

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, :
 :
 Plaintiff, :
 :
 v. : Civil Action No. 99-2496 (GK)
 :
 PHILIP MORRIS USA INC., :
 f/k/a PHILIP MORRIS INC., :
 et al., :
 :
 Defendants. :

MEMORANDUM OPINION

Pursuant to Orders #471 and #471B, Defendants submitted their Notice of Objections ("Objections") to the United States' Submission of the Written Direct Examination of Mr. Frederick T. Gulson, who was In-House Solicitor (or General Counsel) for BATCo's Australian affiliate, W.D. & H.O. Wills Australia Limited ("Wills"), from October, 1989 to November, 1990. Defendants also filed a Notice of Supplemental Authority in support of their Objections, and the Government filed its Response to Defendants' Objections. The Court scheduled oral argument on the issues raised by the Objections, and BATAS filed a Praecipe regarding matters to be heard at that oral argument. Although BATAS was not entitled to participate in that oral argument under Order #670 (currently pending in our Court of Appeals), the Court, in its discretion, did allow counsel for BATAS, the successor to Wills, to present its

arguments. Finally, on February 25, 2005, the Government filed an additional Praecipe regarding the issues raised in the Objections, and BATCo filed a Response thereto.¹ Based upon these many filings, the more than three years of litigation over the Foyle Memorandum, and all applicable case law, the Court reaches the following conclusions.

Initially, it must be noted that the Court has already ruled upon several of BATCo's Objections orally in open court. BATCo's Objections that Mr. Gulson's testimony should be excluded as irrelevant and that his testimony should be excluded under Fed. R. Evid. 602 as speculative were overruled. BATCo also objected to the introduction of Mr. Gulson's Affidavit on the grounds that it is pure hearsay. BATCo is correct on that point, and the Affidavit will be excluded.

¹ The essence of the Government's argument in its Praecipe is that BATCo voluntarily waived any privilege it might have had in Mr. Gulson's testimony because it "voluntarily elicited additional live testimony from Mr. Gulson on precisely the same subject that they previously asserted were privileged and should be sealed and struck from the record (and also failed to object on privilege grounds when the United States questioned Mr. Gulson on redirect)." U.S. Praecipe Regarding Sealed Written Direct and Live In-Court Testimony of Frederick T. Gulson, at 1. As the parties know, the Court went to fairly elaborate lengths to establish a procedure for closing the Courtroom during Mr. Gulson's testimony and sealing the record of his testimony in order to "fully preserve all of BATCo's rights," Order #878 at 2-3, "subject to the Court's final rulings on the objections raised by BATCo." Id. at 3. BATCo is correct that the Government cannot now successfully argue that participation in that procedure, "subject to the Court's final rulings," resulted in a waiver of BATCo's rights.

What remains for the Court's consideration at this point are BATCo's Objections to portions of Mr. Gulson's written direct testimony regarding the McCabe opinion, see McCabe v. BATAS, [2002] V.S.Ct. 73 (Apr. 11, 2002) (Austl.) ("the McCabe opinion"). Specifically, BATCo asks that the following portions of the testimony be struck: 14:8-21, 26:12-28:5, 29:10-14, 30:6-17, 31:2-32:6, 33:16-20, 36:7-15, 44:10-15, 44:23-45:4 and U.S. Exhibit 77,832 (a copy of the McCabe opinion). As to U.S. Exhibit 77,832, the Court long ago ruled, and has stated repeatedly, that a court opinion is a public document of which it can take judicial notice, and therefore need not and will not be admitted into evidence.

As the parties developed their positions on this issue, they raised a number of complex and somewhat academic arguments. Given the limitation on available time, this opinion will focus only on the specific reasons for the Court's rulings.²

First, the essence of BATCo's argument is that Mr. Gulson may not offer any testimony about privileged communications that he had in his role as General Counsel for Wills or about the privileged documents that either underlie those communications or are related to them. In particular, BATCo argues that the Government may not use the McCabe opinion, and its repeated quotations from the Foyle

² As we all know, the course of this litigation could be used as a major teaching tool for a Civil Procedure I class, as well as the subject matter for numerous law review articles.

Memorandum and other privileged documents, in its questioning of Mr. Gulson.

