Mad Dogs and Englishmen: Part Deux

By C. Evan Stewart

One of the most insipid hit records of the 1960s was Roger Miller's "England Swings (Like a Pendulum Do)."[1] In an earlier edition of this august *Journal*, I detailed how differently our English "cousins" swing on the issue of witness preparation.[2] The Brits have been swinging again, this time in a different place, and lawyers with international, cross-border practices need to be aware and on guard.

Internal Investigations and the Privilege

As readers of the *Business Law Journal* know, many American lawyers and judges make numerous and significant mistakes when it comes to the application of the attorney-client privilege and attorney work product doctrine in the context of corporate investigations.[3] But who knew that the English judiciary could (and would) go their American brethren one "worse" (and more)?

The law in America has been pretty clear, at least since 1981. In that year, the U.S. Supreme Court strongly affirmed the privilege in the corporate setting in *Upjohn Co. v. United States*.[4] The *Upjohn* Court stressed the importance of there being "full and frank communications between attorneys and their clients," and that such communications were necessary to enable a lawyer to give "sound and informed advice." The Court concluded that the privilege "promote[s] broader public interests in the observation of law and administration of justice." As a consequence of those policies and interests, the Court barred disclosure to the Internal Revenue Service of corporate counsel's fact-oriented communications with employees regarding an investigation into questionable payments made to foreign government officials; and given an attorney's need to render "sound and informed advice," the Court specifically rejected prior precedent limiting the privilege to only certain employees (i.e., the "control group").[5]

Somewhat akin to the American distinction between the privilege and the attorney work product doctrine,[6] the British have three separate concepts under the general rubric of what is called the "Litigation Professional Privilege" that need to be understood. The first is the *legal advice privilege*; that doctrine applies to confidential communications between a lawyer and her client relating to the giving or receiving of legal advice. The second is the *work papers privilege*; that doctrine applies to lawyers' working papers where disclosure thereof might "betray" a lawyer's mental impression or legal advice. And the third is the *litigation privilege*; that doctrine applies to documents created (by lawyers and non-lawyers) where litigation exists—or where there is a "reasonable prospect" of litigation—*and* the documents were created solely or predominantly to deal with the litigation.[7]

The British Are Coming!

At issue in *The RBS Rights Issue Litigation*[8] was the fruit of a corporate internal investigation conducted in both England and the United States by Wilmer Hale in response to subpoenas issued to RBS by the SEC. Consistent with *Upjohn* protocols, the Wilmer Hale lawyers (i) interviewed a host of RBS employees (and former employees), (ii) gave those individuals appropriate Corporate Miranda Warnings,[9] (iii) told the interviewees to treat the sessions as confidential, and (iv) wrote up interview notes reflecting their "mental impressions." In subsequent civil litigation initiated in England, the plaintiffs sought the interview notes.

Justice Hildyard, of the English High Court of Justice (Chancery Division), ruled that the interview notes were discoverable. Following the controversial precedent of *Three Rivers District Council and others v. Governor and Company of the Bank of England (No 5)* ("information from an employee stands in the same position as information from an independent agent"),[10] he rejected RBS's invocation of the legal advice privilege, ruling that the interviewed individuals were not clients. Essentially adopting the control group approach, the Justice ruled that "only communications with an individual capable in law of seeking and receiving legal advice as a duly authorized organ of the corporation should be given the protection of legal advice privilege."

Hildyard also rejected the applicability of the work papers privilege because—irrespective of the "mental impressions" label in the interview notes—he was not persuaded that their disclosure would in fact "betray" Wilmer Hale's mental impressions or legal advice.[11] In order to render those two rulings, he declined RBS's request that the court apply *Upjohn* (or other relevant U.S. law) in ruling on the interview notes on the ground that an English court hearing a litigation matter in England should apply English law on privilege issues.[12] In so doing, Justice Hildyard recognized that the interview notes would have been protected from disclosure under U.S. law (i.e., *Upjohn*).

