Legal advice privilege: Hong Kong and England move further apart

Hong Kong has enjoyed a wider definition of "*client*" in the context of legal advice privilege following last year's Court of Appeal judgment in *Citic Pacific*. The judge in a recent English case, however, has put a narrow interpretation on who can be considered to be a lawyer's client for the purposes of legal advice privilege. If followed in Hong Kong, this would place serious constraints on the extent to which fact gathering for the purposes of providing legal advice can be carried out under the cloak of privilege.

In a welcome judgment delivered in June 2015, the Hong Kong Court of Appeal in *Citic Pacific Limited v Secretary for Justice & Commissioner of Police* CACV 7/2012 rejected the narrow definition of "*client*" for the purposes of legal advice privilege, opting for a more liberal approach that the "*client*" was the corporation and that communications between the corporation's legal adviser and its employees who may be regarded as being authorised to act for the corporation for the dominant purpose of obtaining legal advice are covered by legal advice privilege. The privilege also protects "*the whole process*" of giving and obtaining legal advice.

In England & Wales, however, it remains an open issue as to whose communications with a corporation's lawyers attract legal advice privilege following the controversial decision of the Court of Appeal in *Three Rivers District Council v Bank of England (No 5)* [2003] QB 1556 - is it only those whose role is to obtain the legal advice, or does it extend to other employees who have material information that the lawyers need in order to give the legal advice?

Three Rivers (No 5) may, on one (heavily criticised) interpretation, have confined privilege to the instructing group, excluding other employees. In *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch), Hildyard J has given renewed vigour to this view of *Three Rivers (No 5)*, deciding that communications, even with lawyers, for the purpose of establishing facts do not attract legal advice privilege.

This decision will have implications for, in particular, the conduct of investigation and other fact-finding exercises. There may be considerable difficulty in undertaking interviews that are, as a matter of English law and procedure, privileged. At the least, great care will be required in the conduct of interviews and what notes are made of the interviews - unless and until *Three Rivers (No 5)* and *The RBS Rights Issue Litigation* are reversed.

Key issues

- The courts in Hong Kong have given a wider definition to the meaning of "*client*" (the entire corporation) in the context of legal advice privilege.
- In England, however, a narrow definition of "*client*" under *Three Rivers (No. 5)* remains the law, and mere employees may not be treated as acting for the lawyer's client for legal advice privilege purposes.
- Under English law, legal advice remains privileged but prior fact finding may not be, absent litigation.
- Care is required in any investigation if privilege might be important.

Background

In English law (as in Hong Kong law), there are two heads of legal professional privilege: litigation privilege and legal advice privilege. Litigation privilege is wide-ranging, covering most communications that have as their dominant purpose the conduct of litigation. But, as its name suggests, litigation privilege depends upon litigation having started or, if not, on its being reasonably in contemplation.

If there is no litigation, only legal advice privilege is available. This covers communications between lawyers and their clients for the purpose of obtaining or giving legal advice. A key difference between litigation privilege and legal advice privilege is that litigation privilege can cover communications with a third party, but legal advice privilege is confined to communications between lawyers and their clients. If, for example, lawyers speak to third parties in order to provide legal advice, those conversations are not privileged.

The underlying basis for legal advice privilege is often referred to as the "*rule of law rationale*". This is as follows: in a complex world, individuals and corporations may need legal advice so that they can arrange their affairs in an orderly manner; it is in the public interest in any society built upon the rule of law that the affairs of individuals and corporations are arranged in an orderly manner; proper legal advice for this purpose can only be given if clients put full and complete facts before their lawyers; those full and complete facts might not be put before lawyers if clients are concerned that any disclosure made to lawyers may subsequently need to be revealed to others, whether in authority, business competitors or merely inquisitive busybodies; as a result, communications between lawyers and clients are absolutely confidential so that clients can safely put the full facts before their lawyers without fear of subsequent disclosure (*Three Rivers District Council v Bank of England (No 6)* [2005] 1 AC 610, [23]-[34]).

Where lawyers' clients are individuals, this raises no problem: communications between lawyers and individual clients are privileged. It becomes more complicated when companies are involved. The companies' information that might need to be given to lawyers to enable the lawyers to provide proper legal advice will seldom be in the head of only one person but will be spread over any number of people. The more complex the issue, the more people - whether junior, middling or senior - are likely to have been involved and to have material information that needs to be given to lawyers in order to allow the lawyers to advise.

Who is the client?

The obvious approach to legal advice privilege in these circumstances is that communications between those who hold the companies' information and the companies' lawyers will be privileged. The rationale for legal advice privilege is to allow lawyers to obtain complete information, and it shouldn't matter from whom within a corporate client the lawyers must obtain this information. Any other interpretation could severely undermine the scope of legal advice privilege for companies.

The Hong Kong Court of Appeal recognised these principles in the *Citic Pacific* decision. It took the view that the constitutional right to confidential legal advice is meaningless if the protection is limited to direct communications seeking and setting out the advice:

"Lawyers need to have the relevant information from their clients before proper advice can be given. Thus, it is a necessary ingredient of the right to confidential legal advice that the whole process is protected by privilege so as to safeguard the confidentiality.

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 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 for 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 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."

This broader approach has also been followed in Singapore and other common law countries.

But that is not the way English law has developed. It appears that under

English law, only those who are actually charged by a company with obtaining the legal advice are able to conduct privileged communications with the company's lawyers. Communications between lawyers (whether in-house or external) and others within the company, no matter how senior, may not be privileged.

