ENGLISH LITIGATION PRIVILEGE: WILL AN EMISSIONS TRADING CASE CAUSE A CHANGE OF CLIMATE FOR INVESTIGATORS?

A recent ruling by the English High Court in *BILTA v RBS*[1], concerning EU Emissions Allowances ("EUAs" or "carbon-credits") trading has re-opened the debate on when materials forming part of an internal investigation can benefit from litigation privilege. The decision further undermines the restrictive approach taken by Andrews J in *SFO v ENRC*[2] when applying the "sole or dominant purpose test" to dual-purpose communications.

Background – Emissions Trading Fraud

BILTA v RBS is part of ongoing litigation brought by the liquidators of companies involved in an alleged VAT fraud in the EUA market. The claim is against their

1. *BILTA (UK) LTD (in liquidation) & Ors v Royal Bank of Scotland PLC and Mercuria Energy Europe Trading Limited* [2017] EWHC 3535 (Ch)
2. *Director of the Serious Fraud Office v Eurasian Natural Resources Corpn Ltd* [2017] EWHC 1017 (QB)

counterparty in the relevant trades, RBS's former subsidiary RBS Sempra Energy Europe Ltd. The liquidators allege dishonest assistance and are claiming £73 million in equitable compensation and the same amount again for fraudulent trading under s.213 of the Insolvency Act 1986.

This particular judgment concerns the claimant's application for disclosure. The claimants sought transcripts of interviews undertaken by RBS with employees from its EUA trading desk. The interviews were part of an internal investigation initiated by RBS, when HMRC indicated RBS may be liable for a VAT charge of nearly £90 million.

Litigation Privilege

In the High Court before Vos LJ, counsel for the parties agreed that the relevant test for litigation privilege was as laid down in *Three Rivers*[3], namely:

a. litigation must be in progress or reasonably in contemplation;

b. communications 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.

The Decision

In relation to this three part test, Vos LJ made the following findings of fact.

- RBS's investigation had been undertaken because the bank was facing a likely tax claim from HMRC. Therefore first limb of the *Three Rivers* test was met. The case was distinguished from *SFO v ENRC* where Andrew J held that the SFO investigation against ENRC would not necessarily result in a criminal prosecution against ENRC and hence litigation was not reasonably in contemplation.
- The third limb of the *Three Rivers* test was also met. While RBS had cooperated with HMRC, this was because the bank was complying with its statutory duties and internal code of conduct. It did not make the context any less adversarial. Again *SFO v ENRC* was distinguished.

Dual-purpose communications

However, the most interesting point about this judgment, is the findings in relation to the second limb of the *Three Rivers* test.

In *SFO v ENRC*, Andrew J controversially used a restrictive interpretation of the "sole or dominant purpose test", deciding that internal "fact-finding" investigations, intended to assist a company avoid or potentially settle a possible future claim, were not privileged; rather, in order to be privileged, the dominant purpose of such communications must be for them to form part of the "defence brief".

In *BILTA v RBS*, Vos LJ clearly rows back from this position. The learned Judge cites *Highgrade Traders*[4] the ratio of which, was that if a document has a "dual purpose" of both informing the party and as use as evidence in the event future proceedings materialise, then the latter purpose is sufficient for privilege to attach. This was elegantly summarised by Vos LJ as: *"assembling evidence to ascertain the strength of one's position is an ordinary part of any litigation and not separate from the litigation purpose"*.

Conclusions

Clearly no two internal investigations are the same and the *Three Rivers* test will always require careful application based on the context; in particular the state of play existing between the company and its regulator at the time the internal investigation is undertaken, as this will determine whether litigation is reasonably in contemplation. This was emphasised recently in *R v Paul Jukes*[5], which applied the *SFO v ENRC* analysis with respect to an early-stage investigation (i.e. the first limb of the *Three Rivers* test).

Nevertheless, *BILTA v RBS* does cast further doubt on the widely criticised decision in *SFO v ENRC* with respect to dual-purpose communications, and raises the stakes as the latter case heads to the Court of Appeal in July this year. We will report further when the judgment is published.

For further information, please contact the authors of this briefing:

ANDREW WILLIAMS
Partner, London
T +44 (0)20 7264 8364
E andrew.williams@hfw.com

CHRISTIAN HORBYE
Associate, London
T +44 (0)20 7264 8421
E christian.horbye@hfw.com

3. *Three Rivers District Council v Governor & Company of the Bank of England (No 6)* [2005] 1 AC 610
4. *Re Highgrade Traders [1984] BCLC 151*
5. *Regina (for an on behalf of the Health and Safety Executive) v Paul Jukes* [2018] EWCA Crim 176

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