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Client Alert

Special Matters & Government Investigations Practice Group

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UK Court Takes a "Realistic" and "Commercial" Approach to Litigation Privilege in the Context of Internal Investigations

In a judgment handed down at the end of 2017, but only recently released, the High Court in London has determined - in *Bilta (UK) Ltd v RBS* - that interviews held with employees in preparation of a report intended to deter a governmental authority (Her Majesty's Revenue and Customs) from taking legal action are privileged. The decision of Vos LJ follows hot on the heels of the judgment of Andrews J in *SFO v ENRC*, where the contrary position was adopted.

As long ago as the Court of Appeal's decision in *Three Rivers (No. 5)* (upheld by the then House of Lords, now Supreme Court), the test for determining whether documents are protected by litigation privilege has been that (i) litigation is in progress or reasonably in contemplation; and (ii) the communications are made with the sole or dominant purpose of conducting that litigation or anticipated litigation. In *SFO v ENRC*, Andrews J applied the further stipulation that the litigation must be adversarial and not investigative or inquisitorial. On the basis that the SFO was merely investigating ENRC and had not at the time of the internal investigation decided to raise any charges, privilege was held not to apply and disclosure to the SFO ordered. Arguably, this is somewhat unrealistic and uncommercial, in circumstances where proceedings are subsequently commenced and the materials are then discoverable by the adverse party.

Vos LJ, in *Bilta (UK) Ltd v RBS*, refused to apply the approach in *SFO v ENRC* as a general principle of law. Indeed, applying the founding principles of *Three Rivers (No. 5)* each case must be decided on its own facts. Bilta claims more than £140 million for alleged dishonest and fraudulent trading by RBS in relation to a VAT fraud. Previously, Her Majesty's Revenue and Customs in the UK had denied RBS relief on VAT in relation to the transactions because it considered that RBS knew or should have known that the underlying transactions were fraudulent. Bilta - no doubt encouraged by the decision in *SFO v ENRC* - sought disclosure of materials relating to RBS' internal investigation, including employee interviews, which had previously been carried out to establish the facts and persuade Her Majesty's Revenue and Customs not to deny relief. Applying a degree of realism and commercialism, Vos LJ accepted that RBS' attempt to fend of HMRC's

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denial of relief was part and parcel of the ensuing litigation and, on this basis, the materials were privileged and protected from disclosure to Bilta.

Vos LJ refused to grant Bilta permission to appeal and it is not yet known whether Bilta will seek leave directly from the Court of Appeal. In any event, with ENRC's appeal due to be heard in the next few months, guidance from the Court of Appeal is keenly awaited before corporates can know with more certainty where they stand in terms of the legal protection afforded to them in their internal investigations. Until then, a great degree of caution must be exercised and it is to be recommended that external advice is sought in every instance.