application, finding that RBS conducted its internal investigation "for the sole or at least the dominant purpose of the expected litigation … following the expected assessment in respect of overclaimed input VAT."

The judge held that "the HMRC [assessment] letter … amount[ed] to a watershed moment," after which RBS expected HMRC to initiate proceedings. The HMRC letter "stated for the first time," after a two-year investigation into the facts, "that [HMRC] considered that it had sufficient grounds to deny RBS nearly £90 million by way of input VAT." The Court also found that "the fact that RBS appointed external solicitors specialising in tax litigation within weeks of receipt of the HMRC letter strongly suggest[ed] that RBS anticipated a claim and was gearing up to defend it." Similarly, the Court noted that the engagement letter described external counsel's scope of work as "provid[ing] legal advice in respect of a dispute with HMRC regarding the recoverability of income tax relating to the purchases of carbon credits by RBS SEE." In addition, RBS filed witness statements "demonstrat[ing] that the key RBS personnel shared th[e] view" that a claim was anticipated and that RBS would need to defend it.

The judge adopted what he termed "the *Highgrade* approach." The Court concluded that each of the claimants' suggested purposes were subsidiary components of RBS's overarching purpose of preparing for litigation: "Here, fending off the assessment was just part of the continuum that formed the road to the litigation that was considered, rightly, as it turned out, to be almost inevitable." The judge accordingly determined that: "all of those purposes are, in my judgment, in this case effectively subsumed under the purpose of defeating the expected assessment."

The Court held, therefore, that RBS gathered facts not merely "as a matter of academic interest," but rather "for the overarching purpose [of] preparing for the litigation … that [RBS] expected to be necessary to contest the assessment it expected." The Court likewise emphasised that RBS's "ostensibly collaborative and cooperative" interactions with HMRC did not preclude the parties from reasonably contemplating litigation.

Noting that *ENRC* was not determinative for the present facts, the Court stated that the decision had given "pause for thought" as to whether the litigation privilege applied "where a party is mounting an investigation in order to settle a dispute or to persuade the opposing party not to initiate a claim." Ultimately, however, the Court concluded, "that was not the commercial reality of the present position." Instead, "[t]he commercial reality here was that RBS had to comply with its own protocols and statutory duties to cooperate with HMRC," which "did not change the fact that the overwhelming probability was that an assessment would follow the HMRC letter[.]"

Implications for Internal Corporate Investigations

In *Bilta*, the Court declined to "draw a general legal principle" from *ENRC*, and emphasised that a document's purpose must be established based on the specific facts of the case. Reconciling *Bilta* with the narrower view of litigation privilege taken last year in *ENRC* may be difficult. For a more nuanced discussion of this decision, please see Latham's previous *Client Alert*. In *ENRC*, the court had held that litigation privilege covered only communications prepared for the sole or dominant purpose of conducting litigation, but not the fact-finding exercise to avoid it. Therefore, documents prepared for the dominant purpose of avoiding a prosecution did not attract litigation privilege.

Until the Court of Appeal opines on this issue, company counsel should anticipate challenges to claims of litigation privilege over internal investigation materials. Nonetheless, the *Bilta* decision illustrates certain steps corporations may wish to consider to insulate themselves against challenges to the litigation privilege in internal investigations:

1. Document and communicate that the investigation's purpose is to prepare for expected litigation

In *Bilta*, the record established that, from the outset of the investigation, RBS had taken steps to document and communicate that the investigation's purpose was to prepare for an adversarial proceeding after the HMRC's letter. For example, the Court noted that RBS's 2012 "retainer letter described [external counsel's] scope of work as '*to provide legal advice in respect of a dispute with HMRC* regarding the recoverability of income tax relating to the purchases of carbon credits by RBS SEE.'"

Company counsel conducting investigations and cooperating with governmental authorities remain in a difficult position, in view of the current uncertainty in this area of English law and the tension between *Highgrade* and *Bilta,* on the one hand, and *ENRC* on the other. To increase the likelihood of success of a privilege claim, company counsel should consider at an early stage whether an objectively justifiable basis for contemplating legal proceedings is available. This includes civil litigant claims or authority proceedings, and if so what they might be. If an investigation may involve cross-border conduct or foreign parties, company counsel should consider litigants and authorities in multiple jurisdictions. Company

counsel should also consider recording in investigation materials (*e.g.*, interview notes, memoranda, and investigation reports) that the purpose of the investigation is to prepare for reasonably contemplated litigation.

