

Counter-currents to *Three Rivers*: Legal advice privilege in Hong Kong

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The English position in relation to legal advice privilege now stands in contrast to the position in Hong Kong and a growing number of jurisdictions that have rejected the *Three Rivers* approach recently endorsed in *The RBS Rights Issue Litigation*. This divergence presents added challenges and complexities for international institutions conducting internal investigations against a backdrop of court proceedings and regulatory or criminal investigations in different countries.

Key Points

- The English decision in *Re: The RBS Rights Issue Litigation* endorsed the Court of Appeal's earlier narrow definition of "client" in *Three Rivers*, to the effect that an employee of a corporate entity is only classified as a "client" if that employee is authorised to seek and receive legal advice from the lawyer. A company's employee/former employee is not a "client" if the employee provides information to the company's lawyer for the purpose of being reviewed and considered by him.
- Hong Kong, Singapore, Australia and the US have all dismissed the narrow interpretation of "client".
- This divergence has important practical ramifications for all corporations, particularly for large, multi-national corporate entities.

Introduction

Financial institutions have recently been scrutinised by a host of stakeholders, from financial regulators to anxious shareholders. The result is an increase in the number and scale of regulatory investigations and other proceedings. Recent major legal decisions on the scope and application of legal advice privilege (LAP) have important consequences.

LAP protects the confidentiality of communications relating to the seeking of legal advice, even if there is no contemplated or actual litigation on the horizon (including in internal investigations which may or may not lead to proceedings). However, LAP is only applicable to communications between a client and its lawyer.

Third party communications are excluded from LAP protection.

Of importance for financial institutions and other corporate entities is the definition of "client" to which LAP attaches, especially given that a corporation can only act through its employees.

While the English decision in *Re: The RBS Rights Issue Litigation*¹ followed the Court of Appeal's (EWCA) earlier narrow definition of "client" in *Three Rivers D.C. v Governor and Company of the Bank of England*², the English approach is increasingly at odds with the position taken in common law jurisdictions in the Asia-Pacific region and even across the Atlantic.

This article explores the divergence, exemplified by the recent decision of the Hong Kong Court of Appeal (HKCA) in *CITIC Pacific Limited v Secretary for Justice and Commissioner of Police*³. It also reviews the practical ramifications, including the status in English proceedings of foreign privileged materials prepared in the context of foreign investigations.

RBS and Three Rivers

Much has already been written about *RBS* and *Three Rivers*. However, it is important to note that in *Three Rivers*, the EWCA adopted a very narrow definition of “client” such that only communications between lawyers and three Bank of England senior employees were covered by LAP. This narrow definition was upheld in *RBS*, to the effect that an employee of a corporate entity is only classified as a “client” if that employee is authorised to seek and receive legal advice from the lawyer. LAP does not extend to information provided by the company’s employees/former employees even if it was prepared for the purpose of being reviewed and considered by the company’s lawyer.

CITIC Pacific: Crest of the Counter-current

CITIC Pacific involved documents initially produced to the Hong Kong Securities and Futures Commission (SFC) by CITIC Pacific, which is listed on the Hong Kong Stock Exchange. The SFC was investigating CITIC Pacific’s delay in publishing a profit warning on significant losses it had suffered in relation to certain foreign currency forward contracts. The SFC, in seeking legal advice, provided those documents to the Hong Kong Department of Justice (DOJ). At about the same time, criminal investigations were initiated against CITIC Pacific and the police wanted to access documents already in DOJ custody. CITIC Pacific resisted disclosure to the police on grounds of LAP. The HKCA confined the issue on appeal to the proper approach in defining “client” for the purposes of LAP.

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The HKCA declined to follow *Three Rivers* on the basis that such a narrow definition of “client” seriously hampered the underlying policy rationale behind the right to confidential legal advice. Information gathering from employees by a client corporation and its lawyers was a necessary incidence of obtaining legal advice such that the whole process should be protected. In arriving at its conclusion, the HKCA took into account:

- the need to ensure the gathering of information necessary for obtaining full, frank, and proper legal advice remained unhindered;
- the modern commercial reality that the technical knowledge and skills of multiple departments (beyond legal) may be required to put together instructions to outside lawyers; and
- the possible arbitrary and capricious outcomes from the narrow definition.

Instead, the HKCA adopted dominant purpose test set out in the first instance decision of Mr Justice Tomlinson in *Three Rivers (No 5)*⁴ at [30] that “an internal confidential document, not being a communication with a third party, which was produced or brought into existence with the dominant purpose that it or its contents be used to obtain legal advice is privileged from production”. From the HKCA’s perspective, the dominant purpose test is demonstrably more appropriate in delineating the boundaries of LAP.

Hong Kong thus joins the list of jurisdictions that have diverged from the English approach set out above. The Singapore Court of Appeal, the Federal Court of Australia, and the United States Supreme Court (commenting on the analogous US

“control group” test) have all dismissed such a narrow interpretation of “client”. Australia and Singapore have also embraced the dominant purpose test for LAP purposes.

