Litigation & Dispute Resolution

The Hong Kong and English Courts’ Different Approaches to Privilege Protection and the Impact on Corporate Internal Investigations

In Hong Kong, Legal Professional Privilege ("LPP") offers wide protection to both individuals and corporations seeking to resist disclosure of confidential documents in the context of civil litigation, criminal investigations and investigations by regulatory authorities.

There are two main types of LPP:

1. Legal advice privilege, which attaches to confidential communications between a lawyer and a client for the dominant purpose of obtaining or giving legal advice ("LAP"); and

2. Litigation privilege, which attaches to confidential communications between a lawyer and a client, or between either of them and a third party, for the dominant purpose of obtaining or giving information or legal advice in relation to an existing, pending or reasonably contemplated litigation ("LP").

**LPP in the context of internal investigations**

In the context of companies, internal and external lawyers are often tasked with “internal investigations” involving the gathering of information from employees for the purpose of seeking and giving legal advice, whether for litigation or non-litigious (transactional) matters. Various materials would come into existence as a result of these internal investigations which may contain sensitive or confidential information, are these internally confidential materials protected by LPP?

LAP clearly protects confidential communications between lawyers and employees authorised to instruct and obtain legal advice from lawyers on behalf of a company, and also any documents containing or forming part of the advice. Examples are the legal opinion itself or the PowerPoint slides made to convey that advice to a company’s management, which are made with and contained facts drawn from internal interviews with employees.

Much less clear is whether companies can use LAP to resist disclosure of internal confidential documents which do not contain or form part of the legal advice but come into existence as part of lawyers’ communications with the company’s employees, who are simply authorized to “divulge information” to the lawyers, which is a preparatory or necessary step for the purpose of getting that advice. Examples are communications between employees, interview notes and lawyers’ working papers.
This Newsletter highlights some important considerations for companies seeking to claim LPP to resist disclosure of these sensitive or confidential internal documents.

**Where litigation or regulatory investigations are commenced**

It is important to be reminded that what is privileged in one jurisdiction will not necessarily be privileged in another. The privilege status of these documents will depend on the laws of the jurisdiction where litigation or regulatory investigations are commenced. For example, the Hong Kong law on LPP differs greatly from English law as to who is “client”.

Who is the “client” seeking or obtaining legal advice?

In *Three Rivers District Council v Governor and Company of the Bank of England (No. 5)* [2003] QB 1556 ("Three Rivers"), the English Court of Appeal adopted a very narrow definition of “client” by holding that LAP is confined to communications between client and solicitor only, and that internal communications between employees for the purpose of getting information for legal advice are no different than information obtained from third parties, which are not protected by LAP. Since December 2016, the English High Court has handed down two significant judgments which further illustrated the narrowness of “client” in the application of privilege in the context of internal investigations under English Law.

First, in the *RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) ("RBS"), group litigation was brought by investors against RBS (the Royal Bank of Scotland) concerning an inaccurate prospectus for fundraising. Investors sought disclosure of interview notes taken by RBS’ internal and external lawyers during RBS’ internal investigations. RBS sought to block access to these interview notes mainly on the ground of LAP. Second, in a subsequent case *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation* [2017] WLR(D) 317 ("SFO v ENRC"), the SFO sought discovery of interview notes taken by lawyers for ENRC prior to the commencement of the criminal proceedings. ENRC sought to resist discovery by both LAP and LP. In both cases, the court held that privilege only extends to communications between lawyers and client (i.e. the employees authorized to instruct and obtain legal advice from lawyers), and a mere authority to provide factual information to lawyers will not render the employee a “client”.

In contrast, in *Citic Pacific Ltd v Secretary for Justice (No 2)* [2015] 4 HKLRD 20 ("Citic"), Hong Kong Court of Appeal rejected the narrow definition of “client” in *Three Rivers* and held that a “client” is simply a corporation and its employees who could be regarded as being authorised to act for the corporation in the process of obtaining legal advice.

The appellate court said it was meaningless to have a right to confidential legal advice if LPP is confined to communications containing that advice, as lawyers likely require relevant information from employees in various departments or levels before proper advice could be
given, and to adopt a restrictive definition of “client” would impinge upon the ability of the corporation to seek and obtain meaningful legal advice.

The appellate court concluded that the “dominant purpose” test should be the appropriate test for setting out the scope for LPP, that is, if internal confidential documents come into existence with the “dominant purpose” that their contents are to be used to seek or obtain legal advice, it is likely protected by LPP shielding these documents from disclosure. Hong Kong law thus offers wider protection on LPP than English law.

When is litigation “reasonably contemplated”? When litigation is subsisting, pending or reasonably contemplated, it may be more convenient to claim LP as the privilege will extend to communications or gathering of information from third parties. Although RBS did not claim LP, ENRC did claim LP to resist SFO’s disclosure notices against the interview notes. But ENRC’s LP claim also failed as the court said (i) ENRC could not show that adversarial litigation was contemplated at the time the documents were created; (ii) “the reasonable contemplation of a criminal investigation does not necessarily equate to the reasonable contemplation of a prosecution,”; and (iii) “the investigation and the inception of a prosecution cannot be characterised as part and parcel of one continuous amorphous process.”

This restrictive definition of “reasonably contemplated litigation” per this English case suggests that LP is going to be very difficult to claim for many internal investigation materials, particularly those that come into existence to address whistle-blower allegations or compliance concerns prior to a formal enquiry by a regulator. ENRC is seeking permission to appeal the decision. It would be helpful if a higher court can provide guidance on when an investigation becomes sufficiently adversarial or confrontational to constitute “litigation” or “reasonably contemplated litigation” for LP purposes, as it remains a grey area. It is also yet to be seen whether Hong Kong will adopt the principles in this ruling when these principles are tested in an appropriate case in Hong Kong.

Does it mean automatic loss of protection? Since LPP has a much narrower application in the UK, concerns are that if documents are produced to a regulator in the UK, such as those disclosed in the SFO v ENRC case, will local protection be automatically lost? In Hong Kong, courts recognise “partial waiver” which means that a privileged document may be disclosed to a specific party for a specified/limited purpose only, thus waiving the privilege to that document as against that party and for that purpose only. Privilege to the document is retained as against all third parties.
Early assessment of applicable laws and internal protocols

Despite Hong Kong law gives much wider protection on LPP when it comes to internal investigations, for Hong Kong companies who may potentially be subject to litigation in the English courts or regulatory investigations by UK authorities, the RBS case and SFO v ENRC case remind us that English law will apply when they are seeking to resist disclosure in the UK. Therefore, when faced with an internal investigation, a company needs to (i) establish early on whether English law may apply to the conduct being investigated, that is whether such conduct may form the subject of litigation or regulatory investigations in the UK, (ii) consider how best to protect the materials created during their internal investigations, if subsequently sought to be produced in the UK or elsewhere, and (iii) design appropriate internal protocols or work procedures for an internal investigation in consultation with external and internal legal opinions to maximize privilege protection. In case of any doubt, do not record any materials before legal advice is sought.

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Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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