Attorney-client communication debate: UK court upholds litigation privilege in RBS case

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The High Court in England has held that an internal investigation prepared in the expectation of HM Revenue and Customs litigation is covered by litigation privilege. Litigation privilege is a professional privilege in the UK, alongside legal advice privilege, applicable to wider communication, for example communication with, and documents prepared, by other non-legal advisers and accountants. This finding is in favour of the Royal Bank of Scotland in a dispute by the liquidators of UK company Bilta concerning trading in carbon credits. This decision is interesting since it contrasts with an earlier judgment in *Serious Fraud Office v Eurasian Natural Resources Corporation Ltd*, in which litigation privilege was held not to be applicable.

In a judgment released on 1 February 2018, the High Court of Justice in England ruled that an internal investigation undertaken by the Royal Bank of Scotland (RBS) in 2012 was covered by litigation privilege. The liquidators of Bilta, a company in the UK, filed a suit against RBS, alleging that the latter had allowed Bilta executives to fraudulently trade carbon credits (greenhouse gas units). Bilta was liquidated in 2009 after its directors allegedly engaged in illegal and fraudulent carbon credit trading. Consequently, the company was unable to meet its tax obligations to HM Revenue and Customs (HMRC). Since RBS facilitated these trades, the liquidators brought an action against RBS and its subsidiary, RBS Sempra Energy Europe, seeking GBP 73 million in compensation for dishonest assistance and fraudulent trading.

Litigation privilege is attached to all communications made to a larger group if they are made in anticipation of adversarial litigation and where litigation is the dominant purpose of that communication. In delivering the judgment, Chancellor Sir Goeffrey Vos explained that the RBS internal investigation was privileged because it was reasonable to expect that HMRC would initiate litigation. Furthermore, the fact that RBS chose to cooperate with HMRC (giving updates on the investigation and providing a summary of witness testimony) did not amount to a waiver of the litigation privilege. In its notification, HMRC informed the bank that it had been under investigation for two years and outlined the evidence that had been collected against it up to that point. According to the High Court, this notification was sufficient for RBS to reasonably anticipate litigation. Consequently, the High Court held that all communications produced by RBS and Pinsent Mason (which conducted the investigation on behalf of the bank) after the HMRC notification were privileged.

This ruling departs on important points from an earlier judgment delivered in *Serious Fraud Office (SFO) v Eurasian Natural Resources Corporation Ltd (ENRC)* (see also In context June 2017), where documents related to an internal investigation where found not to be privileged. The ENRC case arose during the SFO investigation into alleged corrupt practices of ENRC executives in Kazakhstan and Democratic Republic of Congo. According to the court in the ENRC case, the SFO investigation was not in preparation for adversarial litigation and prosecution was not contemplated at the time of the ENRC internal investigation. Furthermore, there was no dominant purpose for the investigation. Dame Geraldine Justice Andrews ruled that litigation privilege covered only communications with the sole and dominant purpose of conducting litigation, and not in order to avoid it. Consequently, the communications in anticipation of SFO investigations were not protected.

In our view, the RBS case offers a guideline as to the point at which communications are covered by litigation privilege. If a company obtains evidence that litigation is likely to occur, for example through notification of an ongoing investigation, this judgment strongly indicates that subsequent communication will be protected by litigation privilege.

The Netherlands has not been immune to the debate about legal privilege. Recently, the Council of Bars and Law Societies of Europe (CCBE) expressed its concerns (in Dutch only), saying that "it is the nature of lawyers to be the recipient of the confidential communications from their clients. Without the guarantee of confidentiality there can be no trust. Confidentiality of this confidential information is therefore recognised as a fundamental one and a primary duty of lawyers." In expressing its approval of the CCBE's statement, the Dean of the Dutch Bar Association (NOvA), stated that attorney-client privilege has come under great pressure recently, and referred to several statements made by the Public Prosecution Service (DPP) calling for the rolling back of the attorney-client privilege. According to the NOvA, the DPP feels that attorney-client privilege sometimes prevents fraud and corruption cases from being resolved, with actors remaining unpunished. In response to the CCBE statement, the Dean stated, "Confidentiality and legal privilege are the foundation under the right to a fair trial. Every citizen, including a suspect, must be able to talk freely and in confidence with his lawyer in order to determine his or her legal position and without the fear that this can be used against you later on."

De Brauw agrees with the NOvA in its ongoing efforts to safeguard and guarantee the attorney-client privilege. We believe that any party to a case should be able to freely communicate with his or her legal counsel – and an attorney can only fulfil this role if clients know they can rely on attorney-client confidentiality in all of their communications. We will keep you informed of further developments.