On the heels of *The RBS Rights Issue Litigation* decision (which was not appealed) came *The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation*.[13] Unlike the prior decision—which concerned a regulatory inquiry by a United States governmental agency, this mat-

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ter arose from the British government's Serious Fraud Office's (SFO) investigation into the Eurasian Natural Resources Corporation's (ENRC) business activities in Kazakhstan and Africa. Among other professionals, the Dechert law firm was hired by ENRC to conduct an internal investigation. Over an 18-month period, Dechert met frequently with SFO officials to update them on the status of its investigation. Then, in April 2013, Dechert was fired by ENRC; communications between the company and the SFO ceased, and shortly thereafter the SFO initiated a criminal investigation.

As part of the SFO's criminal investigation, it requested, *inter alia*, the documents generated by Dechert lawyers, including their notes of interviews of current and former ENRC employees. ENRC resisted producing these materials, citing the litigation privilege and the legal advice privilege. With one exception, however, Justice Andrews of the High Court of Justice (Queens Bench Division), rejected ENRC's privilege claims. With respect to the litigation privilege claim, Justice Andrews ruled that ENRC had not demonstrated that it was "aware of circumstances which rendered litigation between itself and the SFO a real likelihood rather than a mere possibility." This, of course, is a *very* different standard than the U.S. standard under Fed. R. Civ. P. 26(b)(3) for what constitutes "anticipation of litigation."[14]

As for the legal advice privilege claim, Justice Andrews made short work of that in the context of the interview materials, citing both *Three Rivers (No 5)* and Justice Hildyard's *RBS* opinion. As with those cases, the interviewed individuals were not authorized to seek or receive legal advice on behalf of ENRC. At the same time, however, the Justice ruled that five documents prepared by Dechert for the "specific purpose of giving legal advice to ENRC ['s corporate governance committee were] plainly privileged."[15]

What to Do (Deux)?

In light of the two English decisions, American lawyers performing internal investigations for multi-jurisdictional companies face some daunting issues. Obviously, following the *Upjohn* protocols correctly will not suffice in English courts.[16] So what can American lawyers do to have their international clients avoid the same fate as the clients of Wilmer Hale and Dechert?

One suggestion would be—at the onset of any international investigation (which may spawn offshore litigation)—(i) to make clear who is deemed to be in the corporate control group, and (ii) to make sure than any communications of significance and substance be between only those individuals and counsel.[17] *Another* suggestion would be to be very careful (i) on the taking of contemporaneous notes of interviews, and (ii) as to what is put in said materials. A *related* suggestion would be to *not* physically disseminate such materials to the corporate entity (or individuals therein); keeping such materials out of the hands of clients and retaining them as the work product of outside counsel (and in their files/computers located in the United States) is certainly a level of protection that has worked before in the face of determined governmental officials and litigants demanding disclosure.[18] *Another* suggestion would be to legend materials (as appropriate) consistent with the litigation privilege's "reasonable prospect" standard—as opposed to the Rule 26(b)(3) standard.[19] *Finally*, although a corporate entity cannot choose the place it gets sued, given these two English decisions, the more that lawyers can conduct investigations within the jurisdictional boundaries of the United States, the better chance that *Upjohn* protocols may in fact be honored.[20]

England and Conflicts

While we are highlighting our national differences, let us look at another area of the law where our British cousins have a slightly different take: conflicts of interest. This is a subject matter, to this author's mind, where modern-day (especially big firm) lawyers have not comported themselves with honor.[21] Recently, a major international firm (whose home base is New York) found its conduct under English scrutiny, with a *mixed* result.

On July 19, 2017, the United Kingdom's Solicitors Disciplinary Tribunal levied a fine of £250,000 ($324,061) against White & Case LLP and a fine of £50,000 ($64,812) against a partner of the firm, David Goldberg. These fines came on the heels of a 2014 decision of the High Court of England to disbar the firm and Goldberg from representing a Ukrainian client, Victor Pinchuk, in a commercial dispute with other firm clients: Ukrainian businessmen Igor Kolomoisky and Gennadiy Bogolyubov.[22]

While these amounts constitute the largest law firm/lawyer fines ever levied in England, they—at least to this observer—are not the most interesting aspect of the matter. What I find striking is the depth and breadth of the problem, in addition to the English court's antipathy to ethical structures frequently employed by U.S. lawyers (such as advance waiver provisions and ethical screens).

