

Litigation privilege: England and Hong Kong a step further apart

Following an earlier decision which took an unhelpfully restrictive view on legal advice privilege, the English High Court has recently applied a similarly strict approach to litigation privilege for entities under regulatory or criminal investigation. If the English approach is followed in Hong Kong, there would be serious constraints on the extent to which fact gathering for the purposes of any internal investigation can be carried out under the cloak of litigation privilege.

Fact-finding frustrated

The earlier decision in *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) caused consternation amongst English lawyers. That case concerned legal advice privilege, which applies to confidential communications between lawyer and client for the purpose of giving or obtaining legal advice.

The English High Court decided that the "client" for these purposes is limited to those authorised on behalf of a company to obtain legal advice; and does not extend to those who might have information that the lawyers need to know in order to give the legal advice.

On that basis, the court rejected a claim for legal advice privilege over documents containing lawyers' notes of interviews with the client's employees who were not authorised

to seek and receive legal advice on behalf of the company.

In *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB), Andrews J in the English High Court conceded that, particularly in the context of a large corporation, the person directly instructing a lawyer (eg in-house counsel) may not be the same as those within the corporation who want to receive the advice, but that person would still be considered as the "client" for privilege purposes or would be acting as the agent of the "client".

Otherwise, she agreed with the judge in *The RBS Rights Issue Litigation* that fact-finding by lawyers will not be covered by legal advice privilege, unless the facts just happen to be in the heads of those who actually want the legal advice.

Does litigation privilege help?

According to the decision of *The RBS Rights Issue Litigation*, the only way

Key issues

- The scope of litigation privilege in England has been further restricted.
- Litigation privilege requires an adversarial process to be reasonably in contemplation.
- In England, a regulatory or criminal investigation is not necessarily litigation. Only documents prepared for the conduct of litigation are privileged.
- Whilst Hong Kong is not subject to similar restrictions, care is required in any cross-border investigation where privilege may be important.

in which a fact-finding process will be privileged is if it is covered by litigation privilege.

It has been settled (under both English and Hong Kong law) that litigation privilege applies to communications with third parties if three conditions are met: litigation is in progress or reasonably in contemplation; the communications are made with the sole or dominant purpose of conducting the anticipated litigation; and the litigation is adversarial, not investigative or inquisitorial.

However, in *Eurasian Natural Resources*, Andrews J restricted the scope of litigation privilege in a number of areas.

First, the court found that the reasonable contemplation of a criminal investigation does not necessarily equate to the reasonable contemplation of a prosecution (ie litigation). Whilst it is always *possible* that a prosecution might ensue, unless the person who anticipates the investigation is aware of circumstances that make a prosecution likely, it cannot be established that just because there is a real risk of an investigation, there is also a real risk of prosecution.

The court distinguished the situation in *civil* proceedings, where there may be reasonable grounds to contemplate that litigation will be commenced even where there is no proper foundation for the claim.

It follows that a company may conduct an internal investigation into allegations of improper behaviour in fear or anticipation of a criminal or regulatory investigation; but that internal investigation might only be in contemplation of litigation once it becomes clear that there is some truth in the underlying allegations, or at the very least that there is some material to support the allegations of improper practice.

Second, the court took a strict approach to the issue as to whether documents had been prepared for the dominant purpose of litigation.

Even if litigation was in reasonable contemplation at the time the documents were created, if the purpose of their creation was to determine the truth of allegations

brought by a whistleblower (as here) or if they were prepared for the purpose of *avoiding* litigation as opposed to the *conduct* of the litigation, the documents would not be subject to litigation privilege.

However, the court also held that a document created for the purpose of trying to *settle* litigation may be subject to litigation privilege. This distinction between the avoidance of litigation and its settlement may be very fine in practice.

Hong Kong perspective

Taken together, the decisions in *Eurasian Natural Resources* and *The RBS Rights Issue Litigation* suggest an even greater divergence between the law of privilege in England on the one hand, and other common law jurisdictions, including Hong Kong, on the other. The English decisions limit the scope of privilege and, most importantly, undermine the function of privilege.

We understand that there is likely to be an appeal in *Eurasian Natural Resources*, which will, at least, offer the higher courts in England a welcome opportunity to consider the correctness of both of these first instance decisions.

In Hong Kong, litigation privilege has not been subject to similar restrictions. In the Court of Final Appeal decision in *Akai Holdings Ltd v Ernst & Young* (2009) 12 HKCFAR 649, transcripts and notes of private examinations and interviews conducted by liquidators under section 221 of the then Companies Ordinance were held to be protected by litigation privilege where the dominant purpose of conducting the examinations and interviews related to obtaining legal

advice in connection with litigation that was in active contemplation and therefore a real prospect at the time. The fact that an inquiry was inquisitorial and not adversarial in nature does not prevent litigation privilege from attaching, because the examinations in the case were conducted for the purpose of adversarial litigation.

Practical guidance

In Hong Kong, legal professional privilege (including legal advice privilege and litigation privilege) is a substantive right enshrined in statute (the Basic Law) and in common law. The two recent English decisions are in our view unlikely to be followed anytime soon in Hong Kong.

Nevertheless, until the English position settles down, a cautious approach to factual investigations will be required, recognising that in cross-border matters involving England, there is at least a risk that disclosure could be required.

We suggest that our clients exercise care when creating new documents in the course of responding to or running an internal investigation – where no litigation is in reasonable contemplation (hence there is no litigation privilege), internal communications should be structured in a manner that allows legal advice privilege to attach such that the documents can be protected from disclosure.

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