On April 11, 2002, in the McCabe case, the Supreme Court of Victoria in Australia, after striking BATAS's defense due to failure to comply with discovery orders, gave Judgment for the Plaintiff on liability. See McCabe, [2002] V.S.Ct. 73. In explaining its rationale for striking the defense, the trial court quoted directly from many documents over which BATCo asserts privilege in this case. See id. The McCabe opinion, as noted earlier, is a public document. On appeal to the Supreme Court of Victoria - Court of Appeal, the trial court was reversed in BATAS v. Cowell, [2002] VSCA 197 (V.S.Ct. - Ct. App. Dec. 6, 2002) (Austl.) ("Cowell I"). In that opinion, the appellate court also repeated many of the McCabe quotations, although it drew very different conclusions from the documents and surrounding circumstances. The merits of those rulings are, of course, not before this Court.

What is before this Court is the use to which the McCabe quotations may be put. The Supreme Court of Victoria - Court of Appeal recognized "the misfortune for the Defendant that the content of some of these documents have now been published to the world at large by means of the internet and the international media." Cowell I, ¶ 192. However, the same appellate panel which

decided Cowell I also ruled in a second decision -- less than five months later -- using language that is totally dispositive of the issue before this Court -- that:

Strangers to litigation are entitled to make what use they can of what they hear in open court (whether or not of documents) or read in the transcript of the proceedings (if they have a transcript) or see in the reasons for judgment once published (which happens not uncommonly on the internet these days). . . . [O]nce a document is copied or quoted in the reasons for judgment, its contents to that extent are public knowledge and use can accordingly be made, by party and non-party alike, of what appears in the judgment.

BATAS v. Cowell, [2003] VSCA 43, ¶ 38 (V.S.Ct. - Ct. App. Apr. 28, 2003) (Austl.) ("Cowell II").³

³ In response to this language from Cowell II, BATCo submitted -- in an extremely curious fashion -- the cover page and one other isolated page (¶¶ 103-107) of what turns out to be a 60 page opinion by the Supreme Court of New South Wales addressing the retention of privilege over the Foyle Memorandum as it relates to the videotaped testimony of Nicholas Cannar, former solicitor to both BATCo and Wills. Because it was virtually impossible to grasp the import of this out-of-context snippet, the underlying opinion was tracked down after considerable effort.

First, it must be noted that the proceeding in question occurred before a different court than either McCabe or Cowell I and Cowell II. Second, the opinion acknowledges that the language quoted "is a statement of the common law dealing with the use that a stranger may make of material that appears in reasons for judgment." See The Application of Nicholas Basil Cannar, [2003] N.S.W. S.Ct. 802, ¶ 105 (Oct. 8, 2003) (Austl.). The Government of the United States is clearly a stranger to the McCabe-Cowell litigation, which was a civil suit for damages between two private litigants. Third, the Cannar opinion acknowledges that the McCabe opinion is a judgment of the Supreme Court of Victoria and therefore "does not require to be proved in evidence." Id., ¶ 106. That is precisely what this Court has ruled on earlier occasions.
(continued...)

Given the significance of Cowell II to this Court's ruling, it is necessary to explain its procedural posture. Under Australian law, when parties take discovery in a civil case, they take it "subject to an implied undertaking by the party gaining access to the documents not to make use of them or their contents otherwise than for the legitimate purposes of the litigation. . ." (internal citations omitted). Cowell II, ¶ 19. "The primary purpose of implying such an undertaking . . . is to protect the subject party's privacy and thereby inter alia to encourage full and frank discovery whenever required for the purposes of the litigation." Id., ¶ 20.

After the issuance of Cowell I on December 6, 2002, reversing the trial court's earlier entry of judgment on April 11, 2002, a new trial was ordered. Cowell II, ¶ 5.

On April 24, 2002, the plaintiff's lawyer, Peter Gordon, filed a motion with the trial court (the Supreme Court of Victoria) stating that he had received two similar requests, from the United States Department of Justice in Washington, D.C. and from the

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Finally, although the Cannar opinion rejects the Government's request to put the McCabe opinion itself in evidence, it does not address the question decided in Cowell II, and raised in these Objections, as to whether "a stranger to litigation" can ask questions about quotations from that opinion.

For all these reasons, the Court finds the Cannar opinion to be of no help in deciding the pending Objections.

Australian Competition and Consumer Commission ("ACCC"), for documents from the McCabe proceedings which Mr. Gordon might think relevant to their interests. Id., ¶¶ 6-7. In his motion, Mr. Gordon sought a declaration from the trial court that certain specific documents would not be subject to any implied undertaking by the plaintiff or her solicitors; alternatively, he sought a declaration that the plaintiff and her solicitors be released from their implied undertakings in relation to those specific documents. Id., ¶ 8.

The trial court upheld the plaintiff's submission and ruled "that the undertaking had come to an end upon the admission of the documents into evidence and that the plaintiff was therefore free to use those documents for such lawful purposes as she wished." Id., ¶ 9. The defendant, BATAS, appealed. The Supreme Court of Victoria - Court of Appeal concluded that even though only six documents actually remained in contest, it would "deal with all 38 documents, not simply six of them." Id., ¶ 13.

