**LITIGATION PRIVILEGE –THE DOMINANT PURPOSE TEST- THE POST- ENRC LANDSCAPE.**

The Court of Appeal is to consider the **ENRC**[1] judgment later this year. In that case Andrew J held that an investigation into possible criminal conduct by the SFO did not, without more, give rise to a reasonable contemplation of criminal proceedings and thus litigation privilege could not be claimed in respect of certain communications arising during the course of that investigation.

Andrew J nevertheless recognised that in the context of a criminal offence a statement made by an individual may attract the protection of litigation privilege if there was proof that his state of mind led him to reasonably contemplate that a prosecution would take place if certain facts had been discovered or that it was more likely than not that they would be.

*"Criminal proceedings cannot be reasonably contemplated unless the prospective defendant knows enough about what the investigation is likely to unearth or has unearthed to appreciate that it is realistic to expect a prosecutor to be satisfied that it has enough material to stand a good chance of securing a conviction. Of course a person who knows he has committed a criminal offence may reasonably anticipate that if certain facts come to light a prosecution is likely to follow even if there is no investigation under way. Likewise, the state of knowledge of the prospective defendant may be such that even before the investigation has concluded it knows that it has "..a problem which makes a criminal prosecution a real rather than a fanciful prospect…" ( adopting counsel's description).*[2]

Absent proof of such a state of mind the reasonable contemplation of a criminal investigation does not equate to the reasonable contemplation of a prosecution, thus failing to meet one of the three crucial requirements for litigation privilege identified in Three Rivers[3].

Following this case came the recent judgement of the Chancellor in **Bilta v R**[4] who held that in determining whether litigation privilege attaches (i) it is necessary to have regard to commercial reality (ii) dual purpose will not of itself defeat a claim and (iii) each case is fact specific.

The Chancellor refused to accept that the decision of Andrew J in **ENRC**[5] was determinative. He identified tension between that decision and the decision of the Court of Appeal in **Highgrade**[6] which did not appear to have been directly cited in **ENRC** although the court recognised that Andrew J may well have had that case or similar dicta to that effect in mind.

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[1] (2017) EWHC 1017 QB, (2017) 1 WLR 4205)
[2] At paragraphs 160 and 161 of the judgment.
[3] (2004) UKHL 48, (2005) 1 AC 610
[4] handed down in December 2017 (2017) EWHC 3535(Ch)
[5] (2017) 1 WLR 405
[6] (1984) BCLC 151

In **Highgrad**e it was held that even if a document had a dual purpose namely to (i) obtain legal advice and (ii) determine the cause of the fire in question giving rise to the claim, the two purposes were inseparable because it was entirely unrealistic to attribute to the insurers an intention to make up their mind about paying out on the claim independently of the legal advice as to the merits of doing so as informed by the second purpose.

The Chancellor emphasised that although **ENRC** and the Bilta cases both involved internal investigations by corporates in the face of scrutiny by government authorities, each case was fact specific and one could not simply apply conclusions that were reached on one company's interactions with the SFO to the very different context of another company's interactions with HMRC.

In **Bilta** a claim to inspect certain documents held by RBS, which included 29 transcripts of interviews with RBS's key employees and ex-employees (nine of whom had made witness statements already served in preparation of the trial of the action) was met by RBS's assertion that they were subject to litigation privilege.

The Claimants conceded that two of the tests in **Three Rivers**[7] were satisfied, namely (i) litigation was in progress or in contemplation and (ii) the litigation was adversarial and not investigative or inquisitorial. The issue related to the third test, namely, were the communications made "for the sole or dominant purpose" of conducting the litigation.

Following a two-year investigation by HMRC, it wrote to RBS stating that it considered that it had sufficient grounds to deny
it nearly £90m by way of input tax. The letter analysed the relevant law and identified the facts it relied on in support of its position and invited comment from RBS.

The Chancellor found that the letter was a "watershed moment". It was similar in nature to a letter before claim. HMRC had to prove no more than that RBS knew or ought to have known that the relevant transactions were connected with fraud. The issuing of the assessment was, on the evidence and HMRC's findings of fact highly likely, as well as reflecting business and revenue reality.

Furthermore, the court did not regard the ostensibly collaborative and cooperative nature of RSB's interactions with HMRC after the letter altered the position. It is a common place for HMRC to canvass the views of large corporate taxpayers prior to formally issuing an assessment and the burden was on RBS to convince HMRC not to do so. Thus, cooperation did not preclude the investigation being conducted for the dominant purpose of litigation.

The Claimants argued that RBS's purpose in preparing the report (which referred to the interviews but expressly did not waive privilege in respect of them) was to foster good relations with HMRC and to do what it said it would, namely, respond to the letter. Furthermore RBS was under a statutory duty as taxpayer to provide information as well as to do so pursuant to its Code of Practice.

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[7] (2005) 1 AC 610

Adopting the approach in **Highgrade**, the Chancellor found that these purposes were effectively subsumed under the purpose of defeating the anticipated assessment of which HMRC was, by the terms of its letter, confident.

