



## RECENT JUDGMENT JUMP-STARTS LAW OF LEGAL PROFESSIONAL PRIVILEGE IN HONG KONG

In a recent judgment on March 28, 2012, the Hong Kong Court of Appeal jump-started the evolution of the law of legal professional privilege in Hong Kong. The case in question, *Citic Pacific Limited v Secretary for Justice* [2012] HKEC 432, confirmed that a partial waiver of legal professional privilege is a valid legal doctrine in Hong Kong. In reaching his decision, Mr. Justice Hartmann set a new direction for the doctrine of privilege by crafting a hybrid body of law based on English and New Zealand case law.

### LEGAL PROFESSIONAL PRIVILEGE

There are two categories of legal professional privilege, conventionally known as legal advice privilege and litigation privilege, respectively:

1. “Legal advice privilege” relates to communication between a lawyer and his client, made for the purpose of giving or receiving legal advice. “Legal advice” in this context may refer to

guidance on how to implement certain actions or how to present a case, and it is not limited to a legal opinion on what the law is. Unlike litigation privilege, this type of privilege does not extend to third parties.

2. “Litigation privilege” extends to communication between a litigant or his lawyer and third parties in connection with existing or anticipated legal proceedings.

For both categories of privilege, the communication must be made in confidence and with the intention that it remain confidential.

Either form of legal professional privilege may be waived expressly or impliedly by the client, and by the client only, and it does not apply to communication made for criminal or fraudulent purposes. It is in relation to these two points that the *Citic* case is examined in this *Commentary*.

## CASE BACKGROUND

In September 2008, Citic Pacific Limited (“Citic”) became heavily exposed to financial risk in the foreign exchange markets due to the global financial crisis. It was not until six weeks later, on October 20, 2008, that Citic issued a profit warning on the Hong Kong Stock Exchange, informing investors and market participants of its predicted losses. The delay in publishing the profit warning impelled the Securities and Futures Commission of Hong Kong (“SFC”) to begin investigating Citic on the basis that Citic’s management personnel may have engaged in fraud, misfeasance, or other misconduct, or failed to make timely disclosure.

The SFC requested documents and records from Citic for the purposes of the investigation, and Citic provided, among other documents, six documents that it claimed were subject to legal professional privilege (“Legal Documents”). The SFC, seeking legal advice, then gave the Legal Documents to the Hong Kong Department of Justice. The police, which were by March 2009 conducting a criminal investigation into Citic, requested the Legal Documents for their own investigation.

Citic commenced proceedings in the Hong Kong Court of First Instance, requesting an order that the Legal Documents be returned on the ground that they were subject to legal advice privilege. Citic asserted that when they handed the Legal Documents to the SFC, they had only partially waived privilege for the limited purpose of the SFC investigation. The Department of Justice therefore had no authority to possess the Legal Documents, much less divulge the information to the police or any third party. The Court of First Instance held that (i) Citic had waived all privilege in the Legal Documents, and (ii) in any case, privilege would not apply because Citic had created the Legal Documents for fraudulent purposes. The current case is the result of Citic’s appeal of these conclusions.

## COURT OF APPEAL FINDINGS

With regard to the doctrine of partial waiver of privilege, Mr. Justice Hartmann examined the rationale for legal professional privilege cited in English and New Zealand authorities<sup>1</sup>—that a person must be able to consult with his lawyer in

confidence for the administration of justice. This principle is enshrined in Article 35 of the Basic Law of Hong Kong, which provides that residents shall have the right to confidential legal advice. Specifically, Mr. Justice Hartmann considered that he was not bound by the holding in the *Rockefeller* case,<sup>2</sup> in which Mr. Justice Keith JA opined that the doctrine of “partial waiver” would be “conceptually unsound.”<sup>3</sup> The Court of Appeal proceeded to confirm that Hong Kong law incorporates the concept of partial waiver of privilege.