The practical effect of *CITIC Pacific* in rejecting the narrow definition of “client” and accepting the dominant purpose test is that communications and documents produced by a company’s employees (not limited to employees authorised to seek and receive legal advice) are covered by LAP provided that the dominant purpose of those communications is to seek legal advice.

Effect on Corporations

The divergence in the scope of LAP has important practical ramifications for all corporations, but particularly large, multi-national corporate entities. The nature of today’s regulatory environment and the size and structure of an international organisation means that it is increasingly common for departments outside the company’s internal legal department to seek advice from outside lawyers.

Take for example listed companies with a company secretarial department separate from its legal department. An employee within the company secretarial department may seek the assistance of outside lawyers for the purpose of drafting an announcement to the public (e.g. a profit warning). Even though it may be clear that the employee is seeking legal advice, the narrow definition of “client” adopted in *Three Rivers (No 5)* and *RBS* may mean that the employee is treated as a third party whose communications are not subject to LAP because of the employee’s position within the company.

Under the dominant purpose test adopted in Hong Kong, Singapore and Australia, the outcome of the legal analysis would be very different.

Lex Fori

The divergence is also an issue when it comes to dealing with communications, documents and materials prepared in foreign jurisdictions. For example, in *RBS*, certain investigation interview

transcripts, notes and records of employees were generated in relation to a US investigation; as a matter of US law, in US proceedings, these documents could attract legal privilege protection. However, in *RBS*, Mr Justice Hildyard held that the rules of privilege in the *lex fori* (ie the forum where the proceedings were brought) should be applied when determining whether a document is protected by privilege from production.

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Therefore, an internal company communication or document that is privileged under the dominant purpose test in Hong Kong (or elsewhere) may still be subject to production in English proceedings if the relevant employee involved falls outside the narrow definition of “client” as set out in *Three Rivers* and *RBS*.

However, Mr Justice Hildyard in *RBS* did accept that the English courts retained a discretion to restrict or prevent the production of a disclosable document in exceptional circumstances (e.g. where there is a legitimate expectation of privilege protection under foreign law). The general position is that the courts lean in favour of disclosure. While leaving open the future possibility of exercising this discretion, the circumstances of *RBS* were not sufficient to justify its exercise on the facts.

Status of Former Employees

While *CITIC Pacific* has departed from *Three Rivers*, the English position may still have relevance with regards to defining the status of former employees of the corporate entity who were employed at the relevant time when who were employed at the relevant time when the communication, document or material was made. This was one area which the HKCA in *CITIC Pacific* deliberately left open in its decision.

Procedure for Resolving Legal Professional Privilege Claims in Hong Kong

The HKCA in *CITIC Pacific* recommended a procedure for handling disputes between parties concerning legal professional privilege (LPP). As a preliminary point, the HKCA noted that:

- The burden rests on the person claiming LPP to make good his claims.
- Any blanket claim of LPP is objectionable and will be rejected by the court.
- Meaningful assistance from both parties must be given to the court or any independent lawyer appointed by the parties to resolve the LPP claims.

The procedure draws on the existing procedure in England approved in cases such as *R v Middlesex Guildhall Crown Court, exp Tamosius & Partners* [2000] 1 WLR 453 and *R (Rawlinson & Hunter Trustees and Others) v Central Criminal Court*⁵ - as well as updates to the Serious Fraud Office's Operational Handbook and the English Bar Council's guidance for independent counsel for LPP. It provides that:

- The party claiming LPP (LPP claimant) should identify which materials and on which ground of LPP (LAP or litigation privilege) it seeks to assert the privilege claim. It should also adduce evidence setting out the bases and factual context upon which privilege is claimed.
- The LPP claimant should consider granting a carefully drafted limited waiver for specified personnel or independent counsel to inspect the disputed materials, who should then review the disputed materials and advise on whether any concessions on disclosure can be made.
- Both parties should consider whether to appoint an independent lawyer (LPP lawyer) to assist in resolving disputed privilege claims.

Any outstanding privilege claims which the LPP lawyer is unable to resolve can be determined by the court.

Conclusion

The continuing divergence between the above positions is a concern for financial institutions and multinational corporations facing potential investigations and proceedings. Care should be taken as to which employees are internally responsible for the gathering of information and for correspondence with outside counsel.

Despite *RBS* having been granted a leapfrog certificate to appeal the decision of Mr Justice Hildyard directly to the UK Supreme Court, on 2 February 2017 it was announced that the appeal would be withdrawn because amendments to the claimants' statements of case meant the disputed documents were no longer relevant to the pleaded issues. As such, the unhelpful divergence remains in place and, it seems, will remain so for some time.

¹ [2016] EWHC 3161 (Ch)

² (*No 5*) [2003] QB 1556

³ [2015] HKEC 1263

⁴ [2002] EWHC 2730 (Comm)

⁵ [2013] 1 WLR 1634



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