Legal Professional Privilege in Hong Kong: The Impact of the English Court of Appeal's Decision in ENRC

September 2018

This client briefing considers how the recent decision of the English Court of Appeal (**CA**) in *Serious Fraud Office (SFO) v Eurasian Natural Resources Corporation (ENRC) [2018]* EWCA Civ 2006 (**ENRC No 2**) to allow an appeal regarding legal professional privilege (**LPP**) in the context of an internal investigation might affect LPP in Hong Kong.

Introduction

The English CA's decision in *ENRC No 2* is the third in a trilogy of recent English decisions regarding LPP. All three decisions relate back to the difficult case of Three Rivers DC v Governor and Company of the Bank of England (No 5) [2003] QB 1556 (**Three Rivers**), in particular its narrow definition of 'client' in the context of legal advice privilege (**LAP**). The first decision, in Re: The RBS Rights Issue Litigation [2016] EWHC 3161 (Ch) (**RBS**), saw the English High Court endorse the narrow Three Rivers approach to the definition of 'client'. *RBS* was not appealed, but was soon followed by the English High Court's decision in Serious Fraud Office v Eurasian Natural Resources Corporation [2017] EWHC 1017 (QB) (**ENRC No 1**). In *ENRC No 1*, the English High Court sought both to: (i) confine the ambit of litigation privilege (**LP**); and (ii) to reinforce an already restrictive approach under English law to the ambit of LAP in internal investigations. This led to a divergence between the English and Hong Kong positions, most recently exemplified in CITIC Pacific Limited v Secretary for Justice and Commissioner of Police [2016] 1 HKC 157 (**CITIC Pacific**).

We have written about the decisions prior to *ENRC No 2* (and their practical effect for clients) in two previously published articles. Our March 2017 article on *RBS* (which was originally published in the March 2017 edition of *Butterworths Journal of International Banking and Financial Law*) can be found on our website **here** and our May 2017 article on *ENRC No 1* can be found **here**.

In this article, we consider *ENRC No 2* and its impact on LPP in Hong Kong.

Litigation Privilege: a welcome reversal

LP applies to communications between parties or their lawyers and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation. LP may therefore protect communications with third parties which would not be protected by LAP. In order for a communication to be protected by LP: (i) litigation must be in progress or reasonably in contemplation; (ii) the relevant communication must have been made with the dominant purpose of anticipated/actual litigation; and (iii) the litigation must be adversarial as opposed to investigative/inquisitorial.

In *ENRC No 2*, the English CA reversed the English High Court's ruling in *ENRC No 1* that LP would not apply to the documents ENRC sought to withhold from the SFO. The documents in question were documents generated during

investigations undertaken between 2011 and 2013 by solicitors and forensic accountants into activities of ENRC and its subsidiaries.

In relation to the time at which litigation was reasonably in contemplation, the English CA observed that the "*whole sub-text of the relationship between ENRC and the SFO was the possibility, if not the likelihood, of prosecution if the self-reporting process did not result in a civil settlement*" (paragraph 93). The English CA did acknowledge that it was "*not sure that every SFO manifestation of concern would properly be regarded as adversarial litigation*" but went on to state that "*when the SFO specifically makes clear to the company the prospect of its criminal prosecution…and legal advisers are engaged to deal with that situation…there is a clear ground for contending that criminal prosecution is in reasonable contemplation*" (paragraph 96). Moreover, the fact that "*whilst a party anticipating possible prosecution will often need to make further investigations before it can say with certainty that proceedings are likely, that uncertainty…does not in itself prevent proceedings being in reasonable contemplation*". As such, the English High Court should have concluded that litigation was reasonably in prospect.

As to whether the documents in question were prepared for the dominant purpose of resisting contemplated proceedings, the English CA stated that the "*fact solicitors prepare a document with the ultimate intention of showing that document to the opposing parties does not…automatically deprive the preparatory legal work they have undertaken of [LP]. We can imagine many circumstances where solicitors may spend much time fine-tuning a response to a claim in order to give their client the best chance of reaching an early settlement…In both the civil and the criminal context, legal advice so as to head off, avoid or even settle reasonably contemplated proceedings is as much protected by litigation privilege as advice given for the purpose of resisting or defending such contemplated proceedings*" (paragraph 102). The court went on to state that "*where there is a clear threat of a criminal investigation, the reason for the investigation of whistle-blower allegations must be brought into the zone where the dominant purpose may be to prevent or deal with litigation*" (paragraph 109). The English CA also noted the factual position that "*ENRC never actually agreed to disclose the materials it created in the course of its investigation to the SFO. It certainly gave the SFO repeated indications that it would make 'full and frank disclosure' and that it would produce its evidential report to the SFO. But it never actually committed to producing its interviews and intermediate work product to the SFO*" (paragraph 112). The English CA concluded therefore that the English High Court ought to have found that the documents were brought into existence for the dominant purpose of resisting or avoiding contemplated proceedings.