The Secretary of Justice submitted that even if a partial waiver is a valid concept, it is irrelevant because, according to English authorities, privilege is lost in criminal proceedings if the information comes into the hands of the prosecuting authorities through inadvertence, mistake, or even surreptitious conduct by a third party. Here, the court diverged from English authorities in favor of New Zealand case law that held the opposite view.

Mr. Justice Hartmann held that privilege is the same in both civil and criminal proceedings and could not be lost without evidence that it had been intentionally waived by the holder of that privilege. While such evidence may be inferred based on the circumstances of the case, this should not be done lightly because legal professional privilege is a constitutionally guaranteed right. The fact that the person receiving legal advice chose not to heed it, and instead carried out an independent dishonest course of action, would not affect the privileged status of the advice.<sup>4</sup>

On the facts of the case, the court determined that Citic had only partially waived privilege for the purposes of the SFC’s investigation, and that the waiver was broad enough to allow the SFC to use the Legal Documents in order to seek legal advice from the Department of Justice. The court further noted that had Citic’s legal advisors stated in specific terms the basis upon which the documents were provided to the SFC, the breadth of Citic’s waiver would not have been in dispute.

As to the matter of fraud, the court found insufficient evidence to support a clear prima facie case of fraud that would override a claim of legal professional privilege. Where the alleged fraudulent conduct is fundamentally tied to the

legal advice upon which privilege is claimed, there is an even greater burden on the party seeking disclosure. The evidence presented by the Secretary for Justice failed to clear this basic threshold to establish that the Legal Documents were produced to facilitate or further dishonest conduct on the part of Citic's directors.

## COMMENTARY

The practical applications of the doctrine of partial waiver of privilege are well demonstrated in this case. It is worthwhile to note that on this issue, the Court of Appeal preferred the approach taken by the English courts over Mr. Justice Keith JA's approach in the *Rockefeller* case. In any instance, where privileged information is surrendered to a third party, the terms and conditions of waiving privilege, as well as the scope of permitted use by the third party, should be clearly set out in writing.

Further, the Court of Appeal appears to have adopted a fluid approach to developing this area of law in Hong Kong by relying upon the New Zealand line of authorities over the English, in relation to the treatment of privilege in criminal proceedings. This may help Hong Kong navigate the variations of the doctrine of privilege established by other common law jurisdictions.

In recent years, English case law has taken an unsettling turn in the *Three Rivers (No 5)* case involving the Bank of England.<sup>5</sup> The *Three Rivers (No 5)* case dealt with the question of who the "client" is, for purposes of legal advice privilege, when a lawyer renders advice to a corporation. The English Court of Appeal held that only the employees appointed by the bank to deal with the matter requiring legal advice were considered the "client." This meant that communications between those appointed employees and other employees of the bank were not protected by privilege. Not surprisingly, given the size and scale of corporations in operation today, this English decision has not gone without criticism.

So far, the Hong Kong courts have not yet had to grapple with the implications presented by *Three Rivers (No 5)* directly. However, if the *Citic* case is any indication of the courts' willingness to consider non-English developments, Hong Kong may well prefer a different approach.

Given the importance of this area of the law, it is likely that the Secretary for Justice and Commissioner of Police will seek leave to appeal the Court of Appeal's decision. If leave to appeal is granted, it remains to be seen whether the Court of Final Appeal will uphold the ruling of the Court of Appeal.

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## ENDNOTES

- 1 *R v Derby Magistrates' Court, Ex p B* [1996] AC 487; *British Coal Corporation v Dennis Rye Ltd (No. 2)* [1998] WLR 1113; *B and Others v Auckland District Law Society and Another* [2003] 2 AC 736.
- 2 *Rockefeller & Co Inc v Secretary for Justice* [2003] 3 HKC 48.
- 3 Paragraph 37 of Mr. Justice Hartmann's Judgment.
- 4 Paragraph 104 of Mr. Justice Hartmann's Judgment.
- 5 *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2002] 3 WLR 667 (CA).

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