OUTSIDE COUNSEL

'Upjohn' Across the Pond: A Muddy View

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In *Upjohn Company v. United States*, 449 U.S. 383 (1981)—the foundational decision that guides both the scope of attorney-client privilege and how to protect that privilege in internal investigations conducted in the United States—the U.S. Supreme Court held that attorney-client privilege covers communications between *all* employees and the corporation's attorneys. English courts, however, have rejected this central tenet of *Upjohn*. In both this and other respects, English law has taken a restrictive approach to protecting "internal investigation" documents from disclosure, as a pair of recent decisions of the High Court—*Serious Fraud Office v. Eurasian Natural Resources Corporation* (*ENRC*), [2017] EWHC 1017 (QB), and *The RBS Rights Issue Litigation* (RBS), [2016] EWHC 3161 (Ch)—illustrate.

English courts split the "Legal Professional Privilege" into two parts. First, the "Legal Advice Privilege," like the attorney-client privilege in the United States, protects from disclosure "confidential communications between a party and his legal advisers for the purpose of enabling that party to obtain informed and professional legal advice." *RBS* (at 38). However, the privilege attaches only to counsel's communications with those personnel authorized to seek legal advice on the corporation's behalf; communications with any other employees are unprivileged.

Second, the "Litigation Privilege" protects from disclosure "the assembly and content of evidence for the purpose of litigation." *RBS* (at 38). Unlike the Legal Advice Privilege, it (1) may encompass documents created by individuals or experts who do not direct the organization, and (2) can be extended to communications beyond those between client and counsel relating to legal advice.

ENRC and *RBS* evince the High Court's restrictive approach to both kinds of privilege for documents generated in an internal investigation. In *RBS*, addressing the Legal Advice Privilege—and a subsidiary claim to protect "lawyers' working papers"—the High Court rejected the bank's claim that notes made by lawyers during interviews of bank employees in an internal investigation were privileged because they either constituted or reflected legal advice. In *ENRC*, addressing the Litigation Privilege, the High Court held that interview notes generated in an internal investigation, conducted after allegations of potential criminal conduct surfaced and caught the attention of the Serious Frauds Office (SFO), were unprotected because at the time of the investigation, a criminal prosecution was not reasonably contemplated.

Given these decisions, when conducting an internal investigation that implicates both jurisdictions—regardless in which jurisdiction the investigation occurs—lawyers and clients must be sensitive to the subsequent disclosure obligations that English courts may impose.

Scope of Protection

In *ENRC* and *RBS*, the High Court analyzed, in relevant part, privilege assertions for three categories of internal investigation documents:

(1) Reports prepared by corporate employees to aid the corporation in obtaining legal advice.

(2) Notes prepared by counsel.

(3) Counsel's reports to the decision-making body (whether board of directors, in-house lawyers, or a special committee).

In turn, the High Court analyzed three grounds to resist disclosing such documents.

Legal Advice Privilege. In *ENRC*, the High Court ruled that documents in Category 3 above are privileged, at least for reports made to what might be termed the "control group" to provide legal advice. Even if the report contains otherwise discoverable factual information or documents, the entire report is itself privileged. *ENRC* (at 181-87). However, because non-control group employees are not the "client" for purposes of the Legal Advice Privilege, neither documents prepared by such employees to aid the control group in obtaining legal advice, nor notes of counsel's interviews of such employees, enjoy Legal Advice Privilege. *RBS* (at 50, 93); *ENRC* (at 177).

Lawyers' Working Papers. Related to the Legal Advice Privilege, legal professional privilege also encompasses "lawyers' working papers." *RBS* (at 99). In appropriate circumstances, this privilege might protect documents in Category 2 above, i.e., lawyers' notes. However, in both ENRC and RBS, the High Court limited such protection to documents that "betray the tenor of the legal advice." *ENRC* (at 97); see also *RBS* (at 101, 107). Verbatim interview notes do not satisfy this test, nor do generic claims that the notes contain the attorney's "mental impressions" or reveal

the lawyer's "train of inquiry." Because all notes involve some degree of selectivity by the author, "something more is required to distinguish the case from the norm." *RBS* (at 125).

Litigation Privilege. The Litigation Privilege applies where (1) litigation exists or is reasonably contemplated, (2) litigation is the sole or dominant purpose for creating the document, and (3) the litigation is adversarial, not investigative or inquisitorial. *ENRC* (at 51). In appropriate circumstances, such a privilege could protect documents in Category 1 or 2 above from disclosure. However, in *ENRC*, the High Court set a high bar: For Litigation Privilege to shield documents prepared in an internal investigation, the reasonable contemplation of a criminal *prosecution* must exist; mere anticipation of a criminal *investigation* is insufficient. *ENRC* (at 154). The High Court further held that outside counsel's contemporaneous assertion that it reasonably contemplated civil or criminal litigation because allegations of wrongdoing had reached the SFO was insufficient. Rather, it is the "client's state of mind [i.e., what knowledge it has of actual grounds for prosecution] and the objective prospect of criminal proceedings" that determines whether Litigation Privilege applies. *ENRC* (at 123).

Even the reasonable anticipation of litigation, however, may not suffice. The High Court further held that documents "created with the specific purpose or intention of showing them to the potential adversary in litigation"—e.g., when a corporation intends to "self-report" its internal investigation results to a regulatory body to ward off criminal prosecution—"are not subject to litigation privilege." *ENRC* (at 170).