On the Pinchuk side of White & Case, there were *88* lawyers who billed their time (supported by *61* secretarial or other support staff); and on the Kolomoisky/Bogolyubov side of White & Case, there were *50* lawyers who billed their time (supported by *39* secretarial or other support staff). Not surprisingly, lots and lots of time was billed to each set of clients, with an obvious (and large) benefit to the firm's bottom line.

The High Court, per Justice Field, after a thorough vetting of what was done on behalf of both sets of clients, determined that a wide swatch of Messrs. Bogolyubov and Kolomoisky's confidential information had been imparted to White & Case, that the firm had "an unqualified [duty] to keep the information confidential and not, without the consent of [Messrs. Bogolyubov and Kolomoisky], to make use of it or to cause any use to be made of it by others oth-

erwise than for [Messrs. Bogolyubov and Kolomoisky's] benefit."[23]

As for the firm's contentions that ethical screens and the geographical separation of many (but not all) of the scores of White & Case personnel served to wall off conflicts problems, Justice Field first reviewed prior English precedent that was highly skeptical of the efficacy of "Chinese Walls."[24] He then ruled—as an "evidential" matter—that White & Case had failed to demonstrate confidential client information had not in fact flowed between the two large internal firm groups.[25] This ruling came on the heels of prior determinations of Justice Field, in which he had been critical of ethical decisions made by the firm along the time continuum of its trying to represent the two sets of highly adverse clients.[26]

Given the foregoing, why does this author deem the determination by the Solicitors Disciplinary Tribunal a "mixed result"? Well, for one, the fines levied represent a mere fraction of all the lawyers (and others') time billed to (and presumably revenues accrued from) the two sets of adverse clients![27]

