

Case Note: Bilta v RBS

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In Bilta (UK) Limited v Royal Bank of Scotland [2017] EWHC 3535 (Ch), the High Court once again addressed the application of legal privilege to documents prepared in the course of an internal investigation.

The internal investigation in this case was carried out by RBS, prompted by a letter from HMRC in March 2012. The letter alleged that there may be grounds to deny RBS' VAT claim in relation to certain historical trades, on the basis that RBS knew or should have known that the trading involved a fraudulent attempt to avoid VAT. In response to the allegations, RBS commissioned an external law firm to carry out an internal investigation. The investigation spanned nearly two years, and culminated in a report delivered to HMRC in 2014.

Fast forward three years, and in the context of ongoing litigation between Bilta and RBS, Bilta applied to the Court for disclosure of documents prepared in the course of RBS' internal investigation. RBS argued that the documents attracted litigation privilege, and should not therefore be disclosable. The scope of Bilta's application was broad, and included a request to inspect transcripts of interviews carried out by RBS and its lawyers with key RBS employees and ex-employees.

Bilta argued that the documents in question did not meet the legal test for attracting litigation privilege, since the dominant purpose of RBS' investigation was not litigation with HMRC. Unsurprisingly, Bilta relied heavily on the recent case of *SFO v ENRC* [2017] EWHC 1017 (QB) in support of its application, in which it was held that similar documents prepared during an internal investigation – including lawyers' notes of interviews with employees – were not protected by litigation privilege. RBS on the other hand argued that litigation was clearly the dominant purpose of its investigation, and that the March 2012 letter brought litigation with HMRC into clear prospect.

In his judgment, Lord Justice Vos ruled in favour of RBS, and dismissed Bilta's application for disclosure. Although he acknowledged that the investigation had other purposes, including complying with RBS Codes of Practice, and maintaining good relations with HMRC, these motivations were "*effectively subsumed under the purpose of defeating the expected [VAT] assessment*". The documents were therefore prepared for the dominant purpose of litigation with

HMRC, and attracted litigation privilege.

At first blush, the decision in *Bilta* appears to go against the grain of *ENRC*. However, there are important distinctions between the two cases which should not be overlooked. Firstly, *Bilta* is a case before the civil courts, whereas *ENRC* involved a claim for litigation privilege in the context of a criminal investigation. Secondly, and perhaps most importantly, Vos LJ noted that establishing the sole or dominant purpose of a document is highly fact-specific, and must be assessed on a case-by-case basis: “*one cannot simply apply conclusions that were reached on one company's interactions with the Serious Fraud Office [i.e., in ENRC] in the very different context of another company's interactions with HMRC*”. The existence of an internal investigation is not determinative either way, and the principles of litigation privilege must be applied taking a broad view of all the circumstances of the case. As demonstrated by *Bilta* and *ENRC*, applying those same principles to different factual scenarios can produce very different outcomes.