Hong Kong rejects restrictive approach to determining privilege claims under English law

What you need to know

Hong Kong's Court of Appeal has rejected the narrow (and controversial) definition of "client" for the purposes of legal professional privilege currently applied under English law.

The Court of Appeal's judgment confirms that, in addition to communications directly with its lawyers, a company's internal communications will also be protected by privilege if they were created for the "dominant purpose" of seeking legal advice.

While the judgment is persuasive and in line with the approach currently being taken in common law jurisdictions outside England, there is scope for the Court of Final Appeal to revisit this issue.

What you should do

Financial intermediaries and corporates should consider whether their current processes for seeking legal advice take full advantage of the change of position contained in the judgment.

Careful consideration should also be given to whether documents, and in particular documents containing factual summaries and interview notes of staff, can be validly withheld on privilege grounds in civil proceedings or in response to regulatory inquiries. Consideration should also be given as to whether any proceedings would take place in England or under English law, in which case the restrictive definition of "client" would still apply.

This is the first of three articles that we will be publishing on recent privilege decisions in the coming days. In our next two articles, we will outline an important decision of the English courts on whether the "without prejudice" rule applies to settlement discussions for regulatory matters, and a Hong Kong decision that has applied the "fraud exception" to reject privilege claims.

Background

Whether a document is able to be withheld by virtue of legal professional privilege – which encompasses both legal advice privilege and litigation privilege – is a fundamental issue that parties must confront when carrying out discovery in civil proceedings and in responding to regulatory requests for information. In the latest judgment in the Citic Pacific Ltd –v- Secretary for Justice proceedings,1 the Court of Appeal was tasked with determining whether documents seized in the execution of a search warrant were privileged. In determining the issue, the court has issued an important judgment that clarifies who the "client" is for the purpose of legal professional privilege under Hong Kong law. It has held that where legal advice is being obtained for a company, it is the company itself that is the client and not a subset of its employees.

The English law position under Three Rivers (No. 5)

The Court of Appeal's approach departs from the narrow definition of a "client" under English law following the decision of the English Court of Appeal in

1 Citic Pacific Ltd –v- Secretary for Justice, CACV 7/2012, 29 June 2015.
Three Rivers (No. 5).\textsuperscript{2} In that case, it was held that only a small group of employees tasked with responding to an inquiry were the client of the firm of solicitors providing advice on how to respond to the inquiry. Communications passing between that subset of employees and others within the organization were considered to be non-confidential communications with third parties, and therefore not able to be withheld from discovery on the basis of legal advice privilege. The decision in Three Rivers (No. 5) has been controversial and criticised as unrealistic in the context of the modern world where large companies are reliant on a broad group of employees to seek effective legal advice.

\textit{Citic Pacific – taking Hong Kong law in a different direction}

The primary question before Hong Kong's Court of Appeal in Citic Pacific was whether the Court of First Instance was correct in following Three Rivers (No. 5) that only communications between Citic Pacific's group legal department and external legal advisers could qualify for legal advice privilege. In doing so, the Court of First Instance held that: (i) communications between other employees of Citic Pacific and its group legal department; and (ii) communications directly between employees of Citic Pacific outside its group legal department (e.g. its company secretarial department) and its external legal advisers were not covered by legal advice privilege.

The Court of Appeal has decisively rejected the narrow definition of "client" contained in Three Rivers (No. 5). Where a corporate entity is being advised, the Court of Appeal succinctly states "It can, we think, be said that the client is simply the corporation and the question is really one of which its employees should be regarded as being authorized to act for it in the process of obtaining legal advice."

In respect of this question, the Court of Appeal took a pragmatic view of which employees are authorised to seek legal advice on behalf of a company and what documents are protected. It noted that there are good reasons why the group of persons authorised to seek legal advice should not be restricted to a corporate legal department. Advice sought by the company secretarial function directly from external counsel was therefore held to be protected by legal advice privilege.

