Rebalancing the ledger

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English High Court decision upholds privilege for internal investigation documents

In the latest, and perhaps most unexpected, twist in the issue of privilege claims over internal regulatory investigation documents in the matter *Bilta (UK) Ltd v Royal Bank Of Scotland Plc & Anor [2017] EWHC 3535 (Ch)*, the High Court of England & Wales has gone against the run of recent authority and upheld a claim for privilege over internal investigation documents.

Whilst expressly confining his decision to the facts before him, the Lord Chancellor has unquestionably taken a broader view of the application of litigation privilege – specifically the timing and purpose aspects in the context of a regulatory investigation – than was taken in the recent decision (of a different division of the High Court) in *SFO v Eurasian Natural Resources Corporation Ltd [2017] EWHC 1017 (QB)*.

For regulated businesses, this is good news.

What's the issue and why is it important?

To recap:

1. Since the *Three Rivers (No 5)* litigation in the 1990s, legal privilege has been a difficult issue for companies. The first stage was the finding that employees of a company were not 'the client' for privilege purposes, save for a necessarily select few who were designated or in substance acted as such. This means that, of the two limbs of legal privilege, only litigation privilege was available to protect communications between lawyers/the company on the one hand, and its employees on the other. Litigation privilege is great – it's wider in scope than 'advice' privilege in that it protects not only lawyer/client communications, but also communications with third parties (i.e. employees). However, the downside is that it only applies in respect of existing or reasonably contemplated litigation.

2. In late 2016, two High Court decisions looked again at this issue:

- In *Astex Therapeutics Ltd v Astrazeneca AB [2016] EWHC 2759 (Ch)*, the Court held that advice privilege did not apply to lawyers' notes of interviews with employees which were made in the course of an internal investigation. Applying *Three Rivers (No 5)*, the employees were third parties and so only litigation privilege could potentially apply to protect these communications;
- In the *RBS Rights Issue Litigation [2016] EWHC 3161 (Ch)*, the Court also held, applying *Three Rivers (No 5)*, that advice privilege did not apply to lawyers' notes of interviews with employees. In doing so (amongst other things) it expressly

negated the potential 'workaround' of authorising all relevant employees as 'the client' for the purpose of providing information to lawyers. The Court also took a narrow view of the degree to which the lawyers 'mental impressions', as reflected in their notes of interview, could render documents privileged.

3. Finally, in 2017, the High Court's decision in *ENRC* pulled on a different string to restrict the scope of privilege. This time considering litigation privilege (which can apply to third party documents including records of communications with employees), the Court found that documents created for the purpose of an internal investigation in response to a regulatory inquiry were not protected. In so finding, the Court relied on two different but quite closely related bases, each of which stems from an appreciation that a regulatory inquiry is not necessarily 'litigation' for privilege purposes.

- First the Court found that, on the facts, at the time the documents were created the prospect of a prosecution (i.e. 'litigation') was not in reasonable contemplation.
- Second, the Court found that the dominant purpose in creating the documents was not to prepare for any potential prosecution, but to provide to the regulator for the purpose of persuading it not to prosecute.

For regulated businesses of all flavours things were left in a wholly unsatisfactory situation. Following Three Rivers (No 5), and its progeny, advice privilege is pretty much unavailable to protect records created during an internal investigation.

Then, following ENRC, whilst litigation privilege is theoretically available to protect these records, it would only come into play much later in the process – well after any well advised party has taken steps to engage with its regulator on a fully informed basis.

Therein lies the nub of the problem with this whole line of authority. Whilst we treat companies as legal persons, their personality is different to natural persons. Corporate knowledge and action are not the product of one, unitary being that we can easily identify as 'the client' as is contemplated by the traditional privilege analysis. The collective 'corporate mind' is diffused throughout the business – and it is not just at the top. From directors to middle managers to the shop floor, knowledge of relevant facts can be held at all levels depending on this issue at hand.

In order for the corporate to be properly advised and represented these facts need to be communicated to the company's lawyers, and for the fundamental policy reasons upon which privilege is founded, these communications must be protected from disclosure.

Bilta

The decision in *Bilta* is the first step back in the right direction. In this case, the Court upheld the claim for litigation privilege over documents created for the purpose of responding to an HMRC letter asserting its claims that the company was liable for certain taxes. These documents included notes of interviews and communications between RBS's employees and its lawyers.

Two findings were critical to the Court's decision:

1. First, the Court found as a matter of fact that the HMRC letter was in substance equivalent to a letter before claim, in the civil context. This letter marked the end of the 'investigation phase' and meant (it was accepted) that prosecution was very likely. In effect it was the last step before the institution of formal proceedings.

2. Second, the Court found that, in this context, the compiling of material to inform a response to such a letter, was part and parcel of litigation. Like any private litigant, the respondent to a regulatory investigation will hope to be able to persuade the regulator with their response not to take the threatened action – this does not deprive that work of its litigation context nor the documents of their privileged status.

Next Steps

ENRC is due to go to appeal this summer. The appellant in that case, along with regulatory lawyers and their clients, will be hopeful that the more generous approach to litigation privilege in *Bilta* is confirmed. More broadly, it will be an opportunity for a Superior Court to revisit *Three Rivers (No 5)*. Will the Court of Appeal will take this opportunity to come up with a fair and functional concept of corporate privilege?

For more information please contact:

Michael Adkins

Partner // Guernsey

t:+44 1481 734 231 // e:michael.adkins@collascrill.com

Quentin Bregg

Senior Associate // Guernsey

t:+44 (0) 1481 734841 // e:quentin.bregg@collascrill.com