



Hong Kong: legal advice privilege – important development for corporates

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Summary

In an important judgment, the Hong Kong Court of Appeal has recently decided that legal advice privilege (often referred to as “solicitor-client” or “attorney-client” privilege) can extend to confidential internal communications between employees of a client organisation, provided those communications were created for the sole or dominant purpose of obtaining legal advice. The judgment puts the status of such communications on a similar footing to that in other common law jurisdictions such as Australia and Singapore and is more aligned with the position (as we understand it) in the United States. The judgment disagrees with and departs from English case law.

Background

Legal advice privilege is a fundamental human right and applies as much to corporates as it does to individuals. In this context, the expression ‘legal advice’ is widely construed and refers to a client’s rights and obligations eg, advice as to what to do in a relevant legal context, whether litigious or non-litigious. The lawyer and client retainer should make it clear who the client is and what legal advice is sought and to be given.

The privilege was generally well understood until about 2003, when the English Court of Appeal sought to limit the meaning of a corporate client in this context to those employees directly responsible for communicating with the external legal advisers (“*Three Rivers (No 5)*”). According to *Three Rivers (No 5)*, other employees are not considered to be part of the corporate client; therefore, their communications should be treated as communications by third parties and generally not attract legal advice privilege.

It would be fair to state that *Three Rivers (No 5)* has not been well received. However, while best explained by its facts, it has not been overruled and it has been referred to at first instance in Hong Kong (albeit without much enthusiasm)².

Recent appeal judgment

Background – summary

The Hong Kong Court of Appeal judgment is *Citic Pacific Ltd v Secretary for Justice* [2015] HKCA 1263³. It arises out of part of an appeal from a first instance judgment in which the company made a claim to privilege over a large number of documents seized by the police. At first instance, the judge held (among other things) that some of the documents seized did

Any comments or queries?

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1. *Re Three Rivers District Council & Ors (No 5)* [2003] EWCA Civ 474.
2. *Citic Pacific Ltd v Secretary for Justice* [2012] 3 HKLRD G1. Out of which the appeal arises.
3. CACV No. 7 of 2012, June 29 2015 (“*Citic Pacific case*”).

not attract legal advice privilege because they were communications between certain of the company's employees which were not communications on behalf of the company. In effect, the judge adopted a narrow interpretation of the meaning of corporate client in this context, applying *Three Rivers (No 5)*. As such, communications outside the company's group legal department, or not under the direction of its board of directors, were put on the same footing as communications by third parties and were not regarded as being on behalf of the corporate client. Therefore, so the argument went, such communications did not attract privilege⁴.

That was in 2012 and, following the company's appeal, the issue came before the Court of Appeal for determination some three years later.

Issue

For the purposes of the appeal, the Court of Appeal was asked to decide whether the judge was correct to decide that the company's claim to legal advice privilege was limited to communications between members of its group legal department and its external lawyers and, therefore, excluded communications between other employees (eg, communications by members of the company secretariat department). In deciding this issue, the Court of Appeal was asked to determine the proper approach to the definition of a "client" for the purpose of legal advice privilege and whether *Three Rivers (No 5)* was good law in Hong Kong.

Decision

The Court of Appeal held that, in the context of the issue before it, the client is the corporation and it could seek advice through those employees authorised to act for it in the process of obtaining legal advice. The Court of Appeal considered that a restrictive approach to the definition of "client" in the context of a corporation is contrary to the underlying rationale of legal advice privilege in the modern age; namely, to help administer the rule of law and allow clients to avail themselves of what is a fundamental and constitutional legal right⁵.

The Court of Appeal decided that the proper test to establish the parameters of legal advice privilege is the "dominant purpose" test. The Court of Appeal considered that a confidential internal communication by an employee can attract legal advice privilege where it is created for the sole or dominant purpose of seeking legal advice. In determining this, the focus should be on the substance of the communication and context in which it was created.

The following passage from the Court of Appeal judgment helps demonstrate the wider application of the dominant purpose test compared with a restrictive approach to the definition of corporate client:

"In the context of a corporation, where the necessary information may have to be acquired by the management from employees in different departments or at various levels of the corporate structure, there is a need to protect the process of gathering such information for the purpose of getting legal advice. It would be meaningless to have a right to confidential legal advice if the management is hampered in such process by the concern that statements taken in that process could be open to discovery. Additionally, particularly in the present day, it is unlikely that a small group of employees within the legal department of a corporation would be likely to have all the technical knowledge or skills that may be required to obtain information for, and put together, suitable instructions to the corporation's lawyers. To adopt a restrictive definition of who constitutes the client in such circumstances would be just as likely to impinge upon the ability of the corporation to seek and obtain meaningful and useful legal advice, since it might

4. At footnote 3 of its judgment in the *Citic Pacific* case, the Court of Appeal questions why the judge, in applying a narrow definition of corporate client, considered that the company's directors were different to 'employees'; thereby, illustrating the impracticality of *Three Rivers (No 5)*.
5. For example, paragraphs 2, 36-38, 53 and 63. This says much for Hong Kong's Court of Appeal.

well discourage those defined as the client for the purposes of legal professional privilege from seeking the input or assistance of other employees who might be better qualified or able to provide it.”⁶

The result is that the company succeeded on this part of its appeal and the Department of Justice has been, in effect, invited to reconsider the company’s claim to privilege in light of the Court of Appeal’s ruling and guidance given to the parties as to how to deal with the documents in dispute⁷.