Endnotes

1. Smash Records (written by Roger Miller) (released November 1965) (U.S. *Billboard* Hot Adult Contemporary Tracks No. 1; U.S. *Billboard* Hot 100 No. 8; U.S. *Billboard* Hot Country Singles No. 3) ["England swings like a pendulum do; Bobbies on bicycles two by two; Westminster Abbey, the tower of Big Ben; The rosy-red cheeks of the little children."] Competing for the title of most insipid would, of course, be the fictional group, the Archies, and their "Sugar, Sugar" (Calendar) (written by Jeff Barry & Andy Kim) (released May 24, 1969; re-released July 1969 by Don Kirshner) (U.S. *Billboard* Hot 100 No. 1). Incongruously, "Sugar, Sugar" was played over-and-over again on the radio as we were driving all night on Thursday-Friday, August 14-15, 1969 to get to the Woodstock Music & Art Fair ("An Aquarian Exposition: 3 Days of Peace & Music").
2. *See Mad Dogs and Englishmen*, NY Business Law Journal (Summer 2013).
3. *See* C. E. Stewart, *The D.C. Circuit: Wrong and Wronger!*, NY Business Law Journal (Winter 2015); *see also* C.E. Stewart, *Attorney-Client Privilege: Misunderestimated or Misunderstood?*, New York Law Journal (Oct. 20, 2014).
4. 449 U.S. 383 (1981)
5. Although what the Court spelled out in *Upjohn* seems remarkably clear and easy to follow, some American judges (and lawyers) have nevertheless had trouble applying that jurisprudence. *See supra* note 3.
6. *See* C.E. Stewart, *Good Golly Miss Molly!: The Attorney Work Product Doctrine Takes Another Hit*, NY Business Law Journal (Winter 2012).
7. Unfortunately, the law in the United States on these latter two scores used to be clear, rejecting both a "reasonable prospect" test and "predominance" test; now the law is much less settled. *See* C.E. Stewart, *Caveat Corporate Litigator: The First Circuit Sets Back the Attorney Work Product Doctrine*, NY Business Law Journal (Summer 2010).
8. [2016] EWHC (3161) (Ch).
9. As I have repeatedly tried to make clear (*see, e.g.*, C.E. Stewart, *Thus Spake Zarathustra (And Other Cautionary Tales for Lawyers)*, NY Business Law Journal (Winter 2010)), these warnings are **not** *Upjohn* warnings.
10. [2003] QB 1556. *See also Astex Therapeutics Limited v. Astrazeneca* AB [2016] EWHC 2759.
11. *See West London Pipeline v. Total* [2008] EWHC 1729 (Comm); Sumitomo Corporation v Credit Lyonnais Rouse [2001] CP Rep 72. Nonetheless, in rejecting RBS's invocation of the work papers privilege he did suggest that the Upjohn Court's guidance on work product might well be sustained (in a different case): if you can show the "notes of the interviews as containing what [the lawyer] considered to be the important questions, the substance of the responses to them, [the lawyer's] beliefs as to the importance of these, [the lawyer's] beliefs as to how they related to the inquiry, [the lawyer's] thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere." Given the Justice's antipathy to the privilege claim, however, query whether a litigant could ever meet this standard.
12. *See Bourns Inc v. Raychem Corp* [1999] 3 All ER 154. RBS had urged the court to recognize a "newly fashioned rule"—that the "most significant relationship" vis-à-vis the creation of the interview notes was in the U.S. (presumably this was based upon the "touch base" standard employed by U.S. courts—*see, e.g., Veleron Holdings, B.V. v. BNP Paribas SA*, 2014 WL 4184806, at *4 (S.D.N.Y. Aug. 22, 2014)). Hildyard declined to adopt RBS's "newly fashioned rule." One consequence of these two English decisions is that U.S. courts, in employing the "touch base" standard going forward, may well apply English Law to cross-border internal investigations, particularly those that do not follow *Upjohn* protocols.
13. [2017] EWHC 1017 (QB).
14. *See supra* notes 6 & 7. Justice Andrews also opined that the timing is different for anticipating civil vs. criminal litigation: there is "no inhibition on the commencement of civil proceedings" (so they can come at any time) versus criminal proceedings, which cannot commence until a later time—when there is a "sufficient evidential basis for prosecution."
15. As this article is being completed, there is no reported news about an appeal of Justice Andrews' decision.
16. And, as exemplified by the Kellogg Brown and Root embroglio, not all American lawyers know how to follow the *Upjohn* protocols. *See supra* note 3.
17. Of course, if your client finds itself in a jurisdiction that differs from U.S. and British standards, you may well have another set of problems altogether.
18. *See In re Murphy*, 560 F.2d 328 (8th Cir. 1977); C.E. Stewart, "Jumping on a Hand Grenade to Protect a Client," Federal Bar Council Quarterly (November 2009).
19. *See supra* notes 6 & 7. Lawyers creating documents outside the United States should also indicate (if appropriate) that said documents involve a U.S. matter. *See Wultz v. Bank of China*, 979 F. Supp. 2d 479, 492 (S.D.N.Y. 2014).
20. *See supra* note 12. And this is particularly true insofar as having American lawyers conduct the investigations; indeed, in-house European lawyers are not able to invoke the protection of the attorney-client privilege. *See Akzo Nobel Chemicals Ltd. v. European Comm'n*, Case C-550/07 P (Euro. Ct. Justice Sept. 14, 2010) (full text at http://op.bna.com/mopc.nsf/r?Open--jros-89cg88).
21. *See* C.E. Stewart, *The End of Conflicts of Interest? Courts Warm Up to Advance Waivers*, NYSBA: The Senior Lawyer (Fall 2015). As my law school Dean (and ethics guru) Roger Cramton once ruefully remarked: "[large New York firms] are some of the biggest risk-takers that I run into." *Id*.
22. *Georgian American Alloys, Inc. v. White & Case LLP* [2014] EWHC 94 (Comm). The amount sought in the civil litigation and a related arbitration was "not less than $2 billion." *Id*. at ¶ 42.
23. *Id*. at ¶¶ 79-81.
24. *Id*. at ¶¶ 75 & 88. He had previously cast significant doubt on the efficacy of advance waivers under English law. *Id*. at ¶ 17.
25. *Id*. at ¶¶ 84-87.
26. *Id*. at ¶¶ 17, 26, 33 & 51.
27. The financial net benefit to the firm thus perhaps justifying what Dean Cramton once lamented. See *supra* note 21.