2. Ensure attorney direction and oversight

Ensuring that attorneys (whether in-house or outside counsel) direct and oversee an investigation from the outset may allow the corporation to protect documents generated in the investigation. Involving outside counsel at an early stage of an investigation, where appropriate, may allow the company to justify a claim that litigation was reasonably in contemplation. The *Bilta* Court found such engagement of outside counsel as relevant to the privilege analysis. "[T]he fact that RBS appointed external solicitors specialising in tax litigation within weeks of receipt of the HMRC letter strongly suggest[ed] that RBS anticipated a claim and was gearing up to defend it."

3. Expressly disclaim that the company's disclosures are not intended to waive privilege

If disclosing non-privileged factual summaries of investigation materials (such as witness interviews) becomes necessary, company counsel may want to consider expressly stating that the disclosure does not constitute waiver and is not intended to constitute waiver of applicable privilege.

In *Bilta*, RBS provided an investigation report to HMRC in January 2014, which contained analysis that "drew upon the results of interviews," including two interviews that claimants sought to obtain from RBS in litigation. However, RBS did not supply the interview transcripts to HMRC, and the Court noted that RBS's investigation report contained the following express disclaimer: "[RBS] does not waive any legal professional privilege in providing this report to [HMRC]." The Court found this disclaimer corroborated RBS's view that RBS did not conduct the interviews for the dominant purpose of cooperating with HMRC.

US Privilege

The *Bilta* decision indicates that the position under English law may be closer to the position under US law than *ENRC* may have indicated, despite some significant differences. Most notably, and as reflected in the *Halliburton* decision in 2014, under US law, if "one of the significant purposes" of the investigation is to obtain legal advice, then this is generally sufficient to protect privilege (rather than the English law dominant-purpose test).[3] For a more detailed analysis, see Latham's prior *Client Alert*.

Company counsel should be mindful that when companies disclose reports of witness interviews to governmental authorities, this may apply pressure on the privilege under US law. A recent US court decision in Florida, *SEC v. Herrera*, illustrates this pressure.[4] The decision held that a party waived work-product protection by disclosing "interview notes and memoranda … to the SEC in … so-called 'oral downloads,'" in which counsel simply read their investigation work product to the SEC.[5] Thus, US courts may conclude that a party waives privilege if they simply read a detailed "download" from interview memoranda. Importantly, however, under US law, privilege does *not* attach to the underlying facts learned in an investigation.[6] Accordingly, for companies seeking cooperation credit from US authorities, counsel should consider providing summaries of non-privileged facts to a governmental authority that are not simply drawn from interview memoranda. In any event, as both *Bilta* and *Herrera* underscore, company counsel must make early determinations of how to proceed in light of the pressures on the work product and litigation privilege.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Stuart Alford QC
stuart.alford.qc@lw.com
+44.20.7710.4502
London

Timothy H. McCarten
timothy.mccarten@lw.com
+1.202.637.1036
Washington, D.C.

Sandeep Savla
sandeep.savla@lw.com
+1.212.906.1395
New York / London

Clare Nida
clare.nida@lw.com
+44.20.7710.3047
London

Daniel Smith
daniel.smith@lw.com
+44.20.7710.1028
London

***The authors thank Faiza Hasan for her significant assistance with this* Client Alert.**

You Might Also Be Interested In

UK Decision Highlights Potential Privilege Problems in Cross-Border Investigations

English High Court Decision Further Curtails Application of Legal Privilege in Internal Investigations

US Department of Justice Guidance Seeks to Encourage Voluntary Self-Disclosure of Export Controls and Sanctions Violations

Corporate Criminal Liability: the UK is Now Talking the Talk and Walking the Walk

How to Protect Attorney-client Privilege in Internal Investigations

Endnotes

1 *Three Rivers District Council v. Governor & Company of the Bank of England (No 6)* [2005] 1 AC 610 (*Three Rivers*).

2 In relation to (a), "RBS had established that in this case the documents were brought into being when litigation was in contemplation. The litigation in question was a claim likely to be represented by a threatened assessment by HMRC against RBS in respect of overclaimed VAT in the sum of £86,247,876." The parties also agreed that (c) "existed at the relevant time."

3 *In re Kellogg Brown & Root*, 756 F.3d 754, 760 (D.C. Cir. 2014) (*Halliburton*).

4 *SEC v. Herrera*, No. 17-cv-20301 (S.D. Fla. Dec. 5, 2017).

5 *Id.*

6 *See*, *e.g.*, *In re Six Grand Jury Witnesses*, 979 F.2d 939, 945 (2d Cir. 1992) ("underlying factual information" not protected just because it was developed in anticipation of litigation).