Comment

The Court of Appeal’s judgment is significant. The judgment expressly disagrees with the narrow definition of “client” adopted in *Three Rivers (No 5)*. This will be welcomed by the legal profession in Hong Kong and by their corporate clients (not to mention corporate in-house lawyers). The judgment confirms what many have advocated should be (and in reality is) the position; namely, that in determining issues of privilege, the focus should be on the purpose and context of the communication or document at the time of its creation.

This is not to state that everything passing between a client and a lawyer in Hong Kong is privileged⁸. Documents that come into existence as part of a transaction or event that are not produced for the sole or dominant purpose of obtaining legal advice (the Court of Appeal refers to “raw material”) do not attract legal advice privilege⁹. Moreover, in applying the dominant purpose test, the courts will examine a claim to privilege on a case by case basis and it is for the party asserting the privilege to establish it. “Blanket” claims to privilege will fail. The courts will also usually expect some engagement between the parties before being asked to determine disputes involving claims to privilege¹⁰.

It is also important to note that the focus of the Court of Appeal’s judgment in the *Citic Pacific* case is on confidential internal communications between employees of a company and, in this context, the expression “employees” can extend beyond a client’s in-house legal team. The issue of which employees (persons) are authorised to act for the company in the process of obtaining legal advice from its external lawyers is determined on a case by case basis and should be considered at the outset of a retainer.

That said, the importance of the *Citic Pacific* case should not be underestimated; particularly, as regards confidential internal documents that are prepared within a client entity for the sole or dominant purpose of obtaining legal advice.

Going forward, clients still need to be careful about document generation; particularly, in the context of potential lawsuits or regulatory matters. In this regard, the role of in-house lawyers remains important.

In-house lawyers also need to be mindful of which entities within a group structure they work for; this is especially important in cross-border disputes where different laws may apply (eg, in the context of the issue in the *Citic Pacific* case, England/Hong Kong or, more generally, Hong Kong/US or as between common law and civil law jurisdictions).

Way forward

For now, the parties in the *Citic Pacific* case are seeking to resolve their disagreements over the documents in question, further to the guidance given by the Court of Appeal. At the time of writing, it is not known whether the parties will be able to reach agreement on the way forward or if the Department of Justice will seek to appeal.

6. Paragraph 55. Similar sentiments are expressed at paragraphs 53-54 and 58 and will be favourably received by in-house lawyers in Hong Kong.
7. Paragraphs 69-77.
8. That said, clients are not usually in the habit of contacting (or preparing to contact) their lawyers except primarily to seek legal advice.
9. Paragraphs 42 and 52.
10. Paragraph 79. The Court of Appeal: (i) refers to (with approval) the UK Serious Fraud Office’s and England & Wales Bar’s related guidelines; and (ii) lays down its own “Guidance on the procedure to be adopted” (paragraphs 73-76).

Given that the issue raised in the *Citic Pacific* case is of fundamental importance, there could be an appeal to the Court of Final Appeal. If there is such an appeal, there is a good prospect that the Court of Final Appeal will dismiss it while at the same time elaborating on the Court of Appeal's reasoning. The Court of Final Appeal has traditionally adopted an expansive approach to the determination of fundamental rights, including legal professional privilege¹¹. Some important issues relating to legal advice privilege remain unresolved and more disputes can be expected¹².

This leaves Hong Kong's common law having departed from *Three Rivers (No 5)* and become more aligned with the position in other common law jurisdictions. In the meantime, corporate clients in England which still have to wrestle with the application of a narrow definition of corporate client, in the context of claiming legal advice privilege there, may look on with some interest. When the right case comes along, the United Kingdom Supreme Court may well arrive at a similar result to the Hong Kong Court of Appeal's decision in the *Citic Pacific* case.

An inescapable conclusion from all this is that the earlier legal advice is sought from internal or external legal advisers, the sooner a claim can be made to legal advice privilege where need be.

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11. See the three CFA judgments cited at paragraph 2 of the Court of Appeal's judgment.
12. For example, proving the 'dominant purpose' test: (i) with respect to confidential communications between employees and the client organisation's external lawyers (although, this may be self-evident – see footnote 8); and (ii) given the multifaceted role of in-house lawyers. Is there a better test to establish the proper parameters of legal advice privilege?

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