'Upjohn' in the High Court

In *Upjohn*, the U.S. Supreme Court rejected the "control group" test, which would have limited attorney-client privilege to counsel's communications with the officers or directors who direct the corporation's affairs. 449 U.S. at 394. Instead, disclosures made by *any* corporate employees acting within their normal duties are privileged, where: (1) the investigation is supervised (and, ideally, conducted) by counsel; (2) employees are instructed to treat the communications as confidential; and (3) the employees understand that the investigation's purpose is to give the corporation legal advice. *Upjohn*, *supra*; *In re GM Ignition Switch Litig.*, 80 F. Supp. 3d 521, 529 (S.D.N.Y. 2015).

The High Court, by contrast, has limited the Legal Advice Privilege to communications between counsel and those corporate representatives "authorized to seek/obtain the legal advice that is the reason for the communication." *ENRC* (at 73). Such authority normally will be "vested in the Board of Directors, although they might well delegate authority to another group or person," such as a special committee, as well as in-house lawyers or general counsel, so as to render their communications with outside counsel privileged. *ENRC* (at 92, 97). Counsel's communications with any other corporate employees—even employees "authorized to provide [counsel] with information that would equip them to give legal advice to others within the company" (*ENRC* (at 73))—are not so protected.

RBS displays the sharp difference in treatment. The Washington, D.C., office of Wilmer Cutler Pickering Hale and Dorr conducted an internal investigation in both England and the United States, in order to advise RBS on its response to subpoenas issued by the U.S. Securities and Exchange Commission. Following fairly typical American protocols, Wilmer Hale interviewed RBS employees who were outside the "control group," administering Upjohn warnings and telling

witnesses to treat the interviews as confidential. The lawyers' notes (the Interview Notes) stated that they contained the "mental impressions" of counsel. The High Court acknowledged that under U.S. law, the Interview Notes would be privileged. Nonetheless, applying English law, the High Court held that the notes reflected "information gathering … preparatory to" providing legal advice, and, accordingly, the Legal Advice Privilege did not shield them from disclosure. RBS (at 93). The court also ruled that the notes did not qualify as "Lawyers' Working Papers," because nothing in them revealed "the trend of legal advice being given." *RBS* (at 105, 125-28).

Likewise, in *ENRC*, the High Court ordered disclosure of interview notes and investigative materials generated after two alleged whistleblowers reported allegations of corruption and financial wrongdoing. Over time, the company recognized an increasing likelihood of a "dawn raid"; its auditor said that it would file a suspicious activity report; the SFO indicated to the company that a criminal investigation was imminent; and the company's outside counsel advised that it reasonably contemplated litigation, because of the risk that if an SFO investigation occurred, a criminal prosecution would ensue. Despite the foregoing, based upon RBS, the High Court found that Legal Advice Privilege did not apply. The High Court further found that the Litigation Privilege did not apply because ENRC's concerns did not "make prosecution a real likelihood rather than a mere possibility." *ENRC* (at 122).

Choice of Law

With such divergent privilege rules in the two jurisdictions, it is important to know which standards courts will apply. RBS addressed this squarely, as some of the privilege assertions concerned an investigation conducted by U.S. lawyers, of U.S. employees, to respond to a subpoena issued by a U.S. regulatory body. Despite these strong U.S. ties, the High Court held that *the law of the forum governs privilege issues*. Thus, in an English discovery proceeding, *English law determines the scope of the legal professional privilege*. *RBS* (at 169). While the High Court noted that it had "discretion" to prevent disclosure in an appropriate case, it reserved such discretion for an "exceptional" case, which it did not consider *RBS* to present. *RBS* (at 183, 196).[1]

In New York, by contrast, federal courts (where the issue has predominantly arisen) have adopted a "touch base" test, which applies the privilege law of the country having the greatest interest in whether the communication should remain confidential.[2] Thus, even in a litigation on this side of the Atlantic, English law rather than the law of the forum conceivably could apply to a cross-border internal investigation.

Conclusion

When English law is applied, the greatest degree of protection plainly attaches to confidential communications between outside counsel and the "control group" personnel authorized to receive advice. Reports created by other employees, even at counsel's instruction and/or for the purpose of securing legal advice, and interview notes or similar documents prepared by lawyers, enjoy far less protection. Affixing labels such as "privileged and confidential," "subject to litigation privilege," or "contains attorney work product" may be insufficient to prevent such documents' subsequent disclosure. Nor will such documents' non-discoverability under American law, under Upjohn or otherwise, provide protection against disclosure in English courts. Additionally, under the "touch base" or similar test, a U.S. court could apply English law to deem a document subject

to disclosure in a U.S. proceeding, if the court determines England to have the greater interest in the applicability of any asserted privilege.

Accordingly, both clients and counsel in cross-border investigations must balance the need for creating documents that help the investigation proceed in an orderly fashion with concerns about protecting confidentiality in any subsequent litigation. They also must balance the desire for confidentiality with demands or expectations of governmental authorities for "transparency" if the purpose of the investigation is to ward off a government investigation.

1. In declining to apply U.S. privilege law in *RBS*, the High Court noted both that the U.S. proceedings arose out of a financial offering document governed by English law, and that the company's English counsel initially expected English privilege rules to govern.

2. See *Veleron Holding, B.V. v. BNP Paribas SA*, 2014 WL 4184806, at *4 (S.D.N.Y. Aug. 22, 2014) (citing cases). State courts, by contrast, are split on what choice of law principle to apply to privilege issues. Compare *JP Morgan Chase & Co. v. Indian Harbor Ins. Co.*, 98 A.D.3d 18, 25 (1st Dep't 2012) ("The law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding is applied when deciding privilege issue.") with *Hyatt v. State Franchise Tax Bd.*, 105 A.D.3d 186, 204 (2d Dep't 2013) ("To determine which state's privilege law should apply, New York courts apply an interest analysis.").

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