The Supreme Court of Victoria - Court of Appeal noted that "[i]t was common ground before us that the 38 documents, the subject of this proceeding, were produced to the Court only as a result of the coercive processes of the Court . . . and that, accordingly, all 38 were subject to an implied undertaking by the party gaining access to the documents not to make use of them or

their contents otherwise than for the legal purposes of litigation.

. . .” Id., ¶ 19.

After a detailed legal analysis of applicable Australian case law, the Supreme Court of Victoria - Court of Appeal concluded as follows:

Where documents are provided to a party to litigation under some coercive process of the court with the result that an implied undertaking attaches to the effect that, without the leave of the court, they not be used otherwise than for the purposes of the litigation, the party bound by that undertaking is not freed of it simply because the document in question is marked as an exhibit in the proceeding in the course of which it was provided. To the extent that knowledge of the document has become public by dint of its tender in open court, members of the public will be free to make use of that knowledge as they will (subject always of course to any order specially made protecting confidentiality and the like), but the party affected by the undertaking remains bound as to use of the document itself. The distinction seems to us a valid one between, on the one hand, use of the document the contents and probably the provenance of which are known in detail to the party by virtue of a privilege extended to it by the processes of the court and, on the other hand, use of the information about it which comes to the knowledge of the public by reason of the proceedings in open court (and during which, it may be supposed, the document is marked as an exhibit). The knowledge of the one cannot be equated with the knowledge of the other.

Id., ¶ 48 (emphasis added).

Thus, while the Supreme Court of Victoria - Court of Appeal ruled that plaintiff herself remained bound by her original undertaking to use the documents only for the purposes of the litigation, and therefore could not divulge them to the United

States Justice Department or the ACCC, it made equally clear that "the emphasis is on the right of the party [granting discovery] to its privacy which the court will protect by means of the implied undertaking, albeit that binds only the party gaining access to the document and does not inhibit the public at large." Id., ¶ 25.

In so ruling, the Supreme Court of Victoria - Court of Appeal relied heavily on the reasoning set forth in Sybron Corp. v. Barclays Bank PLC, [1985] Ch. 299 at 321,322:

It is necessary ... to distinguish between the party on whom the undertaking is imposed on the one hand and third parties on the other hand. The undertaking binds the former, it does not bind the latter, who have given no undertaking.

Id., ¶ 25. The Court emphasized

that third parties have not given and are not bound by any undertaking. If proceedings are held in open court information derived from any record of those proceedings can be used by third parties without regard to undertakings which may bind the parties thereto or their solicitors.

Id.

Thus, any portions of those documents quoted in the McCabe opinion may be used by strangers to the litigation in any way that they see fit. Defendants cite no case law to the contrary, nor has this Court found any.⁴

⁴ The Court is aware that Defendants cite Transamerica Computer Co. v. I.B.M. Corp., 573 F.2d 646 (9th Cir. 1978) for the proposition that compelled disclosure of documents by a court does
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Second, it is very significant that to the extent the McCabe opinion reveals the content of privileged documents or communications, neither BATCo nor BATAS made the requisite zealous effort to guard the confidentiality of the contents. See In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) ("the privilege must be jealously guarded by the holder of the privilege lest it be waived"). For example, there is no evidence to suggest that either BATCo or BATAS ever took any action in the Australian court system to permanently seal the contents of the McCabe-Cowell opinions, or to strike the relevant provisions from those opinions. (Tr. 13288:14-13289:1).

Finally, the Government argues that BATCo previously waived any privilege it had regarding documents or communications cited in the McCabe opinion by virtue of its failure to either present this argument to the Special Master or appeal Order #341 (adopting Report & Recommendation #109) requiring BATCo to produce a Fed. R. Civ. P. 30(b)(6) witness to testify about, among other topics, the publicly available portions of the Foyle Memorandum, and any practices and procedures described therein. Order #341, at 2-3. In sum, the Government argues that, by failing to appeal this Order

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not waive any applicable privilege in those documents. However, neither Transamerica's facts nor its holding support that proposition or are relevant to the issues presented here.

which was entered on April 11, 2003, BATCo waived any privilege it had in testimony about the publicly available portions of the Foyle Memorandum and the document management issues quoted in McCabe.