This issue emerged from ambiguous nineteenth century case law that was given a new lease of life by the much-criticised Court of Appeal decision in *Three Rivers District Council v Bank of England (No 5)* [2003] QB 1556, though there were special circumstances applicable in *Three Rivers (No 5)* suggesting that the decision was of no application outside its singular facts.

In England, however, *Three Rivers (No 5)* has now been given, in our view, an even more narrow and less commercial interpretation in *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch).

The RBS Rights Issue case

The core issue in *The RBS Rights Issue Litigation* was whether notes of interviews conducted by lawyers as part of an investigation in response to Securities and Exchange Commission subpoenas in the United States were privileged in subsequent litigation between the bank and its shareholders in the English courts. Hildyard J decided that they were not privileged. The judge recognised the force of the criticisms of *Three Rivers (No 5),* but still declined to confine the application of that case to its facts.

The judge considered that *Three Rivers (No 5)* restricted legal advice privilege to communications between a lawyer and the lawyer's "*client*" (though he accepted that the company as a whole will still be the client in the broader, real, sense). The "*client*" for these purposes only includes those authorised to seek and receive legal advice on behalf of the company. "*Clients*" in this sense would, the judge anticipated, usually be a small number of persons at a relatively high level within a corporation. An employee might be authorised to communicate with the lawyers and to pass the company's information to the company's lawyers, but that was not sufficient to make the employee the lawyers' "*client*", or a recognised emanation of the "*client*", for privilege purposes. Fact gathering and the notes of that fact gathering were dismissed as "*preparatory to and for the purpose of enabling [the company], though its directors or other persons authorised to do so on its behalf, to seek and receive legal advice.*" The legal advice eventually given will be privileged, but the preparatory steps are not.

Working papers

As an alternative, the bank argued in *The RBS Rights Issue Litigation* that the notes of interviews were privileged because they were lawyers' working papers. Hildyard J again took a narrow view of this ground. Having decided that the interviews themselves were not privileged, notes of the interviews could only be privileged if they offered a clue as to the legal advice, or some aspect of the legal advice, given to the bank.

The judge was not satisfied that the bank had discharged the burden of showing that the interview notes did this. On his approach, it would have been difficult for the bank to have done so.

Proper law

The interviews in *The RBS Rights Issue Litigation* were largely conducted by or for US lawyers in the light of the SEC's subpoenas. The bank argued that, in these circumstances, the relevant law of privilege was not English law but US law. On rather more orthodox grounds, Hildyard J rejected this argument. Whether a document is privileged from production in the English courts depends upon the English law of privilege, not any foreign law.

Implications - England

The RBS Rights Issue Litigation does not affect the privilege attaching to legal advice as such, only to fact gathering prior to the facts being used to give legal advice. It is, nevertheless, an unfortunate decision that undermines the basis of legal advice privilege under English law by making it difficult for lawyers to gather information in a manner that will be privileged.

At a practical level, the decision will raise serious issues for the conduct of investigations in England. If the decision is followed (and other judges might be persuaded to take a different approach), normal communications between the company's lawyers and employees outside the lawyers' instructing group or ex-employees will not be privileged (absent litigation), unless a way of including all interviewees within the instructing group can be found. That is likely to prove difficult.

This leads on to the question of what notes lawyers should make in interviews. Is a formal statement or similar actually required, or can it be rolled into the lawyers' advice (which

will still be privileged)? Should lawyers conducting an interview be sure to include elements of their advice in any notes, whether for their own purposes or recording an explanation given to the interviewee? The desirability of protecting the content of interviews will need to be balanced against the practicability of any attempted solution.

The best and most commercial solution would be for *Three Rivers (No 5)* and *The RBS Rights Issue Litigation* to be overturned or, at least, explained in a manner that gives greater recognition to the rationale for legal advice privilege. To do this authoritatively may take a trip to the United Kingdom Supreme Court. In the meantime, corporates in England may have to operate on the basis that there is a serious risk that internal fact-finding investigations will not attract privilege unless litigation is imminent.

Implications - Hong Kong

The decision in *The RBS Rights Issue Litigation* appears to suggest a greater divergence in the laws of English and other common law jurisdictions, such as Hong Kong and Singapore, on legal advice privilege.

If the case were decided under Hong Kong law, following *Citic Pacific*, a claim of legal advice privilege over the fact gathering process and working papers of the legal advisers would likely be upheld. Whilst the decision may be of passing interest to Hong Kong courts asked to decide the issue, we believe that *The RBS Rights Issue Litigation* is unlikely to be followed in the territory based on *Citic Pacific*.

Nevertheless, in light of these two competing approaches to privilege under Hong Kong law and English law, we recommend that clients in Hong Kong exercise extra care when handling cross-border investigations, particularly when there is an English law element in the matter.

Contacts

Brian Gilchrist
Partner

T: + 852 2825 8878
E: Brian.Gilchrist
@cliffordchance.com

Edward Johnson
Partner

T: +852 2826 3427
E: Edward.Johnson
@CliffordChance.com

Donna Wacker
Partner

T: +852 2826 3478
E: Donna.Wacker
@CliffordChance.com

William Wong
Senior Associate

T: +852 2826 3588
E: William.Wong
@CliffordChance.com

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Clifford Chance, 27th Floor, Jardine House, One Connaught Place, Hong Kong

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