Internal communications between the corporate legal department and other employees were also held to be protected by legal advice privilege, provided that those communications or documents were produced or created for the dominant purpose of seeking legal advice. The court placed significant emphasis on the dominant purpose test as being able to effectively screen out unmeritorious privilege claims. The court noted that, in the modern world, a small group of legally qualified employees is unlikely to have the technical knowledge and skills required to gather information necessary for the purpose of seeking legal advice. While primary or underlying documents created during the course of a transaction will not be subject to legal professional privilege, the court held that "the processing of such knowledge into a documentary form for the purpose of seeking legal advice" will attract privilege.

\textbf{The proper process for determining privilege claims}

The Court of Appeal was critical of the approach that had been taken by the parties to the determination of privilege claims in the Court of First Instance and before it. It was considered that insufficient detail had been provided to enable the courts to examine the context of each class of document and the reasons why they were said to be privileged. The court therefore suggested the following process for resolving disputed privilege claims for documents seized under a search warrant:

\begin{itemize}
  \item[a)] The person claiming legal professional privilege should: (i) identify for the other party the materials over which privilege is claimed; (ii) specify with respect to each of those materials whether the privilege claimed is legal advice or litigation privilege; and (iii) provide context to support the basis on which privilege is claimed.
  \item[b)] The person claiming privilege should also consider giving a limited waiver of privilege to allow an independent lawyer appointed by the relevant authority, or a subset of its staff not directly involved in the matter, to inspect the documents for the specific purpose of assessing whether the claim of legal professional privilege has properly been made out.
  \item[c)] The person claiming privilege and other party should actively consider instructing an independent lawyer to resolve any disputed claims of privilege, without prejudice to their right to further dispute the matter if required.
  \item[d)] Where the person claiming privilege wishes to apply to the courts for determination of their claims of privilege, this must be through an originating summons supported by a detailed supporting affirmation.
\end{itemize}

\textsuperscript{2} Three Rivers District Council –v- Governor and Company of the Bank of England (No. 5) [2003] QB 1556.
Analysis

By rejecting the narrow definition of "client" set down in Three Rivers (No. 5), the Court of Appeal has taken Hong Kong’s law of privilege in a different direction to English law. The application of the dominant purpose test, which confirms that internal communications within a company are privileged provided that they were created for the dominant purpose of seeking legal advice, should be welcomed as providing much needed clarity to Hong Kong law.

The effect of the judgment is to provide more flexibility as to how factual material is gathered within an organisation for the purposes of seeking legal advice. The client will be the corporate entity itself and not a narrow subset of its staff confined to its corporate legal department. However, to ensure that a privilege claim is able to be maintained, it would be advisable to record in writing requests to gather factual information and the purposes for which it is required so that there is a ready record to demonstrate that the dominant purpose test has been met.

An issue that frequently arises in the context of regulatory investigations is whether interview notes of staff are properly able to be subject to legal professional privilege. Where such interviews are carried out, staff are often given an "Upjohn warning" where they are told that the interview is privileged and must be kept confidential, that the privilege belongs to the firm and that the firm may waive that privilege at its own discretion. While the issue was not directly before the court, the reasoning in the judgment suggests that interview notes created in this context could properly be subject to a claim of privilege if they satisfy the dominant purpose test. It is also noteworthy that the Court of Appeal referred to the decision of the US Supreme Court in Upjohn v United States (the case after which Upjohn warnings were named) with approval. Whether Hong Kong’s financial regulators will still expect privilege to be waived over such interview notes is, however, a separate issue.

Given the fundamental importance of the issues raised by this Court of Appeal decision, it is likely that it will be closely considered by the Court of Final Appeal in the near future – whether in a further appeal in the Citic Pacific litigation or another proceeding. As the Court of Final Appeal may take a different approach, companies should still exercise caution in how they approach fact gathering for the purposes of seeking legal advice, which staff are permitted to instruct external counsel, and ensure that confidentiality is maintained over any documents that could potentially be subject to a privilege claim. If there is a possibility that proceedings relating to the issue could also arise in England or in an English law governed dispute, a conservative approach in line with the restrictive definition of "client" under English law should continue to be applied.

Further information

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