BATCo's response is extraordinarily troubling. In response to Order #341, BATCo presented Ms. Alison K. Kinnard as its Rule 30(b)(6) witness. After her deposition was taken, the Government filed a Motion in Limine to Preclude BATCo's Introduction of Evidence at Trial on the Subject Matters Specified in Order #341 for Which BATCo Failed to Produce a Knowledgeable 30(b)(6) Witness ("Motion to Preclude") because Ms. Kinnard was totally unprepared to respond to certain issues on which Order #341 specifically directed BATCo's 30(b)(6) witness to be prepared, namely, the publicly-available portions of the Foyle Memorandum and the document management issues discussed in McCabe.

In its Opposition to the Government's Motion to Preclude, BATCo openly admitted that "[i]t is true that Ms. Kinnard did not review privileged documents -- such as the Foyle Memorandum and other exhibits referenced in the McCabe judgment -- in preparation for her testimony and that she did not interview the attorneys involved in drafting those documents. . . ." BATCo's Opp'n to Pls.' Mot. to Preclude, at 2-3. BATCo explained this failure by claiming that if Ms. Kinnard had been instructed to consult privileged documents or other privileged information in preparation

for her deposition, it would have arguably waived any applicable privilege claims. See id. at 10-11.

In short, BATCo violated the plain command of Order #341, as it later acknowledged in oral argument relating to these Objections -- by failing to prepare its witness to comply with that Order's requirement that she be able to testify about the publicly available portions of the Foyle Memorandum and the document management issues discussed in McCabe.

What is more, BATCo never told the Court, contrary to its misleading suggestion at oral argument on the Objections, that it was going to avoid complying with Order #341.⁵ Rather, it

⁵ At oral argument, BATCo counsel stated:

Your Honor, we didn't appeal that order [Order #341] per se. However, we did object. At the deposition we objected to the use of the McCabe decision to pose questions.

And furthermore, we were very careful and we told the court, we told the court, we were very careful to not have Ms. Kinnard review the Foyle memorandum or otherwise become familiar with its contents or anything with respect to it.

We laid that out for the court. We told the court what we were doing because we alerted the Court to the fact that we believed that someone would argue, or could argue, that we had waived the privilege by doing that. So we were very careful to not do that and very careful to alert the court to exactly what we were doing.

(Tr. 13279:2-14).

(continued...)

unilaterally decided not to prepare Ms. Kinnard in accordance with the requirements of Order #341 and only disclosed that information after the fact in its Opposition to the Government's Motion to Preclude. BATCo's conduct was, at best, deceptive and, at worst, in flagrant violation of Order #341. By trying to outsmart the Government, failing to note an appeal from Order #341, and then openly violating that Order, BATCo has indeed failed to "jealously guard" its privilege over the subject matter covered in Order #341, directing the Rule 30(b)(6) witness to testify about:

The document management issues addressed in the McCabe decision, specifically including any consideration, decision, policy, practice or procedure concerning the destruction, editing or management of documents at BATCo or any affiliate of BATCo, in Australia or elsewhere, for the purpose of avoiding discovery of such documents in United States litigation or preventing the public from learning the true health effects of smoking.

Order #341 at 2-3. Because BATCo has already acceded to this Court's Order requiring testimony about "the publicly available portions of the Foyle Memorandum and any practices or procedures described therein," as well as "[t]he document management issues

⁵(...continued)

However, all the references by BATCo's counsel to "alerting the court" and "telling the court" and "telling the court what it was doing" relate to arguments made -- after the fact -- in its Opposition to the Government's Motion to Preclude.

addressed in the McCabe decision," it has waived any potential privilege objection to Mr. Gulson's testimony on these topics.⁶

For the foregoing reasons, the Court concludes that the Government is not precluded from eliciting testimony from Mr. Gulson about publicly available portions of the McCabe opinion.⁷ That does not end the inquiry. Mr. Gulson may offer testimony as to his personal knowledge about events or documents quoted in the McCabe opinion, including events relating to the creation of the Foyle Memorandum. He may testify whether he thinks or believes that the McCabe quotes from the Foyle Memorandum are accurate or are consistent with his memory. However, he cannot reveal anything that was in the Foyle Memorandum that is not directly quoted in the McCabe opinion. Having set those parameters as to what Mr. Gulson

⁶ Unfortunately, it is true that the Court denied the Government's Motion to Preclude on July 23, 2004. In all candor, it can only be said that given the 895 Orders issued in this case to date and the papers relating to each and every one, the Court did not at that time appreciate the full significance of the arguments presented in the Government's Motion.