In **ENRC** Andrew J's dicta concerning a party mounting an investigation in order to settle a dispute or to persuade the opposing party not to initiate a claim, caused the Chancellor to "pause for thought" but he did not think that that was the commercial reality on the facts of the case before him.

RBS had to comply with its statutory duties and Code of Practice and the discussions conducted between the parities, which were entirely appropriate, did not change the fact that the overwhelming probability was that the assessment would follow the letter and that RBS knew that fact.

RBS had taken steps to protect its position which were consistent with its "overarching purpose" namely, the preparation for the litigation that it fully contemplated as necessary to contest the anticipated assessment.

The Chancellor declined to accept that one could draw a general legal principle from Andrew J's approach to the facts in **ENRC**. Furthermore, he did not think it much mattered whether the litigation purpose was the sole purpose (as submitted) or merely the dominant purpose. Highgrade suggested that a subsidiary purpose is subsumed into the dominant litigation purpose.

How does this case impact on the ratio of **ENRC**, if at all?

It may be noteworthy to have in mind that the proceedings in question were civil and not criminal. This distinction was highlighted by Andrew J**.**

"*One critical difference between civil proceedings and a criminal prosecution is that there is no inhibition on the commencement of civil proceedings where there is no foundation for them other than the prospect of sanctions being imposed after the event. A person may well have reasonable grounds to believe that they are going to be subjected to a civil suit ….even when there is no properly arguable cause of action or where the evidence that would support the claim has not yet been gathered. Criminal proceedings on the other hand cannot be started unless and until the prosecutor is satisfied that there is a sufficient evidential basis for prosecution and the public interest test is also met."*[8]

In **Bilta** the Chancellor clearly identified the HMRC letter (against the background of commercial, business and revenue reality) as equating to a letter before claim thus triggering the evidential basis for concluding that RBS did, at the material time, reasonably contemplate litigation.

A month after **Bilta** the Court of Appeal (Criminal Division) has taken a fresh look at the issue ahead of the **ENRC** appeal in the case of **Jukes**[9].

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[8] ENRC at paragraph 160

[9] judgment handed down on 25 January 2018 (2018) EWCA Crim 176

In this case the prosecution was permitted to rely on an inconsistent statement made by the defendant in writing to his employer's solicitors, in the course of the employer's investigation into the death at work of an employee.

In the course of that investigation the defendant had made a written statement confirming that he had responsibility for the proper performance of health and safety requirements in the workplace. He had denied such responsibility in interview under caution and in his Defence Case Statement when eventually he was prosecuted by the Health and Safety Executive.

At trial and on appeal it was submitted that the written statement was protected by litigation privilege and was thus inadmissible. When the written statement was made there was no investigation under way by the Health and Safety Executive let alone any prosecution.

Adopting the approach of Andrew J in **ENRC** the Court of Appeal held that litigation privilege did not attach to the statement. Leaving aside the fact that any such privilege belonged to the employer who had never claimed it, the court found that there was no evidence from the employer or the defendant that when the statement was made *"..any of them had enough knowledge as to what the investigation would unearth or had unearthed when the Health and Safety Executive concluded its investigations, that it could be said that they appreciated that it was realistic to expect the Health and Safety Executive to be satisfied that it had enough material to stand a good chance of securing convictions…..There was no evidence as to the state of mind of any of the persons subsequently prosecuted nor from the Health and Safety Executive as to the stage of their investigation (at that time)."*[10]

Furthermore, there was no evidence to suggest that the evidence relied on had been obtained improperly or was wrongly sought to be deployed in the knowledge that legal privilege applied. Had it been otherwise an application could have been made to exclude the evidence pursuant to s.78 PACE.

The author detects no new principle of law from these cases; each of which is fact specific. However, in criminal proceedings there is a higher barrier to clear in claiming the privilege in respect of a statement made in the course of an investigation given that statutory criteria have to be satisfied before a prosecution can be instigated. In the absence of evidence that at the material time it was contemplated that a prosecution was more likely than not, then a claim to litigation privilege will fail.

This reflects the approach in Bilta. The factual difference between the cases, driven it must be said by a heavy slice of commercial reality, was that in **Bilta t**he court found clear evidence that at the material time RBS *did* reasonably contemplate that the assessment would be made and that litigation would be required to contest it and thus was more likely than not to take place; indeed it appeared to be inevitable that it would.

[10] ibid at paragraph 24.

Clearly each case will turn on its facts and will be determined by reference to the true purpose for making the statement and the state of mind of its maker at the material time as seen against the purpose, nature and circumstances of the investigation that triggered it.

An investigation or contemplated investigation does *not* equate to contemplated litigation; whether civil or criminal.

Only where the evidence demonstrates that ahead of or in the course of an investigation it was reasonably contemplated that proceedings were more likely to be brought than not, will litigation privilege be available as a possible bar to discovery/disclosure and/or admissibility. For the reasons identified, this may be more readily capable of proof if the proceedings are civil rather than criminal.

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