Legal advice privilege: is there light after Three Rivers?

In its recent judgment in CITIC Pacific Limited v Secretary for Justice and Commissioner of Police (unreported, 29 June 2015) the Hong Kong Court of Appeal (HKCA) rejected the much-criticised approach to legal advice privilege under English law, as established by the Court of Appeal in Three Rivers District Council v Bank of England (Three Rivers No 5). Instead, it opted for a broader test based on the dominant purpose of the document or communication, more akin to the test that applies to litigation privilege.

In my view at least, the HKCA’s approach is eminently sensible, elevating substance over form and avoiding the need for corporate clients to jump through formalistic hoops, in an attempt to obtain the protection of privilege for documents produced as part of the process of obtaining legal advice. The HKCA’s decision may add weight to calls for a review of this area under English law, ultimately, one may hope, leading to the adoption of a more workable approach to legal advice privilege here also.

Three Rivers No 5

As is well-known, in Three Rivers No 5, the Court of Appeal adopted a narrow view of who is the “client” for the purposes of legal advice privilege. On the facts of that case, only the three-member committee formed by the Bank of England to coordinate communications with its external lawyers in relation to the Bingham Inquiry into the collapse of BCCI constituted the
client. Privilege was restricted to communications or draft communications between that committee and the lawyers, which meant that any documents or communications prepared by others within the bank were denied protection, even if they were prepared so that the lawyers could advise.

Following the Court of Appeal’s decision in *Three Rivers No 5*, there was no real guidance as to whether, and if so when, such a narrow interpretation of “client” might be applied in other cases. In fact, it seems there were simply no English cases in which the decision was applied to restrict the definition of “client” in this way. If there were, they would no doubt have hit the headlines. So it began to seem that the Court of Appeal’s decision on this point might be confined to its own particular facts (though corporate clients could not ignore the decision, as it remained possible that in any given case it might be applied to restrict the “client” to a limited group within the organisation).

**CITIC Pacific**

Against this background, the Hong Kong Court of First Instance caused ripples among the English legal profession when, in 2011, it applied *Three Rivers No 5* to restrict the “client” to the group legal department (comprising two in-house lawyers) and the board of directors of the relevant client company. This meant that communications from other employees to the company’s external lawyers could not benefit from the protection of legal advice privilege.

The HKCA has now overturned that decision, rejecting the approach established in *Three Rivers No 5* on which the lower court’s decision was based and highlighting a “mismatch” between a narrow definition of client and the proper limitation of legal advice privilege. In the HKCA’s judgment, the client for privilege purposes is simply the corporation.

As well as rejecting the narrow definition of client, the HKCA has gone further and adopted a "dominant purpose” test for legal advice privilege. This means that under Hong Kong law, the privilege is no longer restricted to communications between lawyer and client, but will protect internal confidential documents of the client organisation which are produced for the dominant purpose that they or their contents be used to obtain legal advice. This test is in fact derived from the first instance decision of Mr Justice Tomlinson in *Three Rivers No 5* (a test that unfortunately did not find favour with the English Court of Appeal).

**The starting point**

It has long been accepted that if legal advice privilege is to serve its purpose – allowing parties to seek the assistance of professional lawyers in confidence, without fear of prejudicing their position at a later date – then it has to protect from disclosure not only the product of the retainer, the advice itself, but also the information communicated to the lawyer to enable the advice to be given. To use the rather outmoded language of the 19th century, in the case of *Anderson v Bank of British Columbia*, it is necessary that a man should be able to make a clean breast of it to the gentleman whom he consults to obtain legal advice or assistance.

That is all quite straightforward where the client is an individual and has in his or her mind the information the lawyer needs in order to advise. The information itself will not be privileged, so any pre-existing documents recording the information may have to be disclosed in due course, and the client may be called to give evidence and be cross-examined on the relevant facts. But
the information as recorded in a letter or email to the lawyer, so that the lawyer can advise, will be protected.

Where the client is not an individual, but a company or other large organisation, it is not nearly so straightforward. The information the lawyer needs might have to be compiled from various employees in various parts of the organisation. Those employees may or may not fit within a narrow concept of the lawyer’s “client”, and even if they do it is difficult to see why the privilege should only protect communications between those individuals and the lawyers, rather than the whole process of information gathering.

This point was key to the decision in CITIC Pacific. The HKCA said it would be meaningless to have a right to confidential legal advice if management was hampered in the process of gathering the necessary information for the lawyers by concerns that statements taken in that process might have to be disclosed.

Jumping through hoops

For the moment at least, however, legal advice privilege under English law protects only communications and draft communications between the lawyer and client (either directly or through an agent), and there remains a risk that on a given set of facts the “client” may be defined narrowly to exclude some (perhaps a large number) of the employees of the client organisation.

Unless and until a more workable approach is adopted by the English courts, corporate clients who want to be able to benefit from the protection of legal advice privilege under English law will need to continue to jump through a number of formalistic hoops. In particular, factual reports or summaries which are necessary to enable the lawyer to advise should be prepared (so far as practicable):

- By those who are likely to form part of the “client” for the purposes of legal advice privilege if a narrow view is ultimately taken by the court.
- In the form of a memo or letter addressed directly to the lawyers whose advice is sought, rather than as a free-standing document or a communication to another individual within the client organisation where privilege may be open to question.

Third party communications

Finally, even on the HKCA’s approach, legal advice privilege is available only for internal documents, not third party communications, which will only be protected, if at all, by litigation privilege (if prepared for the dominant purpose of litigation in reasonable contemplation). There is, however, a tantalising suggestion in the HKCA’s judgment that even that distinction may be up for grabs.

The HKCA said that in this appeal it was not concerned with the position of third parties and noted that it was a matter for consideration on another occasion whether the shift in the raison d’être of legal professional privilege, which is now recognised as a fundamental human right even in a non-litigious context, would lead to a shift in the scope of legal advice privilege.

Arguably, once a dominant purpose test is adopted for legal advice privilege, the distinction
between whether a document was prepared internally, by an employee of the organisation, or by a third party consultant or adviser, begins to look somewhat arbitrary. But, as the HKCA said, that is a question for another day.