⁷ BATCo argues that the portions of the written direct testimony referred to on p. 3, supra, should be struck because they are classic hearsay. That analysis simply is not correct. Mr. Gulson is giving testimony based upon his own personal knowledge of material quoted from the McCabe opinion and events surrounding creation of those documents. As such, that does not constitute hearsay. Moreover, the Government has never suggested that the accuracy of the McCabe opinion, or any quotes from it, should be adopted by this Court or that they are, in and of themselves, being offered for the truth of their substance.

can testify to, the Court will examine each of the nine portions of testimony specifically objected to by BATCo.

At page 14, lines 8-21, Mr. Gulson is being asked whether a direct McCabe quote from the Foyle Memorandum accords with his understanding of the genesis of Wills Document Retention Policy. Based on the criteria set forth above, the objection to the testimony is **overruled**.

At page 26, line 12 to page 28, line 5, Mr. Gulson is being asked whether Andrew Foyle ever expressed a concern similar to that expressed in the particular quote from the McCabe opinion. Based on the criteria set forth above, the objection to the testimony is **overruled**.

On page 27, line 7, Mr. Gulson was asked a similar question. The objection is **overruled**. On page 27, line 13, Mr. Gulson is being asked about what was being referred to by the particular language quoted from the Foyle Memorandum in the McCabe opinion. That answer would require testimony about the contents of the Foyle Memorandum which are not publicly available, pursuant to our Court of Appeals' decision in United States v. British American Tobacco (Investments) Ltd., 387 F.3d 884 (D.C. Cir. 2004). The objection is **sustained**.

On page 28, line 1, Mr. Gulson is again asked about whether he recalls Andrew Foyle expressing concerns quoted in the McCabe

opinion. That objection is **overruled**. On page 28, line 6, Mr. Gulson is asked whether any action was taken as a result of this concern. The answer to this question would not reveal any content of the Foyle Memorandum not publicly available. Therefore, the objection is **overruled**.

On page 29, lines 11-12, Mr. Gulson is asked whether the McCabe opinion accurately quoted a portion of the Foyle Memorandum. Based on the criteria set forth above, the objection is **overruled**.

On page 30, line 14, Mr. Gulson is asked about what is referred to by a particular phrase from the Foyle Memorandum quoted in the McCabe opinion. The answer to that question does not require testimony about any other portion of the Foyle Memorandum that is not publicly available in the McCabe opinion. Rather, it requires Mr. Gulson to give his personal recollection of the reference or meaning of a quote from the McCabe opinion. The objection is **overruled**.

On page 31, lines 6-7, Mr. Gulson is asked why BATCo was concerned about SRG documents specifically. The answer to that question does not require testimony about any other portion of the Foyle Memorandum. Based on the criteria set forth above, the objection is **overruled**. On page 31, line 21, Mr. Gulson is asked whether the particular quote from the Foyle Memorandum in the McCabe opinion acknowledges that Wills has certain BATCo research

reports. The answer to that question can be ascertained from the McCabe opinion quotation. Therefore, based on the criteria set forth above, the objection is **overruled**.

On page 32, lines 2-3, Mr. Gulson is asked the meaning of a question quoted from the Foyle Memorandum in the McCabe opinion. The answer to that question on lines 4-6 does not appear to come from portions of the Foyle Memorandum which are not publicly available in the McCabe opinion. Rather, the answer appears to be based upon Mr. Gulson's general knowledge of surrounding events and circumstances. Therefore, the objection is **overruled**.

On page 33, lines 17 and 19, Mr. Gulson is asked whether he received a copy of a particular letter from Mr. Wilson and whether that letter is faithfully reproduced in the McCabe opinion. The answer to these questions does not reveal any information from the Foyle Memorandum or any other privileged documents that is not publicly available from the McCabe opinion. Therefore, the objections are **overruled**.

On page 36, line 12, Mr. Gulson is asked whether he recalled certain advice being given by Mr. Wilson; the McCabe opinion quotes notes purporting to reflect that advice. Based on the criteria set forth above, the objection is **overruled**.

On page 44, line 12, Mr. Gulson was asked whether he recalled sending a letter which was quoted in the McCabe opinion. His

recollection (which he did not actually have) does not require any testimony from documents that are not publicly available in the McCabe opinion. Based on the criteria set forth above, the objection is **overruled**.

On page 45, line 3, Mr. Gulson is asked whether he recalls seeking certain advice which was quoted in the McCabe opinion. The answer to this question does not require testimony about any subject that is not publicly available in the McCabe opinion. Therefore, based on the criteria set forth above, the objection is **overruled**.

For all the foregoing reasons, Defendants' Objections to the United States' Submission of the Written Direct Examination of Mr. Frederick T. Gulson are **sustained in part and overruled in part**.

An **Order** will accompany this Opinion.

March 14, 2005

_____/s/_____
Gladys Kessler
United States District Judge