The effect of *ENRC No 1* was that LP might not have been available as early in investigations as practitioners may previously have assumed. While not determinative of the position in Hong Kong, important English cases are still of persuasive authority. The decision in *ENRC No 2* ought therefore to be welcomed, particularly in the context of investigations into potential criminal conduct.

Legal Advice Privilege: converging streams?

LAP protects the confidentiality of communications relating to the seeking of legal advice, even if there is no contemplated or actual litigation in contemplation (including in internal investigations which may or may not lead to proceedings). It is only applicable to communications between a client and its lawyer. Third party communications are excluded from LAP protection.

In the past, as a result of *Three Rivers*, we in Hong Kong were faced with an uncertain situation as to how LAP applied to corporate entities. The English CA in *Three Rivers* effectively chose to recognise only a particular team within a corporate client as constituting the 'client' for LAP purposes. As a result, documents produced by employees of that company who were outside of that team, although produced to be given to external lawyers, were held not to be privileged. The key consequence was that not every communication between a lawyer and an employee of his corporate client was privileged - only communications with the 'privilege' client would be privileged. The *Three Rivers* approach was followed in *RBS* and *ENRC No 1*. However, in *CITIC Pacific*, the Hong Kong Court of Appeal (**HK CA**) declined to follow *Three Rivers* on the basis that such a narrow interpretation of 'client' hampered the underlying policy rationale behind the right to confidential legal advice. Information gathering from employees by a client corporation and its lawyer was a necessary incidence of obtaining legal advice such that the whole process should be protected. The HK CA adopted a dominant purpose test and diverged from the English approach (consistent with the approach taken in Singapore, Australia and the USA). The practical effect of *CITIC Pacific* in rejecting the narrow definition of 'client' and adopting the dominant purpose test was 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.

Unfortunately, the English CA in *ENRC No 2* concluded that it did not need to decide matters relating to LAP - such matters would be for the English Supreme Court to examine. However, the court did acknowledge that there are outstanding questions and problems in relation to *Three Rivers*. For example, the English CA observed that the narrow definition of 'client' might lead to a situation where a smaller company was in a more advantageous position than a larger company with regard to LAP. It was the English CA's view that "*whatever the rule is, it should be equally applicable to all clients, whatever their size or reach*" (paragraph 127). The English CA made specific reference to *CITIC Pacific* and the dominant purpose test (paragraph 128) before going on to state that "*it seems to us…that English law is out of step with the international common law on this issue. It is undoubtedly desirable for the common law in different countries to remain aligned so far as development is not specifically affected by different commercial or cultural environments in those countries. In this regard, [LPP] is a classic example of an area where one might expect to see commonality between the laws of common law countries, particularly when so many multinational companies operate across borders and have subsidiaries in numerous common law countries. If, therefore, it had been open to us to depart from Three Rivers, we would have been in favour of doing so*" (paragraphs 129 - 130).

While the positions in relation to LAP remain at odds in England and Wales on the one hand and Hong Kong (and other major common law jurisdictions) on the other, the English CA's comments in *ENRC No 2* are encouraging in that one hopes that the English Supreme Court will, in the near future, be presented with an opportunity to align the two positions.

Conclusion

ENRC No 2 is to be welcomed in Hong Kong. While not going so far as to do so, it lays the groundwork for closing the gap which had begun to emerge between the various approaches to LAP. Indeed, the English CA's apparent endorsement of the approach taken in Hong Kong and other common law jurisdictions is encouraging. The progressive approach taken in relation to LP is also encouraging, hopefully reducing the risk of any future divergence between the English law concept of privilege and that in other common law jurisdictions such as Hong Kong in the future.

While *ENRC No 2* represents a step forward, care still needs to be taken while the divergence of approaches remains. Financial institutions and multinational corporations facing potential investigations and proceedings should still remain vigilant and be aware of the position in relation to LPP in each relevant jurisdiction. In particular, care should be taken as to which employees are internally responsible for gathering information and corresponding with outside counsel. It is also worth being aware of why documents are being created, particularly in the early stages of any matter.

To the extent you have any questions regarding the above, please contact either Mark Hughes or Kevin Warburton, whose contact details are below.

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Dated September 2018

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